FEDERAL COURT OF AUSTRALIA

Weidemann v Victorian Farmers Federation, in the matter of the Victorian Farmers Federation [2023] FCA 1643

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| File number: | VID 834 of 2023 |
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| Judgment of: | **BEACH J** |
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| Date of judgment: | 20 December 2023 |
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| Catchwords: | **CORPORATIONS** — removal of directors — replacement of directors — convening extraordinary general meeting of members — notice to move a resolution for the removal of directors — s 203D of the *Corporations Act 2001* (Cth) — notice calling for the convening of a general meeting — requirements of s 249D of the Act — validity of s 249D notice — whether request of members holding at least 5% of the vote — notice to convene meeting under the Victorian Farmers Federation constitution —construction of constitution — whether proposed resolutions can be passed — defects in notices — application of ss 1322(2), (4) and (6) of the Act to cure defects — notice held to be invalid — application dismissed |
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| Legislation: | *Corporations Act 2001* (Cth) ss 203D, 249D, 249E, 1322 |
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| Cases cited: | *Allied Mining & Processing Ltd v Boldbow Pty Ltd* (2002) 26 WAR 335  *Aurora Funds Management Ltd v Primary Securities Ltd* (2019) 138 ACSR 1  *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280  *Aveo Group Ltd v State Street Australia Ltd* [2015] FCA 1019  *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322  *Donaldson v Natural Springs Australia Limited* [2015] FCA 498  *DVT Holdings Ltd v Bigshop.com.au Ltd* (2002) 42 ACSR 378  *Gratton v Carlton Football Club Ltd* (2004) 187 FLR 25  *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1988) 13 ACLR 110  *In the matter of 333D Limited* [2021] FCA 349  *Khan v Khan*; *Re Islamic Association Western Suburbs Sydney Inc* [2015] NSWSC 638  *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466  *National Roads and Motorists’ Association v Parker* (1986) 6 NSWLR 517  *Re Railway & Transport Health Fund Ltd* (2020) 150 ACSR 14  *State Street Australia Ltd (in its capacity as trustee for Retail Employees Superannuation Pty Ltd) v Retirement Villages Group Management Pty Ltd* (2016) 113 ACSR 483  *Taiqi Investments (Aust) Pty Ltd v Winlyn Developments Pty Ltd* (2011) 86 ACSR 197  *Totally & Permanently Incapacitated Veterans’ Association of NSW Ltd v Gadd* (1998) 28 ACSR 549  *Weinstock v Beck* (2013) 251 CLR 396 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 182 |
|  |  |
| Date of hearing: | 13 and 20 October 2023 |
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| Counsel for the Plaintiff: | Mr T Walker KC and Mr J Page |
|  |  |
| Solicitor for the Plaintiff: | Colin Biggers & Paisley |
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| Counsel for the Defendants: | Mr H Austin KC with Ms C Exell |
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| Solicitor for the Defendants: | Maddocks |

ORDERS

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|  | | VID 834 of 2023 |
| IN THE MATTER OF THE VICTORIAN FARMERS FEDERATION (ABN 67 079 980 304) | | |
| BETWEEN: | **ANDREW WEIDEMANN**  Plaintiff | |
| AND: | VICTORIAN FARMERS FEDERATION  First Defendant  NATHAN MARK FREE  Second Defendant  DANYEL CUCINOTTA (and others named in the Schedule)  Third Defendant | |

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| order made by: | BEACH J |
| DATE OF ORDER: | 20 December 2023 |

THE COURT ORDERS THAT:

1. The plaintiff’s originating application be dismissed.

2. The plaintiff pay the defendants’ costs of and incidental to the proceeding.

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

REASONS FOR JUDGMENT

## BEACH J

1 By his originating application, Mr Andrew Weidemann seeks orders to the effect that an extraordinary general meeting of the Victorian Farmers Federation (VFF) be held and that certain resolutions relating to the removal of directors and the appointment of their replacements be considered at that meeting.

2 The VFF is a public company limited by guarantee and incorporated on 5 September 1997. It had its origins in a predecessor incorporated association formed in 1979 when the Victorian Farmers Union, the United Dairyfarmers of Victoria and the Graziers Association of Victoria amalgamated.

3 Mr Weidemann is a member of the VFF. He has previously been a director of VFF.

4 On 14 August 2023, Mr Weidemann delivered to the VFF a notice to move a resolution for the removal of directors pursuant to s 203D of the *Corporations Act 2001* (Cth) (the s 203D notice). Section 203D provides:

**203D**  **Removal by members—public companies**

*Resolution for removal of director*

(1)  A public company may by resolution remove a director from office despite anything in:

(a)  the company’s constitution (if any); or

(b)  an agreement between the company and the director; or

(c)  an agreement between any or all members of the company and the director.

If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed.

*Notice of intention to move resolution for removal of director*

(2)  Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

*Director to be informed*

(3)  The company must give the director a copy of the notice as soon as practicable after it is received.

*Director’s right to put case to members*

(4) The director is entitled to put their case to members by:

(a) giving the company a written statement for circulation to members (see subsections (5) and (6)); and

(b) speaking to the motion at the meeting (whether or not the director is a member of the company).

(5) The written statement is to be circulated by the company to members by:

(a) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or

(b) if there is not time to comply with paragraph (a)—having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.

(6)  The director’s statement does not have to be circulated to members if it is more than 1,000 words long or defamatory.

…

5 On 15 August 2023, Mr Weidemann delivered to the VFF a further document that he described as “a request by members of a public company for directors to call a general meeting” (the s 249D notice). The s 249D notice proposed resolutions as follows:

**Resolution 1 - removal of director and President**

The members resolve that Emmanuele Vanessa Germano is removed from being a director and President of the Federation, effective from the date of this resolution.

**Resolution 2 - removal of director and Vice President**

The members resolve that Danyel Cucinotta is removed from being a director and Vice President of the Federation, effective from the date of this resolution.

**Resolution 3 - appointment of director and President**

The members resolve that Paul Weller is appointed director and President of the Federation, effective from the date of this resolution.

**Resolution 4 - appointment of director and Vice President**

The members resolve that Georgina Gubbin[s] is appointed director and Vice President of the Federation, effective from the date of this resolution.

6 Section 249D provides:

**Calling of general meeting by directors when requested by members**

(1) The directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting.

(2) The request must:

(a) be in writing; and

(b) state any resolution to be proposed at the meeting; and

(c) be signed by the members making the request; and

(d) be given to the company.

(3) Separate copies of a document setting out the request may be used for signing by members if the wording of the request is identical in each copy.

(4) The percentage of votes that members have is to be worked out as at the midnight before the request is given to the company.

(5) The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 months after the request is given to the company.

7 The VFF challenges the validity of the s 249D notice. And no extraordinary general meeting has been called by the VFF following the requisition in the s 249D notice.

8 Further, no such meeting has been called and arranged to be held under s 249E by any of the members who made the request in the s 249D notice.

9 Section 249E provides:

**249E Failure of directors to call general meeting**

(1)  Members with more than 50% of the votes of all of the members who make a request under section 249D may call and arrange to hold a general meeting if the directors do not do so within 21 days after the request is given to the company.

(2)  The meeting must be called in the same way—so far as is possible—in which general meetings of the company may be called. The meeting must be held not later than 3 months after the request is given to the company.

(3)  To call the meeting the members requesting the meeting may ask the company under section 173 for a copy of the register of members. Despite paragraph 173(3)(b), the company must give the members the copy of the register without charge.

(4)  The company must pay the reasonable expenses the members incurred because the directors failed to call and arrange to hold the meeting.

…

10 On 10 October 2023, Mr Weidemann filed the present proceeding seeking declaratory and injunctive relief as to the validity of the s 249D notice. He also sought interlocutory relief as follows:

Pursuant to section 1324 of the Act, alternatively section 23 of the Federal Court of Australia Act 1976 (Cth), an injunction ordering the Second to Seventh Respondents to call and arrange to hold a general meeting pursuant to the Notice and/or to hold a general meeting to consider and vote in respect of the resolutions proposed in the Notice or as the Court thinks appropriate.

11 Now I note that Mr Weidemann’s originating application sought no specific relief in relation to the s 203D notice. But in any event, absent a valid s 249D notice calling a meeting, the s 203D notice has lost any direct relevance in terms of being of any operative force.

12 The VFF and other defendants have opposed the final and interlocutory relief sought.

13 Now on 13 October 2023 I refused the interlocutory injunction application and proceeded to deal with the matter as a final hearing. The final argument occurred on that day and also on 20 October 2023.

14 For the reasons that follow, the s 249D notice was not validly given under s 249D of the Act. Moreover, the s 249D notice had no separate operative force under the VFF constitution. Accordingly, Mr Weidemann has no entitlement to the principal relief sought.

15 Before I delve further into the competing contentions and legal arguments, let me deal with some further background.

## The relevant factual circumstances

16 Mr Weidemann is a director of Weidemann Pastoral Pty Ltd and a voting member of the VFF. He joined the VFF in 1983, and has held multiple positions within the VFF. He is affiliated with the grains commodity group of the VFF.

17 On 14 June 2023, Mr Weidemann attended what can be described as a branch meeting of the VFF held in St Arnaud, Victoria. At that meeting, he proposed a resolution calling for an extraordinary general meeting of the VFF. What was sought or contemplated was to remove and replace the board of the VFF.

18 The minutes of that meeting, which I have taken as prima facie evidence of what occurred, record the following:

MINUTES OF ST.ARNAUD VFF MEETING

WEDNESDAY 14TH JUNE 2023 at 7 PM

ST. ARNAUD SPORTING CLUB 24 DUNSTAN ROAD ST ARNAUD

President Colin Coates welcomed a large crowd to the meeting a total of 84 in attendance, special guests – Ian Hastings, Ron Hards, and Andrew Weidemann.

Apologies – Mark Collins, Peter Thomson, Mrs Thomson, Russell Heard, Paul Petering, Mr Fletcher

…

Resolution. We the members of the Victorian Farmers Federation call for an Extraordinary General Meeting as per item 13.4.1 of the Victorian farmers federation Constitution with the express purpose to remove the current board.

Moved Brett Hosking Seconded Andrew Weidemann Carried

Actions to be undertaken if EGM process is successful.

* Subject to the removal of the VFF Board an interim board to be put in place for 6 months. With the intention to stabilise the finances and run a total election process.
* Interim Board members Paul Weller, TBA x 4.
* These people will seek representation from each commodity to re-establish the VFF Board and Property Trust Directors.
* Establish a VFF Constitutional Review
* Review to look at commodity autonomy arrangements within the VFF Constitution.
* VFF Financial Allocations and Process.
* Consider Farrer House future and options ongoing.
* Invite all other Commodities to be involved in the process.
* Independent EGM Process facilitated by the Australian Electoral Commission.
* Negotiating Group as required, Brett Hosking, Andrew Weidemann, Ash Fraser.
* EGM to be held in Bendigo as it is central to all VFF Members

Members then signed with their details in support of the Resolution.

President Colin Coates closed the meeting at 10.30pm

19 The resolution was carried. Following the meeting, Mr Weidemann and others gathered signatures in support of what I will describe as the EGM request. It is appropriate to note at this point that what was contemplated was a removal of the entire board of the VFF with an interim board to be then put in place. One of the proposed new board members identified was Mr Paul Weller.

20 On 26 June 2023, a copy of the EGM request was hand delivered to the CEO of the VFF, Mr Brendan Tatham.

21 The form of the EGM request signed by 156 members was as follows:

We the members of the Victorian farmers Federation call for an Extraordinary General Meeting as per Item 13.4.1 of the Victorian farmers’ federation Constitution with the express purpose to remove the current board.

Resolution: Moved Brett Hosking Seconded Andrew Weidemann

Actions to be undertaken if EGM process is successful:

* Subject to the removal of the VFF board an Interim board to be put in place for 6 months. With the intention to stabilise the finances and run a total election process.
* Interim Board members Paul Weller, TBA x 4
* These people will seek representation from each commodity to re-establish the VFF Board and Property Trust directors
* Establish a VFF constitutional review
* Review to look at commodity autonomy arrangements within the VFF Constitution.
* VFF financial allocations and process.
* Consider Farrer house future and options ongoing.
* Invite all other commodities to be involved in the process
* Independent EGM process facilitated by the Australian electoral commission
* Negotiating Group as required, Brett Hosking, Andrew Weidemann, Ash Fraser
* EGM to be Held in Bendigo as is central to all VFF Members.

…

22 So, what was contemplated was that the entirety of the current Board was to be removed and replaced, with Mr Weller identified as one of the new members.

23 Between 14 July 2023 and 14 August 2023, Mr Weidemann and other members of the VFF sought further support for an extraordinary general meeting consistent with the EGM request.

24 On 14 August 2023, Mr Weidemann delivered the s 203D notice to the VFF accompanied by 254 signatures of voting members of the VFF. The two resolutions posed by the s 203D notice were that, first, Ms Emmanuele Germano be removed from being a director and President of the VFF and, second, Ms Danyel Cucinotta be removed from being a director and Vice President of the VFF. It is to be noted that s 203D of the Act in terms only dealt with the topic of removal of directors.

25 On 15 August 2023, Mr Weidemann delivered the s 249D notice to the VFF accompanied by 254 signatures of voting members of the VFF.

26 I have already set out the resolutions posed by the s 249D notice which were four in number.

27 The first resolution was that Ms Germano be removed from being a director and President of the VFF.

28 The second resolution was that Ms Cucinotta be removed from being a director and Vice President of the VFF.

29 The third resolution was that Mr Weller be appointed director and President of the VFF.

30 The fourth resolution was that Ms Georgina Gubbins be appointed director and Vice President of the VFF.

31 Now as at 29 August 2023 there were approximately 6044 registered voting members of the VFF. The number of signatures gathered by Mr Weidemann in support of the s 203D notice and the s 249D notice amounted to approximately 4.2% of registered voting members based on the VFF’s member register. In other words, the 5% threshold stipulated under s 249D was not reached.

## The parties’ arguments

32 Let me at this point set out the parties’ arguments concerning the validity or efficaciousness of the s 249D notice, whether under s 249D or under the VFF constitution.

#### Mr Weidemann’s submissions

33 Mr Weidemann seeks a declaration that the s 249D notice complies with the requirements of s 249D. Alternatively, he seeks a declaration that the purported s 249D notice complies with clause 13.4.1 of the VFF constitution.

34 Section 249D, which I have already set out, provides that the directors of a company must call and arrange to hold a general meeting on the request of members with at least 5% of the votes that may be cast at the general meeting. Section 249D(2) sets out the formal requirements of the request. Those requirements are that the request must be in writing, must state the resolution to be proposed at the meeting, must be signed by the members making the request and must be given to the company.

35 As to the constitutional requirement, clause 13.4.1 of the VFF constitution provides that the board of the VFF, whenever requested to do so by 100 voting members of the VFF, must call an extraordinary general meeting by notice to members within 21 days after the request is given to the VFF. Such a meeting must then be held not later than 60 days after the request is given to the VFF. Clause 13.4.2 then sets out the formal requirements that the request must comply with, which are generally consistent with the requirements of s 249D(2).

36 It is convenient to set out clause 13.4 which provides:

**13.4 Extraordinary General Meetings – Convened by members**

13.4.1 The Board whenever requested to do so by:

(a) at least thirty (30) Branch Presidents; or

(b) one hundred (100) Members who are entitled to vote at an Annual General Meeting or Extraordinary General Meeting,

must call an Extraordinary General Meeting by notice to the Members within twenty-one (21) days after the request is given to The Federation. The Extraordinary General Meeting must be held not later than sixty (60) days after the request is given to The Federation.

13.4.2 A request by Members to call and arrange an Extraordinary General Meeting pursuant to clause 13.4.1(b) must:

(a) be in writing;

(b) state any resolution to be proposed at the Extraordinary General Meeting;

(c) be signed by the Members making the request; and

(d) be given to the Chief Executive Officer of The Federation.

13.4.3 Members with more than fifty percent (50%) of the votes of all of the Members who make a request under clause 13.4.1(b) may call and arrange to hold an Extraordinary General Meeting if the Board does not within twenty-one (21) days from the date of the delivery or receipt of such requisition.

13.4.4 Subject to the Corporations Act, not less than twenty-one (21) days notice shall be given to the Members of The Federation of such Extraordinary General Meeting and the business thereof. Such notice shall be given to Members in accordance with clause 5 and the Corporations Act. The meeting must be held no later than ninety (90) days after the request is given.

37 Now Mr Weidemann says that the s 249D notice is valid as a notice under the VFF constitution. He says that whilst the notice is expressed to be pursuant to s 249D, the request is valid for the purposes of clause 13.4 of the VFF constitution. Moreover, he says that the request is not invalid because of the omission of reference to the constitution. And if that is a deficiency, he says that it can be cured under ss 1322(4) and (6).

38 Section 1322 provides:

**1322 Irregularities**

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

(a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and

(b) a reference to a procedural irregularity includes a reference to:

(i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and

(ii) a defect, irregularity or deficiency of notice or time.

(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non‑receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.

…

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;

(b) an order directing the rectification of any register kept by ASIC under this Act;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

…

(6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) in the case of an order referred to in paragraph (4)(c)—that the person subject to the civil liability concerned acted honestly; and

(c) in every case—that no substantial injustice has been or is likely to be caused to any person.

39 The discretionary power conferred by s 1322(4) is remedial in nature and should be interpreted liberally. It is to be noted that s 1322(4)(a) is not confined to procedural irregularities as for s 1322(2), but may also be used to cure substantive contraventions of the Act. But of course I note that if s 1322(4)(a) is sought to be invoked, then s 1322(6) must be considered.

40 Mr Weidemann says that the request was validly made by 100 members who are entitled to vote at an annual general meeting or extraordinary general meeting. Moreover, this power conferred by the VFF constitution is not inconsistent with the Act, but merely an additional power for members to requisition a meeting of the VFF.

41 Let me say now that putting to one side the problems with the resolutions, in my view the s 249D notice otherwise has validity under clause 13.4 of the VFF constitution even if the s 249D notice was not purported to have been given under clause 13.4. Clearly, the 100 member requirement is satisfied. Moreover, I have no difficulty treating the deficiency concerning the non-reference to clause 13.4 as falling within s 1322(4)(a).

42 In *Weinstock v Beck* (2013) 251 CLR 396, French CJ said (at [39] to [41]):

Corporations, in contemporary Australian society, serve the purposes of enterprises, large and small, owned and operated by men and women, some of whom are sophisticated, knowledgeable and well-advised on matters of corporate governance and some, perhaps many, of whom are not. Section 1322(4) and related provisions reflect a long-standing legislative recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions made in relation to corporations be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties. In accordance with its evident purpose, s 1322(4)(a) is to be construed broadly and applied pragmatically, principally by reference to considerations of substance rather than those of form.

The dispensing power conferred on the Court by s 1322(4)(a) is not in the nature of a general absolution for all past errors. It does not authorise the making of an order declaring that an impugned act, matter or thing is valid. It allows a determination by the Court that the act, matter or thing done “is not invalid” by reason of a provision of the *Corporations Act* or a provision of the constitution of a corporation. The remedy may be sought by a party fearing or suspecting invalidity on such a ground or, as in the present case, to meet a contention of invalidity advanced by another party in adversarial proceedings. The effect of a declaration under the provision is limited to overcoming invalidity flowing from a particular contravention or contraventions. It could not be otherwise. It is only with respect to particular contraventions that the Court can reach the state of satisfaction required by s 1322(6).

The term “contravention” is defined in the *Macquarie Dictionary* as: “the act of contravening; action counter to something.” It defines “contravene” as “1. to come or be in conflict with; go or act counter to; oppose. 2. to violate, infringe, or transgress.” The notions of “conflict”, “counter to” and “oppose” are broad. It is not only the evident purpose of s 1322(4)(a) but its field of operation which requires the broadest available construction of “contravention”. It applies not only to contraventions of the *Corporations Act* but also to contraventions of company constitutions. Constitutions – including the “replaceable rules” in the *Corporations Act*, which may be or form part of a company constitution – are typically concerned with membership rights, the establishment, operation, powers and procedures of governance structures, particularly general meetings and board of directors, and the qualifications, appointment, retirement and removal of directors. These are not generally provisions expressed in terms of obligation or prohibition. That is not to say that a company constitution may not impose obligations upon company officers to do certain things or require that they do not do other things. But the requirement that a contravention of a company constitution involve disobedience of a prohibition or non-compliance with an obligation would amount to an inexplicable limitation of the evident purpose of s 1322(4)(a).

(footnotes omitted)

43 I should also say that I am satisfied with the matters under ss 1322(6)(a) and (c). But for completeness I should also say that s 1322(2) has no application. A proceeding under the VFF constitution is not a proceeding under the Act.

44 Now Mr Weidemann also says that the s 249D notice is a valid notice under the Act, notwithstanding that the relevant 5% threshold was not reached.

45 He says that any deficiency in the request relied upon as one made pursuant to s 249D constitutes a procedural irregularity for the purposes of s 1322(2), in that there is “a defect, irregularity or deficiency of notice” under s 1322(1)(b)(ii) for the purposes of s 1322(2).

46 Further, he says that any “defect, irregularity or deficiency of notice” consists not of a shortfall of 5% of the votes that may be cast at a general meeting, but a deficiency in the notice not having all of the relevant signatures concerning votes associated with the membership entities that signed the notice.

47 Moreover, Mr Weidemann says that even if s 1322(2) does not apply, then in any event reliance can be placed on s 1322(4). He seeks a declaration pursuant to s 1322(4) that the s 249D notice is not invalid.

48 Let me deal with another dimension to the challenge concerning the validity of the s 249D notice which focuses on the validity of the proposed resolutions rather than on the number of signatures or the title to the notice.

49 Mr Weidemann says that resolutions 1 and 2 are valid on alternative bases.

50 First, on the composite view of those resolutions, he says that if it is within the power of the members in general meeting to remove Ms Germano and Ms Cucinotta either as director or as President and Vice President, the resolutions are valid.

51 Second, on the view of those resolutions as carrying two separate proposals, he says that if one proposal is within the power of the members in general meeting and the other is not, the valid part of the proposed resolution can be severed and put to the members in general meeting.

52 Further, he says that resolutions 3 and 4 are also valid. He says that if resolutions 1 and 2 are carried at an extraordinary general meeting, then there will be a vacancy in the office of the President and the Vice President. And he says that the members of VFF may pass resolutions 3 and 4 which would have the effect of electing the named individuals to the office of President or Vice President.

53 In this respect he says that the VFF’s “package” argument, which is to the effect that if resolutions 3 and 4 are invalid then resolutions 1 and 2 also fall, ought to fail.

54 He says that as part of the initial EGM request on 14 June 2023, a resolution was proposed to remove the board of the VFF, which made no mention of replacements and which gained support at that meeting.

55 Further, he says that the s 203D notice contains only resolutions 1 and 2, and makes no reference to replacements.

56 More generally, he says that even if resolutions 3 and 4 are found to be invalid, there is no sound basis to state that resolutions 3 and 4 cannot be separated from resolutions 1 and 2. He says that the members have the capacity to remove a director by way of s 203D, supported by clause 25.1.1 of the VFF constitution. And he says that if that director also happens to be the President or Vice President, then the removed director will be removed from that office at the same time by reason of clause 10.2.5.

57 Moreover, he says that there is no basis to conclude that fewer than 100 members would have signed the requisition if resolutions 3 and 4 were not present on the notice.

58 Let me turn then to the defendants’ position which for convenience I will simply address by reference to the VFF’s position.

#### VFF’s submissions

59 Now the VFF has put the following points in answer to Mr Weidemann’s contentions.

60 First, it is said that the s 249D notice was invalid and ineffective because the request was not signed by members who held at least 5% of the votes that may be cast at a general meeting. I note that as to the position that the requisition was not signed by members with 5% of the votes that may be cast at a general meeting, Mr Weidemann’s counsel accepted before me that this deficiency persisted whether or not one considered Mr Weidemann’s figures or the VFF’s figures as to the number of members.

61 Second, it is said that the s 249D notice as a statutory notice could not be cured under either s 1322(2) or s 1322(4) together with s 1322(6) given the failure to satisfy the 5% threshold.

62 Third, the VFF says that although the relevant constitutional threshold of 100 members was satisfied, the purported s 249D notice should not be treated as a clause 13.4.1 notice. Moreover, the VFF says that any deficiency in that respect could not be cured under ss 1322(4) and (6).

63 Fourth, the VFF says that in any event the s 249D notice was invalid and ineffective because the resolutions could not be lawfully made by the VFF at a general meeting. Moreover, it says that the suite of resolutions were in truth a package deal and could not be severed or disentangled, such that a meeting ought not be called in respect of any aspects.

64 In elaboration it was said that there was no power to pass the resolutions appointing Mr Weidemann’s chosen individuals named in resolutions 3 and 4, because only persons elected as President and Vice President in accordance with clause 10.2 of the VFF constitution could be appointed to those offices.

65 Clauses 10.1 and 10.2 of the constitution are in the following terms:

**10.1 Directors of The Federation**

10.1.1 The Board shall consist of not more than nine (9) Directors and include:

(a) the President and Vice President elected pursuant to clause 10.2, as ex officio members; and

(b) one (1) Director each for the following Commodity Groups pursuant to clause 10.6.1(a):

(i) the Grains Group;

(ii) the Horticulture Group;

(iii) the Livestock Group; and

(iv) the United Dairy Farmers of Victoria;

(c) one (1) Director from the Commodity Groups other than those listed in clause 10.1.1(b); and

(d) up to two (2) Special Skills Directors as resolved in accordance with clause 10.6.

10.1.2 The President shall act as the Board Chairperson and in his or her absence the Vice President shall act as the Board Chairperson. In their absence the Directors shall elect a Board Chairperson from the Directors present at a Board meeting.

10.1.3 All Directors must be natural persons who reside ordinarily in Australia.

**10.2 President and Vice President**

10.2.1 The President and Vice President shall be elected by the Voting Members of the Federation and the election, if contested, shall be conducted by Prescribed Ballot utilising the Preferential System of Voting. The elections will take place at a date specified by the Board in line with the term of office for the President and the Vice President.

10.2.2 A separate ballot shall be conducted for the position of President and Vice President.

10.2.3 The President and Vice President must be Voting Members in order to be eligible to assume the offices of President and Vice President.

10.2.4 Nominations for the offices of President and Vice President shall be submitted to the Chief Executive Officer in writing signed by five (5) nominators who shall be Voting Members together with the signed consent of the person nominated for the office of President or Vice President and lodged at least forty (40) days before the time at which the election is to be held.

10.2.5 The President and Vice President are also Directors of the Board.

66 Further, and relevantly to the operation of clause 10.2.1, clause 1.4.1 sets out definitions of “Preferential System of Voting” and “Prescribed Ballot” in the following terms:

…

“Preferential System of Voting” means the preferential system of voting prescribed by the Board from time to time.

“Prescribed Ballot” means a ballot conducted by electronic, postal or any other means as resolved by the Board.

…

67 Similarly, the VFF says that there was no power to remove the existing President and Vice-President, other than by the election processes set out in clause 10.2 of the constitution which could not be carried out “on the spot” at a general meeting.

68 Further, it was said that if there was removal, the immediate casual vacancy could only be filled by the board under clause 10.8.4 of the VFF constitution. Clause 10.8 is in the following terms:

**Board – Vacancies**

10.8.1 In the event that the office of a Director nominated by a Commodity Group in accordance with clause 10.1.1(b) becomes vacant, the relevant Commodity Policy Council shall nominate an alternative Director for the remainder of the retiring Director's term. The person filling the vacant position will be eligible to stand for that position as a new candidate at the end of the vacancy term.

10.8.2 In the event that the office of a Director nominated by Commodity Groups not listed in clause 10.1.1(b) becomes vacant the relevant Commodity Groups shall nominate an alternate Director for the remainder of the retiring Directors term. The person filling the vacant position will be eligible to stand for that position as a new candidate at the end of the vacancy term.

10.8.3 In the event of a vacancy in a Special Skills Director position, the position shall be filled at the discretion of the Board for the remainder of the Special Skills Director’s term. The person filling the vacant position will be eligible to stand for that position as a new candidate at the end of the vacancy term.

10.8.4 In the event of a vacancy of the President or Vice President the vacancy shall be filled by the Board for the remainder of the relevant term. The person filling the vacant position will be eligible to stand for that position as a new candidate at the end of the vacancy term.

10.8.5 The Board may call an election to fill a casual vacancy in the President or Vice President position if the remainder of the President or Vice President’s term is greater than one (1) year. Such an election to be conducted in accordance with clause 10.2.1.

69 The VFF says that the appointment of President and Vice President could only be fully effected by the election process in clause 10.2. And whilst the VFF accepted that those democratic election processes or mechanics could be put in motion at a general meeting for later determination in respect of resolutions 1 and 2, those resolutions would still require alterations from the form currently proposed insofar as they sought the removal of directors.

70 Further, the VFF argued that if parts of a requisition were valid and parts were invalid, the directors were only required to convene a meeting in respect of the valid aspects of the requisition, as long as they could be separated from the invalid aspects.

71 But the VFF argued that it would not be possible to so separate in this case. The VFF argued that the suite of resolutions put forward by Mr Weidemann was a package deal intended to bring about replacements.

72 Resolutions 1 and 2 sought to remove the two directors and strip the respective President and Vice President of their elected offices. And having removed those directors, resolutions 3 and 4 in effect sought to replace them with persons selected by Mr Weidemann rather than persons chosen by the board under clause 10.8.4 or otherwise elected.

73 The VFF said that those who signed the requisition may well have supported the removal and replacement of the persons named in the requisition, but not the removal and replacement of the President and Vice President at large, particularly given the importance of the offices of President and Vice President and the nexus between the removal and replacement resolutions.

74 In the circumstances, the VFF said that resolutions 3 and 4 could not be severed, de-coupled or tinkered with such that a meeting be required to be convened in respect of resolutions 1 and 2 only.

## Is the s 249D notice valid as a statutory notice?

75 In my view the s 249D notice is not valid as a statutory notice as it does not satisfy the 5% threshold. Let me make the following points, putting to one side for later discussion the form of the resolutions.

76 First, Mr Weidemann seeks to equate his impression of a large contingency of member dissatisfaction with satisfaction of the statutory requirement at s 249D(1) that the request was one made by members with at least 5% of the votes that may be cast at a general meeting. But this reasoning is spurious. Even if there were dissatisfied members, Mr Weidemann cannot in order to satisfy s 249D rely on a hope or a belief that all eligible voting members as well as their nominees would have each supported the requisition.

77 Second, the use of extrinsic evidence in such a fashion in this context is impermissible. In *Gratton v Carlton Football Club Ltd* (2004) 187 FLR 25, Mandie J stated (at [10]):

… The question whether a request satisfying the requirements of s 249D has been made must be answered by having regard to the nature of the physical document or documents given to the company and not with regard to extrinsic evidence or assertions as to the circumstances in which various sheets of paper, said to constitute the request, were signed.

78 Third, the question arises as to whether there is a procedural irregularity in the failure to achieve the 5% threshold. Now I agree with what Palmer J said in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322 at [103] that what is a procedural irregularity is first to be ascertained by determining the thing to be done that the procedure is designed to regulate. Now if an irregularity changes the substance of the thing to be done, the irregularity will be substantive. But if the irregularity diverges from the prescribed manner in which the thing is to be done, but does so without changing the substance of the thing, then the irregularity is only procedural.

79 In *Khan v Khan*; *Re Islamic Association Western Suburbs Sydney Inc* [2015] NSWSC 638, Black J considered the validity of a requisition under the constitution of an association which required that it be signed by the members making the requisition. Now the requisition was signed in the handwriting of one individual for and on behalf of named persons who were identified as members of the association and referred to an annexure which was a petition. Black J found that the requisition was signed by less than 5% of the association’s members because it was only signed by one individual. But his Honour considered that the several deficiencies in the petition and the requisition, including that the signatures to the petition did not take effect as signatures to the requisition, were procedural irregularities within the meaning of s 1322(1)(b) and would be validated under s 1322(2). Aggregating the signature to the requisition with the signatures on the petition, one exceeded the 5% threshold. His Honour held (at [86]):

… It was plain enough that the persons who had signed the Petition intended to indicate their assent to the Requisition, from its terms, and the Plaintiffs had the ability to confirm that matter by reviewing the terms of and the handwritten signatures to the Petition. …

80 Now Black J went on to say that substantial injustice within the meaning of s 1322(2) may have been established if the signatures on both the requisition and petition taken together had not been signed by at least 5% of the members. His Honour said (at [88]):

The Defendants contend that it would be a procedural irregularity, validated under s 1322(2) of the *Corporations Act*, if the Requisition and Petition, taken together or separately, were not signed by at least 5% of the total number of members of the Association … This issue does not arise on my findings above. Once the procedural irregularity of the separation of the Requisition and Petition is validated, the two should be read together, and I have held above that the Plaintiffs have not established they were signed by less than 5% of members of the Association on that basis. Had that issue arisen, it seems to me that substantial injustice might well have been established to prevent validation, where the effect of validation would be to require the Association to call a special general meeting, and the Plaintiffs to face the threat of removal from office, although only a lesser number than contemplated by the Constitution had indicated their wish that such a meeting occur. The result in that regard would also likely depend on the extent of the shortfall in the number of requisitionists from that contemplated by the constitution. Again, that issue does not arise if the Requisition and Petition are read together so that the 5% threshold for calling the meeting is satisfied.

81 In *Aurora Funds Management Ltd v Primary Securities Ltd* (2019) 138 ACSR 1, Rees J considered the validity of a notice under s 252D which did not identify the names of members who had called the meeting. Section 252D is in essence the equivalent to s 249D in respect of registered schemes and also carries a 5% threshold requirement. It appears that the notice was signed by a person purporting to be an agent for members who between them held more than 5% of the votes that may be cast at a general meeting and who had provided signed authority for the convening of the meeting. But the notice did not attempt to identify those members.

82 Now in that case the members giving such a signed authority did in fact hold more than 5% of the votes, but her Honour was not persuaded to treat that matter as a procedural irregularity. As her Honour said (at [167]):

I confess that my focus is somewhat different to Ch 6 concerns. I consider that the failure to identify, in the notice of meeting, the members calling the meeting is a substantive irregularity. The Corporations Act does not give members a right to call a meeting without identifying themselves, and for good reason. This was not a case of attempting to do something which the Corporations Act permits but failing to achieve that result due to a procedural failure or omission. Primary, Mr Staermose and Wonfair attempted to do something which the Corporations Act does not authorise. As a substantive irregularity, s 1322(2) does not apply and Primary has not sought an order under s 1322(4). That is the end of the matter.

83 In the case before me the defect of there being insufficient member signatures to amount to at least 5% is not a procedural irregularity. That is central to the statutory preconditions to the issue of a valid statutory notice.

84 Moreover, howsoever you cut it, the 5% threshold is not reached. Notwithstanding Mr Weidemann and Ms Lawerence-Hartcher’s further evidence, the request is still signed by fewer than 5% of members entitled to vote at a general meeting of VFF. There is no other indication that any signature is applied on behalf of any person who themselves have signed an affixed document. Further, Mr Weidemann cannot claim the support of nominees who did not sign in their capacity as nominees but whose membership under which they were nominated did support the making of the requisition.

85 In the matter before me, even on the assumption that the relevant member organisations relied on by Mr Weidemann did purport to sign on behalf of each and every one of their nominees (despite not expressly saying so), the failure of the notice of meeting to identify all of the members calling the meeting is a substantive irregularity. The Act does not confer rights on members to call a meeting without identifying themselves.

86 Moreover, even if it be thought that this defect is a procedural irregularity, then substantial injustice would exist so as to prevent validation. So, the failure to satisfy the 5% threshold is not capable of being cured under s 1322(2).

87 Further, arguably s 1322(4)(a) could not be invoked as no “contravention of a provision of this Act” has occurred. What has occurred is that there has been a failure to meet the 5% threshold rather than any contravention in a formal sense. But even if s 1322(4)(a) applied to the failure to achieve the 5% threshold, the conditions under s 1322(6) would not be satisfied.

88 *In the matter of 333D Limited* [2021] FCA 349 I synthesised my views concerning s 1322(6) at [26] to [31] and [37] to the following effect:

Section 1322(4) is “cast in very broad terms” and “is not to be hedged about by any implied limitation” (*Weinstock v Beck* (2013) 251 CLR 396 at [53] and [55] per the plurality). And as explained by French J in *Re Wave Capital Ltd* (2003) 47 ACSR 418 at [29], the powers under s 1322(4) reflect:

a broad legislative policy that the law should not inflict unnecessary liability or inconvenience or invalidate transactions because of non‐compliance with its requirements where such non‐compliance is the product of honest error or inadvertence and where the court can avoid its effects without prejudice to third parties or to the public interest in compliance with the law.

But the power is not to be exercised lightly and is to be exercised having regard to the general purposes of the Act, including the provisions in respect of which relief is sought, the interests of all parties affected and the public interest in ensuring compliance with the Act.

The relevant exercise of power can be described as involving a two step process. First, is it appropriate to make one or other of the orders in 1322(4)? Second, are the conditions in s 1322(6) satisfied?

Section 1322(6)(c) provides that I must not make any order under s 1322(4) unless I am satisfied “that no substantial injustice has been or is likely to be caused to any person”. The first part of the disjunction “has been” invites an inquiry as to the consequences of the non-compliance sought to be cured. The second part of the disjunction “likely to be” focuses on the effect of the proposed order.

Further, s 1322(6)(b) provides that an order under s 1322(4)(c) may not be made relieving a person of civil liability unless I am satisfied that the person acted honestly. It is not in doubt that the concept of acting honestly can embrace an active but incorrect consideration of an issue, a failure to turn one’s mind to the relevant issue or a failure to appreciate the true significance of non-compliance (see *In the matter of DAC Finance (NSW/QLD) Pty Ltd* [2020] NSWSC 182 at [32] and [33] per Gleeson JA).

But even if the pre-conditions or criteria in ss 1322(4) and (6) are satisfied, I still retain a discretion whether to make the orders sought. So, it is necessary to take into account whether the relevant applicant has taken prompt action to remedy the error. Further, the public interest is a relevant consideration in the exercise of my discretion.

…

Now s 1322(6)(a) provides that I must not make a s 1322 order unless I am satisfied that the act, matter or thing is essentially of a procedural nature, or that the person concerned in or party to the contravention or failure acted honestly, or that it is just and equitable that the order be made. In my view, 333D’s failure to lodge a cleansing notice was the result of an honest mistake, as opposed to the deliberate disregard of the requirements of the Act. Moreover, in my view it is just and equitable that the relevant orders be made. So, on any view, either or both of limbs (ii) and (iii) of s 1322(6)(a) apply in relation to the order made under s 1322(4)(a).

89 Here, even assuming that one of the limbs of s 1322(6)(a) was satisfied, in my view s 1322(6)(c) could not be satisfied. In summary then, neither s 1322(2) nor s 1322(4) together with s 1322(6) assist to establish the validity of the s 249D notice as a statutory notice.

90 Let me turn then to the next question as to whether the purported s 249D notice should be treated as a valid notice under the VFF constitution.

## Is the section 249D notice valid as a notice under the VFF constitution?

91 Clause 13.4 of the VFF constitution resembles the regime in s 249D, save that the request must be made by “one hundred (100) Members who are entitled to vote at an Annual General Meeting or Extraordinary General Meeting”.

92 Now “Member” is defined in clause 1.4.1 as “a Voting Member and/or a Non-Voting Member,” but given the text of the threshold in clause 13.4.1, one is relevantly referring here to voting members.

93 Now on the evidence, Mr Weidemann obtained at least the required 100 member signatures.

94 But the problem here is that the s 249D notice was expressed to be served “in accordance with s 249D of the Corporations Act”. It was not a notice making a request for an extraordinary general meeting under clause 13.4.1. The s 249D notice is singularly focused on the requirements of s 249D. In its bolded capitalised title it requests that a general meeting be held under that section, and in the first paragraph the members said to be making the request are described as those “being entitled to not less than 5% of the votes that may be cast at the general meeting”. The notice does not say that it is a request under clause 13.4.1 being one made by 100 members entitled to vote at an extraordinary general meeting.

95 Now the VFF says that even where there is no requirement for a constitutional notice to state that it is made under the constitution, the terms of the s 249D notice direct no attention to it as a constitutional requisition. The VFF says that directors receiving the notice, which if valid would oblige them to call and hold an extraordinary general meeting, would have no way of assessing its validity other than by reference to the fact that it was invoking s 249D and the requisite 5% threshold. Equally, so the VFF says, members signing the requisition could not have understood anything other than that they were supporting a request for a meeting made under the Act, as long as it was also supported by members with 5% of the votes that may be cast at a general meeting.

96 Now clearly in my view the notice is defective. But can it be cured under s 1322(2) or s 1322(4)?

97 Now assuming that the s 249D notice is in fact to be treated as a constitutional notice, s 1322(2) does not avail Mr Weidemann. The service of a constitutional notice does not concern “a proceeding under [the Corporations Act]” within the meaning of s 1322(2). A “proceeding under this Act” does not include the removal of a director effected solely pursuant to a company’s constitution. In my view s 1322(2) does not here cure the problem.

98 But in my view s 1322(4)(a) can operate to cure the deficiency. Moreover, the conditions in s 1322(6) are satisfied. In my view the notice is valid for the purposes of clause 13.4 of the VFF constitution at least in terms of the 100 members requirement.

99 Let me turn now to the form of the resolutions, the perceived difficulties with their form and how these difficulties impact on the validity of the notice.

## The form of the resolutions

100 Let me begin by addressing some relevant concepts.

101 First, the directors may decline to call a meeting under section 249D if the proposed resolution is not a resolution which can be effectively passed by the members in general meeting or in other words could not be lawfully effected by the company in that meeting; see *Re Railway & Transport Health Fund Ltd* (2020) 150 ACSR 14 at [8] per Black J, *DVT Holdings Ltd v Bigshop.com.au Ltd* (2002) 42 ACSR 378 at [9] and [14] per Windeyer J, and *National Roads and Motorists’ Association v Parker* (1986) 6 NSWLR 517 at 521 to 522 per McLelland J.

102 Second, if parts of a requisition for a general meeting under this section are valid and parts are not, directors must convene the meeting in respect of the valid parts of that requisition, as long as those valid resolutions can be separated from the invalid resolutions; see *Re Railway* at [8], but note also *Totally & Permanently Incapacitated Veterans’ Association of NSW Ltd v Gadd* (1998) 28 ACSR 549 at 551 to 554 per Young J.

103 Third, there is a distinction to be made between a statement of the objects of a meeting and the proposed resolutions. As to the former, if the object of a requisition cannot be lawfully effectuated at a meeting, the directors are at least entitled to omit that object from the notice of meeting and if there is a single object, being to pass a resolution which cannot be lawfully passed, then there is no obligation to call a meeting at all. But of course in the present context I am concerned with the form of the proposed resolutions, rather than any statement of the objects of the proposed extraordinary general meeting.

104 Fourth, let me say something further about the authorities.

105 In *Taiqi Investments (Aust) Pty Ltd v Winlyn Developments Pty Ltd* (2011) 86 ACSR 197, Barrett J said at [30]:

A more powerful consideration, to my mind, is the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful. If this were a case in which members had requisitioned a meeting rather than actually called it, the court would say that the directors were under no obligation to create the desired forum by acting in accordance with the requisition: see, for example, *Turner v Berner* [1978] 1 NSWLR 66; (1978) 3 ACLR 272; *National Roads and Motorists Association v Parker* (1986) 6 NSWLR 517; 11 ACLR 1. Here too, in my view, the court should prevent the creation of the desired forum.

106 In *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280, Allsop CJ, Foster and Gleeson JJ (at [27] to [38]) held that the shareholders had no power to pass an ineffective resolution at an annual general meeting which would have interfered in or with the board’s powers, and held that the attack on the directors for not having put those ineffective resolutions to the annual general meeting failed.

107 In *Aveo Group Ltd v State Street Australia Ltd* [2015] FCA 1019, I distinguished *Taiqi* at [63] to [65] and [78] to [88]. I said at [63] to [65]:

In *Taiqi Investments (Aus) Pty Ltd v Winlyn Developments Pty Ltd*, having concluded that the proposed resolutions, if passed, would have no valid or effective operation, Barrett J considered whether the meeting should nevertheless be allowed to proceed. In concluding that the meeting should not proceed, Barrett J reasoned that:

[30] A more powerful consideration, to my mind, is the undesirability of allowing legally meaningless resolutions to go forward lest those who have proposed them rely on them, once passed, as if they were legally meaningful. If this were a case in which members had requisitioned a meeting rather than actually called it, the court would say that the directors were under no obligation to create the desired forum by acting in accordance with the requisition: see, for example, *Turner v Berner* [1978] 1 NSWLR 66; (1978) 3 ACLR 272; *National Roads and Motorists Association v Parker* (1986) 6 NSWLR 517; 11 ACLR 1. Here too, in my view, the court should prevent the creation of the desired forum.

Similarly, in *Hopkins Professional Services Pty Ltd v Foyster Holdings Pty Ltd* (2001) 39 ACSR 519, Barrett J at [6] found that certain proposed shareholder resolutions were within the province of the board of directors and, on that basis, found that “it is, in a real sense, futile for the meeting of shareholders scheduled to be held tomorrow to attempt or purport to deal with the second, fourth, fifth and sixth items in the notice of meeting”.

In my view, these observations should be read in context. In the case before me, even accepting that the proposed resolution cannot *bind* the Stapled Entities and the directors, nevertheless it does have utility. It is expressly referred to as one of the three conditions in cl 13.3(a)(vii) as a trigger for the Stapled Entities to then exercise their discretionary power. But it is obvious that it cannot bind the Boards of the Stapled Entities and nor does it in truth purport to do so. It is only expressed as it is to satisfy the condition expressed in cl 13.3(a)(vii). The applicants referred me to *Molopo Energy Ltd v Keybridge Capital Ltd* (2014) 104 ACSR 46, but the observations of White J at [68] and [78] to [81] were in a different context dealing with a reduction of capital and the interaction with statutory requirements.

108 Let me turn then to the validity of each of the proposed resolutions.

#### Resolutions 1 and 2

109 Resolution 1 refers to Ms Germano being “removed from being a director and President”. Resolution 2 refers to Ms Cucinotta being “removed from being a director and Vice President”. Resolutions 1 and 2 each present as a composite resolution and do not purport to carry two separate proposals. These resolutions must be assessed against the framework of the VFF constitution.

110 As to the general principles concerning the construction of corporate constitutions, in *Donaldson v Natural Springs Australia Limited* [2015] FCA 498, I said at [148] to [150]:

There is little doubt (*Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 (*Lion Nathan*) at [28], [29], [46] to [59], [97] to [102], [122] to [124], [232], [233], [238], [244], [251] to [257] and *Oil Basins Ltd v Bass Strait Oil Company* (2012) 297 ALR 261; [2012] FCA 1122 at [32]) that:

* the Constitution should be read and construed as a whole;
* *general* principles of construction of commercial contracts (see generally *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]) are applicable to the Constitution; more particularly, the commerciality of a particular construction may tip the balance in its favour where it is implausible that the parties could be taken to have intended otherwise;
* the Constitution should not be construed narrowly or pedantically;
* words used should usually be given their natural and ordinary meaning;
* a construction of a provision which gives a congruent operation of the various applicable provisions of the Constitution should be preferred to another construction which does not; and
* extrinsic evidence *may* be adduced as an aid to construction, subject to a qualification that I will address in a moment, but only in the *limited* manner envisaged in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [35] to [41].

Moreover, a purposive interpretation, rather than a creative interpretation, of the Constitution should be given, so long as it is understood that this is an objective exercise bounded by such principles.

Notwithstanding the generality of the principles just expressed, in construing a Constitution “ordinarily primacy must be given to the objective intention discernible from the language in which the [C]onstitution is expressed rather than to other features of the surrounding matrix of fact in which its provisions may have been made” (*HNA Irish Nominee* *Ltd v Kinghorn* (2010) 78 ACSR 553; [2010] FCAFC 57 at [42]). This is because the range of surrounding circumstances available as aids to construction is a more unstable (or at least changeable) foundation than that available for construing contracts generally. Constitutions and replaceable rules can be amended at different times and in different circumstances. Further, the members are likely to change. Further, and more generally, a Constitution serves a public purpose; it is not merely an embodiment of a private bargain. Surrounding circumstances can be taken into account in construing the provisions of a Constitution, but restraint needs to be exercised (*Lion Nathan* at [55], [56], [59], [63], [102], [124], [226], [236], [254], [255] and [259]).

111 Now under the VFF constitution the President and Vice President do hold a separate elected office, only by virtue of which are they also directors. Holding the position of President and Vice President, they become directors and ex officio members of the Board (clause 10.1.1(a)).

112 Now the VFF constitution does not provide an express power for the members of the VFF to remove a President or Vice President by the passing of a resolution at an extraordinary general meeting.

113 Further, clause 25.1.1 provides:

**Disqualification**

25.1.1 The office of a Director, or a member of the Commodity Policy Council or any other committee or of The Federation shall be vacated:

(a) if they shall cease to be a Member of The Federation;

(b) if they shall become appointed as a full time salaried member of a statutory board or authority engaged in or concerned with Primary Production;

(c) if a resolution be passed by the governing body by whom they were elected that they shall be removed from office (a copy of such resolution shall be forwarded to the Chief Executive Officer);

(d) if by notice in writing to the Chief Executive Officer from the elected person; or

(e) if the elected position is no longer available as a result of a Commodity Group merging or dissolving.

114 On one interpretation, clause 25.1.1(c) does not provide for a power to remove from office the President or Vice President because it only allows a “Director” to be removed. That clause says nothing explicitly of the roles of President or Vice President.

115 Further, it is arguable that the members have no express power under the VFF constitution to strip the existing President and Vice President of their roles outside the election process in clause 10.2.

116 Now in my view resolutions 1 and 2, albeit infelicitously drafted, are valid.

117 Let me begin with considering whether each of resolutions 1 and 2 are a composite or two separate proposals.

118 The composite view is that by removal as a director, it follows that the holding of the office of President or Vice President by that person shall cease. On this view, the power of removal of a director can rely on s 203D and, given that the office of President and Vice President must also cease, it is not necessary to identify a separate source of power of the members in general meeting to remove the President and Vice President. Alternatively, if a person is removed from the office of President or Vice President, that person’s ex officio membership of the board must cease. On the composite view of the resolutions, if it is within the power of the members in general meeting to remove Ms Germano and Ms Cucinotta either as director or as President and Vice President, the resolutions are valid.

119 But on the view of the resolutions as carrying two separate proposals, if one proposal is within the power of the members in general meeting and the other is not, the valid part of the proposed resolution can be severed and put to the members in general meeting.

120 I agree with Mr Weidemann that on either the composite or separate view of resolutions 1 and 2, they are valid.

121 The right of members to vote on the removal of a person from the office of President and/or Vice President derives from either the VFF constitution or a residual or implied right under the general law.

122 Now the VFF constitution does not provide for the direct election of board members by the VFF in general meeting, but it does so provide for the direct election of the President and Vice President by voting members. Further, the VFF constitution does not provide an express power for the members of the VFF to remove a President or Vice President by the passing of a resolution at an extraordinary general meeting.

123 But the VFF constitution makes it clear that the office of President and the office of Vice President are indivisible from the directorships held by the persons occupying these offices. Clause 10.1.1(a), in providing for the composition of the board, includes the President and Vice President as “ex-officio” members. So, any voting member can become President or Vice President, and once elected by voting members of the VFF the electees become members of the board. Further, as clause 10.2.5 provides that the President and Vice President are also directors of the board, clause 10.1.1(a) avoids a situation whereby a newly elected President or Vice President cannot serve because they are not also a director. In this sense then, a person’s status as a President or Vice President cannot be separated from their status as a director.

124 Further, other provisions of the VFF constitution governing the office of President and Vice President are dependent on provisions relating to directors. For example, the term of office for the President and Vice President is not provided for other than qua directors. Further, the VFF constitution provides that the President shall act as the chairperson of the board and in his or her absence the Vice President shall act as chairperson of the board.

125 Further, if this all be so, then clause 25.1.1(c) on a broad reading may be utilised to remove the President and Vice President as directors and so also causing them to lose that officer status.

126 Further, the power of voting members to remove from office the President and Vice President is also concomitant to the power of election provided by clause 10.2.1. This is a necessary implication in order to lend efficacy to the principle of accountability to the voting members in whom the power of election is reposed.

127 Further, under s 203D(1)(a), a public company may by resolution remove a director from office despite anything in the company’s constitution. Section 203D empowers members to remove directors so as to ensure that members retain ultimate control of the company and to prevent directors from becoming entrenched in their positions (see *Allied Mining & Processing Ltd v Boldbow Pty Ltd* (2002) 26 WAR 335 at [52] per Roberts-Smith J).

128 So, s 203D can provide an additional source of power to that given under a constitution to remove a director.

129 In *State Street Australia Ltd (in its capacity as trustee for Retail Employees Superannuation Pty Ltd) v Retirement Villages Group Management Pty Ltd* (2016) 113 ACSR 483 at [16] to [22], I said:

REST has relied on the decision of Bryson AJ in *Scottish & Colonial Ltd v Australian Power and Gas Co Ltd* (2007) 65 ACSR 313; [2007] NSWSC 1266 (*Scottish & Colonial*) to assert that the provisions of s 203D provide the only mechanism by which the director of a public company can be forcibly removed to the exclusion of any mechanism in a company’s constitution. I do not agree and do not propose to follow that decision. In my view, although s 203D(1) is mandatory in the sense that it overrides a company’s constitution to the extent of any inconsistency, it does not provide an exhaustive codification of the mechanism for removal. Before turning to *Scottish & Colonial* and the other authorities, it is appropriate to directly address the text and context of s 203D.

First, the language of s 203D(1) uses the phrase “[a] public company *may* …”. The word “may” is empowering. Significantly, the phrase is not “may only …”. The text suggests that s 203D(1) provides *a* mechanism rather than *the* mechanism.

Second, the phrase is “… may by resolution remove a director from office *despite anything* in … the company’s constitution …”. The words “despite anything” clearly indicate that s 203D(1) operates to in effect override a mechanism in a company’s constitution that might operate inconsistently and might otherwise prevent a director from being removed by an ordinary resolution of shareholders. But s 203D(1) does not purport to be exhaustive or to be an exclusive codification for the mechanism available to remove a director of a public company. The words “despite anything” operate to override a constitution to the extent of any inconsistency only. Nothing more can be read into the words “despite anything …”.

Third, nothing turns on the point that s 203D is not a replaceable rule. True it is that it cannot be displaced by a company’s constitution. As I have said, it operates of its terms to override any otherwise inconsistent provision in a constitution. But that is a different thing from saying that it provides an exhaustive codification. It is there as *a default* mechanism rather than *the* mechanism.

Fourth, it is true that s 203D does not contain the predecessor subsection (s 227(11) of the Corporations Law) which said “Nothing in the preceding provisions of this section … derogates from any power to remove a director that may exist apart from this section”. But nothing can be read from the absence in s 203D of the predecessor subsection. Such a subsection was unnecessary given the plain text of s 203D(1). Further, the explanatory memorandum to the Corporate Law Economic Reform Program Bill 1998 which explained the changes from the prior s 227 of the Corporations Law provides no support for the position that there was any intention to make any change by the deletion of that prior subsection. The explanatory memorandum was replete with the phrase that “The draft provisions will rewrite without substantial change the existing provisions of the Law about Officers (Part 3.2) …”. Part 3.2 is now Ch 2D. There were some significant changes identified in the explanatory memorandum, but not in relation to the point under discussion. Now I accept that such a general statement, which encompassed numerous statutory provisions, carries little weight because of its generality and breadth. Nevertheless what is important to note is that there was no express statement in the explanatory memorandum to support the suggestion that any change was intended by the deletion of the earlier subsection.

Fifth, it has been said that s 203D can be distinguished from its predecessor provision in terms of its construction because, inter alia, it confers new rights which the predecessor provision did not contain. That may be so at one level, but I do not consider that to be a relevant distinction in the present context. The provisions of subss (2)–(6) all refer to “*the* director” and “*the* resolution” thereby referring back to the mechanism in subs (1). Further, subs (7) refers to “a director removed under this section”. It is apparent that all other rights are attached to and triggered by the utilisation of the mechanism under subs (1) only. But that still does not answer the construction question as to whether subs (1) is the *only* method for removal. Can it be said that the legislature intended to confer the right in subs (4) in *all* cases? The text does not so indicate. It is only indicated where subs (1) has been triggered and not otherwise. Moreover, there is no suggestion in the explanatory memorandum to suggest a broader and comprehensive scope.

Sixth, the proviso in subs (1) cannot be separated from the principal operative provision such that the proviso could be said to be mandatory in all cases, but the operative provision not. The proviso refers to “*the* director” and “*the* resolution”. The use of the definite article in each case is a reference back to the operative provision and the circumstance under which it has been invoked. In other words, if the operative provision has not been invoked to remove a director because another mechanism, say under the constitution, has been used for removal (assuming the construction I have found as to the operative part), then the proviso does not apply. But if the operative provision has been invoked, then the proviso may operate. In other words, the operative part and the proviso are coupled. One could only argue that the proviso could be decoupled if the text of the proviso had said “*a* director” and “*a* resolution”. But it does not. Accordingly, the proviso cannot separately be said to be mandatory in all cases where the operative provision was not.

130 And consistently with this, in *Allied Mining* at [56] it was also said:

What this means is that the constitution of a public company cannot displace or modify s 203D. A constitutional article which provides for an alternative means of removing a director does not in my view displace or modify s 203D. It still remains to fulfil its legislative function, namely, to ensure that despite the provisions of the constitution the shareholders will always retain the ultimate right to remove directors.

131 So, it is not correct to say that a President or Vice President, by virtue of holding such an office, cannot be removed as directors. Their positions are inextricably linked to their directorships, which may be taken away by the members under s 203D, which operates despite the VFF constitution. In both form and substance, the President and Vice President are directors for the purposes of s 203D.

132 Moreover, if the VFF constitution had stated that a President or Vice President cannot be removed by members, then any such clause would have no operation by reason of s 203D as it would be inconsistent with the Act (see also clause 34 of the VFF constitution). Further, any such implied term to the effect that the President or Vice-President could not be removed by members would be equally problematic.

133 Accordingly, if a resolution is passed to remove a director in accordance with the statutory power to do so, and the director so removed also happens to be the President or Vice President, then the director so removed will also cease to be President or Vice President respectively.

134 And this plain reading is also not only consistent with s 203D, but in fact facilitates the purpose of s 203D. To suggest that a director who is a President or Vice President cannot be removed because they occupy this office is not tenable. On the VFF’s construction, this would mean that one class of director mandated by the VFF constitution (President and Vice President) are not answerable to voting members. This would be paradoxical, as they hold their directorships by virtue of election to the office of President and Vice President.

135 For these reasons, a resolution to remove a person as a director and as President or Vice President is not invalid. So, resolutions 1 and 2 are valid.

#### Are resolutions 3 and 4 valid?

136 If resolutions 1 and 2 are carried at an extraordinary general meeting, then there will be a vacancy in the office of the President and the Vice President. This then turns attention to the separate resolutions 3 and 4, which relate to the election of President and Vice President.

137 The President and Vice President are to be elected by the Voting Members “by a Prescribed Ballot” which is defined to mean “a ballot conducted by electronic, postal or any other means as resolved by the Board”. This involves “utilising the Preferential System of Voting”, which is defined to mean “the preferential system of voting prescribed by the Board from time to time”.

138 Plainly, a resolution which purports to circumvent these constitutional requirements is not one which the members of VFF could validly pass at a general meeting, so as to appoint Mr Weidemann’s chosen individuals to those roles. Now the resolutions seek to appoint a President and Vice President, with the consequence that each would then be *ex officio* members of the board of directors. But the members cannot exercise this power in general meeting.

139 Now Mr Weidemann points out that in the ordinary course, it is the voting members of the VFF that elect the President and Vice President. He says that if the position is contested, that is, more than one voting member wishes to be elected, then the election is to be conducted by way of prescribed ballot.

140 Further, he points out that the VFF constitution provides that if there is a vacancy in the office of President or Vice President, then the board shall fill the vacancy for the remainder of the relevant term, at which point an election will occur.

141 The VFF constitution also provides that the board may call an election to fill a casual vacancy if the remainder of the President’s or Vice President’s term is greater than a year, which election is to occur in accordance with clause 10.2.1. In other words, the VFF constitution facilitates member choice in circumstances where the duration of the President’s or Vice President’s remaining term is greater than a year. So, the Board *may* call an election to fill their vacancies by reason of clause 10.8.5 of the VFF constitution and if that election is not contested, then the member being proposed is elected.

142 Mr Weidemann says that this was what was sought by resolutions 3 and 4. He says that the resolutions are to be put to members for consideration at a general meeting and, if thought fit, passed. The members may therefore elect to pass the resolutions, which would have the effect of electing the named individuals to the office of President or Vice President.

143 Now it may be accepted that members have an inherent common law power to appoint a director by ordinary resolution, subject to the terms of any constitution.

144 In *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1988) 13 ACLR 110, Bryson J stated (at 114):

To my mind there is no sign of an attempt at any of the places where powers to appoint directors are conferred, that is to say, in art 84, 85, 92 or 93(c) to cover the field and state comprehensively so as to exclude other powers which might otherwise exist how directors are to be appointed. The starting point which all those provisions to my mind assume and supplement is a starting point indicated by the nature of the corporation as an incorporation of its members and by the relation between the corporation itself and its directors. Unless an article dealing with the appointment of directors provided expressly or by clear implication that the members of the company acting in the way in which they ordinarily act in a general meeting may not appoint a director to an available office as director, it ought in my view to be understood that the natural and ordinary state of affairs exists and the members of the company are to appoint the persons who are to have management and control of the business and affairs of the members in their incorporated capacity.

145 Further, in *Link Agricultural Pty Ltd v Shanahan* [1999] 1 VR 466, Kenny JA stated (at [54] and [55]) in the context of s 227 of the then Corporations Law, which provided both for the removal and appointment of directors:

The terms of s. 227(3)(b) and (9) imply that, under the Law, the members in general meeting retain the power to appoint a person in place of a director removed by them in accordance with the section. This reflects the position at common law that the company, constituted by the members in general meeting, retains an inherent power to appoint a director by ordinary resolution …

The other submission was that the power of the company, in general meeting, to appoint to the board was limited to the occasions specified in arts 93 and 95 and, if a place on the board fell vacant and was not filled under either of these articles, it fell to the board, not the general meeting, to fill the place, as a casual vacancy under art. 79. Whilst it is convenient to confer power on the board to fill a casual vacancy, it by no means follows that the board is the only repository of the power to appoint when a vacancy arises: cf. *Worcester Corsetry Ltd. v.* *Witting*; *Kraus v. J. G. Lloyd Pty. Ltd.* [1965] V.R. 232 at 234 and *Integrated* *Medical Technologies Ltd. v. Macel Nominees Pty. Ltd.* (1988) 13 A.C.L.R. 110; 6 A.C.L.C. 426. Article 93 confers power upon the company in general meeting to appoint to the board on the occasion specified by it, but it does not, as a matter of necessary implication, exclude the inherent power of the company in general meeting to appoint to the board when another occasion for appointment arises. Absent any express or necessary limitation in the articles upon the power of the company in general meeting to appoint a director, the company in general meeting must, it seems to me, retain such a power to appoint. The power is a usual concomitant of the relationship which exists between the members on the one hand and the company’s directors on the other. As Bryson J. said in *Integrated Medical Technologies Ltd. v. Macel Nominees Pty. Ltd.* at 13 A.C.L.R. 114; 6 A.C.L.C. 431 the directors are “the persons who are to have management and control of the business and affairs of the members in their incorporated capacity”. For these reasons, I reject the submission that Pivot’s articles of association exclude the power of the company in general meeting to appoint a director, or limit its exercise to the circumstance where no other repository of the power is able to exercise it.

146 But a resolution which seeks to interfere with the exclusive jurisdiction of the board cannot validly be put in terms which purport to bind the board, and members are unable to interfere with the board’s exercise of powers if those powers are vested exclusively in the board.

147 It is necessary to construe the words of the VFF constitution to determine whether it does expressly or by clear implication vest exclusive power in the board to appoint the President and Vice President should those offices be vacated. I have already referred to the principles relevant to construing a company’s constitution by reference to what I said in *Donaldson*; see also *Aveo Group* at [59] to [62].

148 Now Mr Weidemann points out that the VFF constitution sets out two mechanisms for the appointment of a President or Vice President outside of an election in the ordinary course: appointment by the board, or possible election by members if the remainder of the Presidential or Vice Presidential term is greater than a year as at the date the relevant office is vacated (clause 10.8.5).

149 Mr Weidemann says that “may” in clause 10.8.5 is important. It suggests that the VFF constitution does not in fact intend to vest sole and exclusive authority with the board of directors to appoint a President or Vice President in circumstances where the vacated office of President or Vice President is greater than 12 months. If shorter than 12 months, then 10.8.4 would appear to cover the field.

150 Mr Weidemann says that by providing the board with discretion under clause 10.8.5, the VFF constitution empowers the board to call an election should the term of the vacated office be greater than 12 months, but it does not close the door on the members also exercising their inherent power to seek an election by way of resolution.

151 Moreover, Mr Weidemann says that even if this inherent power is found to have no operation in this case, resolutions 3 and 4 may still be deemed effectual on the basis that, if considered and passed, they would reflect the view of members that the board should exercise its discretion to call an election pursuant to clause 10.8.5. Mr Weidemann says that if this requires the resolutions to be read down so as to be construed as being non-binding on the board, then so be it.

152 But I would reject Mr Weidemann’s arguments.

153 The power to fill a casual vacancy in the office of President or Vice President lies not with members at a general meeting but with the board under clause 10.8.4 of the constitution. Moreover, whilst the board may call an election, it is not required to do so under clause 10.8.5.

154 Further, I agree with the VFF that resolutions 3 and 4 themselves can in no way be construed as a substitute election process as Mr Weidemann now argues, on the basis that the meeting proposes to “consider and if thought fit, pass” those resolutions. That language could only be implemented by way of a vote on the actual resolutions themselves.

155 Further, merely because the resolutions may be deliberated on at a meeting would not have the effect of electing Mr Weller as President and Ms Gubbins as Vice President in the manner specified by the VFF constitution. To do so would be contrary to the requirements of clauses 10.1.1(a) and 10.2 of the VFF constitution that those persons sit on the board only after being elected pursuant to clause 10.2, that is, following a prescribed ballot and using the preferential system of voting.

156 Further*, Link Agricultural* does not assist Mr Weidemann to establish any residual inherent power of appointment of directors to save resolutions 3 and 4. In that case, s 227 of the Corporations Law contained an express power to remove and also provided for their replacement (either at the meeting at which the director was removed, or filled as a casual vacancy). The relevant article of association in that case also conferred a right on the members in a general meeting to remove a director and appoint another in his stead exercisable by special resolution. In that case, the statutory and constitutional provisions were said to be concurrent and alternative procedures, neither preventing recourse to each other and affording members a choice whether to proceed under one or the other.

157 But in the VFF constitution, clause 10.2 is the only repository of power for the appointment of the President and Vice President and clause 10.1.1(a) is the only trigger for their appointment of those office holders to the board. Further, where clause 10.8 operates, the relevant power is vested in the board and the choices available to the board under clauses 10.8.4 and 10.8.5.

158 In summary, proposed resolutions 3 and 4 are invalid. But if that be the case, what effect does such invalidity have on the effect of the notice? And can a meeting be convened to just address resolutions 1 and 2? To answer such questions requires me to turn to the “package” argument.

#### Are resolutions 1 to 4 a package?

159 In my view, resolutions 1 and 2 are linked with resolutions 3 and 4. So, the whole notice falls. Resolutions 1 to 4 were put to the members who signed the s 249D notice as one package.

160 There is no reason to conclude that the members who signed the s 249D notice would have done so had the replacement individuals proposed by resolutions 3 and 4 not been part of the package of resolutions.

161 Now Mr Weidemann gave evidence that a large contingent of VFF members had become frustrated with the current leadership of the VFF. He gave evidence that the issues concerning many members revolved around the leadership of the VFF board and the steps the VFF board was starting to take steps regardless of member support. Mr Weidemann gave evidence that many VFF members were in favour of removal of the current leadership.

162 Further, Mr Weidemann gave evidence that as part of the process on 14 June 2023, a resolution was proposed to remove the board of the VFF, which gained support at that meeting. It is said that this resolution of 14 June 2023 made no mention of replacements. The subsequent EGM request which gathered 156 signatures states:

We the members of the Victorian farmers’ Federation call for an Extraordinary General Meeting as per Item 13.4.1 of the Victorian farmers’ federation Constitution with the express purpose to remove the current board.

163 Mr Weidemann says that the mention of replacement members is made only under the heading “[a]ctions to be undertaken if the EGM process is successful”. He says that this did not form part of the resolution, and was mentioned as a mere possible future action.

164 Further, Mr Weidemann says that the s 203D notice with 254 member signatures contains only resolutions 1 and 2. No reference is made to replacements. Mr Weidemann says that it can therefore be inferred that a similar number would have supported the s 249D notice had it not included resolutions 3 and 4. This argument is problematic and I will answer it in a moment.

165 Mr Weidemann says that there is no reason to conclude that fewer than 100 members would have signed the requisition absent resolutions 3 and 4 being present. He says that the evidence is that there was more than enough support for a resolution to call an extraordinary general meeting on the basis that the specified directors be removed, such that it can be inferred that resolutions 1 and 2, if proposed in isolation, would have attracted similar support.

166 But I reject Mr Weidemann’s attempts to disaggregate the collection of resolutions.

167 Even if it be the case that a large contingent of certain unnamed members were frustrated with the VFF leadership, the fact that the frustration was directed towards and focused on members of the VFF board or leadership does not establish that removing the board was a *severable* focus of those members.

168 The asserted frustrations are insufficient to find that those dissatisfied members did in fact support the requisitioning of a meeting on the basis of resolutions 1 and 2 alone. The members who supported Mr Weidemann’s resolutions only ever considered resolutions to remove and replace the leadership.

169 Further, the relevant June 2023 events and what was proposed do not assist Mr Weidemann.

170 Mr Weidemann places reliance on the absence of any words of “replacement” within the 14 June 2023 resolution itself. But the first proposed action to be undertaken if the removal processes were successful was described immediately under the proposed resolution as follows: “Subject to the removal of the VFF board an interim board to be put in place for 6 months….”

171 Further, the second proposed action was described as “Interim Board members Paul Weller, TBA x 4”. As the VFF rightly contends, the replacement of board members with at least Mr Weller and others was not a mere possibility, but a priority action in the package.

172 Further, the proposed replacement actions in substance did form part of the resolution. In the EGM request, below each of the proposed actions but immediately above the signatures obtained, it was said: “The below signed members are in support of this resolution”. Properly construed, the EGM request sought the removal of the board and its replacement with Mr Weller and others.

173 And as for the August 2023 attempted requisition, which contained many of the signatures of the signatories to the EGM request, that too was a package deal.

174 Further, as for Mr Weidemann’s reliance on the s 203D notice, it appears from the evidence that the signatures on the s 203D notice were obtained at the same time as the signatures on the s 249D notice. Each of the notices contained the same number of signatures being 254. Further, an examination and comparison of certain pages of the requisitions themselves support them having been obtained simultaneously.

175 I agree with the VFF that there is no support for the inference sought to be drawn by Mr Weidemann that a similar number to the 254 members who signed the s 203D notice would also have supported the s 249D notice had it not included resolutions 3 and 4.

176 Further, if one just considers the form of the s 249D notice itself, the members manifestly from the face of the notice supported the suite of resolutions 1 to 4, which were presented to them as the removal and replacement of the President and Vice President as contained in the s 249D notice. And the signing of the s 249D notice was part of the same process as signing the s 203D notice. Moreover, it is well apparent why the s 203D notice had to take the more limited form consonant with what s 203D was designed to address, namely, removal only; its terms and the number of signatures thereon are not inconsistent with the package characterisation.

177 More generally, the regime of the resolutions is in substance for the replacement of the current President and Vice President by specified individuals. There is no reason to conclude that the members who signed the requisition would have done so had the replacement by the specified individuals not been part of the package of resolutions. To have had such disaggregation may have led to uncertainty and instability. It is unlikely that members would have only signed on to resolutions 1 and 2 being put. At the least, there is significant uncertainty as to that possibility.

178 In *Re Railway*, Black J considered a case in which the resolutions in question sought the removal of certain directors and the appointment of others in their place. The company’s constitution provided for a detailed election procedure in respect of directors to be carried out at an annual general meeting. His Honour held that the constitution excluded any implied or residual power of members to appoint directors and thus the resolutions proposed by the member in question could not properly be passed at a general meeting of the company and the directors were not bound to call the relevant meeting.

179 As to the power to remove directors, his Honour acknowledged at [4] that:

… Pausing there, there is no doubt that [the applicant] (and sufficient other persons to satisfy the requirements of s 249D of the Act) could validly have required [the company] to call a meeting of its members that simply sought to remove specified persons as directors of [the company], as distinct from seeking to replace those persons at the same meeting without compliance with cll 12.2 and 13 of [the company]’s constitution …

180 His Honour’s reference to those clauses of the constitution was to the machinery around the election of directors, which was sought to be circumvented by the resolutions. His Honour’s substantive treatment of the resolutions to both remove and replace directors as a package was correct. His Honour also resisted the suggestion that the proposed resolutions in that case could be amended so that the appointment of new directors be removed from the meeting, that being qualitatively and significantly different so as to not be open.

181 In summary then, resolutions 3 and 4 were part of a package. Given that resolutions 3 and 4 cannot be validly put to an extraordinary general meeting as they cannot have any operative effect, the whole of the purported s 249D notice is tainted and invalid.

## Conclusion

182 For the foregoing reasons, Mr Weidemann is not entitled to any of the relief that he seeks. His proceeding must be dismissed with costs.

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| I certify that the preceding one hundred and eighty-two (182) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach. |

Associate:

Dated: 20 December 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | VID 834 of 2023 |
| Defendants |  |
| Fourth Defendant: | EMMANUELLE VANESSA GERMANO |
| Fifth Defendant: | CRAIG JOHN DWYER |
| Sixth Defendant: | JAMES BRENSLEY DOWNING |
| Seventh Defendant | COLIN CRAIG PEEL |