ASX ANNOUNCEMENT

16 March 2023

ADMINISTRATIVE APPEALS TRIBUNAL (AAT) DECISION – PDF REGISTRATION REINSTATED

HIGHLIGHTS

- **The Department for Industry Innovation and Science Australia's decision of 23 April 2021 to affirm a decision of 3 February 2021 under s 47 of the Pooled Development Funds Act 1992 (Cth) to revoke MEC's Pooled Development Fund registration declaration is set aside.**
- **In substitution the AAT decided not to revoke MEC's Pool Development Fund registration.**
- **MEC's PDF registration is reinstated.**

MEC Resources Limited (**"MEC"** or the **"Company"**) (ASX:MMR) is pleased to announce that following an appeal to the Administrative Appeals Tribunal ("**AAT**") a decision has been made by the AAT to set aside the revocation of MEC's Pooled Development Fund registration.

Further, the AAT, in substitution, has decided not to revoke the Applicant's PDF registration under S 47 of the of Pooled Development Funds Act 1992 (Cth) ("**PDFA**").

The AAT has informed the Company that following an application made by MEC under S 56 of the PDFA for review of a decision made by the Innovation Investment Committee of Innovation and Science Australia (the "**Committee**") to revoke MEC's PDF registration it found that the decision was not correct.

A full copy of the decision and reasons for the decision by Deputy President Boyle of the AAT is attached.

PDF REGISTRATION

The reinstatement of the Company's PDF registration brings back a number of benefits to the Company and its shareholders. Some of the key elements are;

- PDFs raise capital & make equity investments complying with a structure established under the Australian Government's PDF Act, enacted in 1992.
- MEC's PDF status means it is taxed at 15% on its income and capital gains received from its investments.
- MEC shareholders are exempt from capital gains when selling their MEC shares.
- Australian residents receiving franked and unfranked dividends from their MEC shares are also exempt from tax.

David Breeze (Managing Director) authorised the release of this announcement to the market.

For further information please contact:
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Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: **GENERAL DIVISION**

File Number: **2021/3080**

Re: **MEC Resources Ltd**

APPLICANT

And **Industry Innovation and Science Australia**

RESPONDENT

DECISION

Tribunal: **Deputy President Boyle**

Date: 15 March 2023

Place: **Perth**

The Respondent's decision of 23 April 2021 to affirm a decision of 3 February 2021 under s 47 of the *Pooled Development Funds Act 1992* (Cth) to revoke the Applicant's Pooled Development Fund registration declaration is set aside and in substitution it is decided not to revoke the Applicant's Pool Development Fund registration declaration under s 47 of the *Pooled Development Funds Act 1992* (Cth).

.....[Sgd].....

Deputy President Boyle

CATCHWORDS

POOLED DEVELOPMENT FUNDS - Pooled Development Funds Act 1992 - Revocation of registration declaration under s 47(1) – ultimate sanction of revocation of registration not appropriate – claimed breaches do not subvert the objects of the Act – no other power applicable in present case – breaches occurred when Applicant under different management – procedures for compliance now in place – procedural fairness –ground for cancellation argued not referred to in SFIC - revocation order set aside and substituted

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) ss 37, 41(2)

Industry Research and Development Act 1986 (Cth) ss 6, 21(2)

Pooled Development Funds Act 1992 (Cth) ss 3, 4, 10, 11, 14(1), 18, 19, 19(1), 19(2), 20A, 20A(2), 21, 22, 23, 24, 25, 25(1), 26, 27, 27A, 28, 28(2A), 33, 35, 35(1), 35(4), 42, 42(2), 42(2)(a), 42(3)(a), 46(2), 47, 47(1)(a), 47(3)(a), 55, 56

Tax Agent Services Act 2009 (Cth) ss 60-125(2)

Venture Capital Act 2002 (Cth)

CASES

Austcorp No 500 Pty Ltd v Innovation Australia [2010] AATA 270

Bartlett v Federal Commissioner of Taxation (2003) 54 ATR 261

Evans v Federal Commissioner of Taxation (1989) 89 ATC 4540

MEC Resources Ltd and Innovation and Science Australia [2021] AATA 4030

Rio Tinto Ltd v Commissioner of Taxation [2004] FCA 335

Saffron v Federal Commissioner of Taxation (1991) 22 ATR 131

SECONDARY MATERIALS

Explanatory Memorandum, *Pooled Development Funds Bill 1992* (Cth)

Commonwealth, *Second Reading Speech of the Explanatory Memorandum of Pooled Development Funds Bill 1992* (Cth), House of Representatives, 26 May 1992, 2757 (Mr Free, Minister of Science and Technology)

REASONS FOR DECISION

Deputy President Boyle

15 March 2023

THE APPLICATION

1. The Applicant seeks the review of the Respondent's decision of 23 April 2021 to affirm a decision of 3 February 2021 under s 47 of the *Pooled Development Funds Act 1992* (Cth) (**PDFA**) to revoke the Applicant's Pooled Development Fund (**PDF**) registration declaration.

2. The application for review is made under s 56 of the PDFA.

BACKGROUND

3. The following facts are taken from paras 3.1 – 3.28 of the Respondent's Statement of Findings of Fact and Reasons[1] which the Applicant said are "*broadly agreed*".[2]

4. The Applicant is an Australian public company. The Applicant became a registered PDF on 19 September 2005.[3]

5. On 20 August 2020, the **Department** of Industry, Science, Energy and Resources wrote to the Applicant identifying potential breaches of the PDFA and requested information from the Applicant in relation to those potential breaches.[4] The potential breaches identified by the Department involved:

   (a) failure to comply with conditions imposed on an approval granted by the **Board**[5] under s 25(1) of the PDFA for the Applicant to commit more than 30% of its committed capital to **Advent Energy** Pty Ltd, as those conditions included:

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[1] R3, T2/11-8.

[2] A1, [6].

[3] R3, T3/22.

[4] R3, T4/23-5.

[5] Defined in the PDFA as Industry Innovation and Science Australia, established by s 6 of the *Industry Research and Development Act 1986* (Cth).

(i) the Applicant providing information to the Department on a quarterly basis about its progress towards achieving compliance with the 30% limit established by s 25 of the PDFA; and

(ii) the Applicant becoming compliant with the 30% limit established by s 25 of the PDFA by 5 August 2020

and the Applicant had not provided updates about its progress towards achieving compliance with s 25 of the PDFA.

(b) an investment in **Intelligent IP** Hosting Pty Ltd, which involved the Applicant committing:

(i) more than 30% of its committed capital to Intelligent IP, contrary to s 25 of the PDFA; and

(ii) an amount that was less than 10% of Intelligent IP's paid-up capital immediately after the investment, contrary to s 27 of the PDFA;

(c) failure to notify the Board within 30 days after it invested in Intelligent IP for the first time, contrary to s 27A of the PDFA; and

(d) failure to notify the Board in writing within 30 days after at least three notifiable events under s 42 of the PDFA, comprising persons becoming or ceasing to be relevant officers of the Applicant and a change in the address of the Applicant's registered office.

6. On 20 August 2020, Andrew Bald on behalf of the Applicant replied, stating that the Applicant would need to consider its formal response, but had not deliberately done any of the things identified by the Department and would welcome the opportunity to engage with the Department to remedy the potential breaches and ensure ongoing compliance.[6]

7. On 2 September 2020, the Applicant provided its response to the Department's request for information.[7] In its response, the Applicant stated that:

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[6] R3, T4/23.
[7] R3, T5/26-9.

(a) its investment in Advent Energy had never exceeded 30% of the Applicant's shareholder funds, as:

(i) at the time of its investment, the Applicant's investment of $8.77 million represented 29.93% of its shareholder funds, which totalled $29,298,925;

(ii) it had not invested further in Advent Energy, but it had increased its shareholder funds to $30,644,378, decreasing the portion of its funds invested in Advent Energy to 28.16%.

(b) despite not providing information to the Board in accordance with the condition imposed by the Board under s 28(2A) of the PDFA, it had not contravened s 28 because it had been compliant with s 25 of the PDFA;

(c) on or around 30 August 2019, the Applicant entered into a binding term sheet with Intelligent IP whereby it was to invest $405,000 in Intelligent IP, which it also referred to as "*Claratti,*" which represented 12.8% of the issued capital in Intelligent IP and 1.31% of the Applicant's committed capital;

(d) in response to the potential failure to notify the Board of its initial investment in Intelligent IP within 30 days of investment, that it had divested its investment in Intelligent IP *"rapidly"* after its initial investment, it had *"endured a tumultuous period since approximately December 2016"* and the board of directors of the Applicant had taken steps to ensure it complies with its obligations; and

(e) it had *"new processes"* that it stated would ensure it would notify the Committee of notifiable events and listed the names and appointment dates of its board of directors members as well as its registered address.

8. On 11 September 2020, the Department requested further information from the Applicant regarding its investments in Advent Energy and Intelligent IP and asked the Applicant to provide the details of the appointment of particular board of directors members in accordance with s 42(3)(a) of the PDFA, which were not provided as part of the correspondence received on 2 September 2020.[8]

[8] R3, T6/30-1.

9. On 2 October 2020, the Department notified the Applicant by email that at the next meeting of the Committee on 7 October 2020, the Department would recommend that the Committee:[9]

   (a) find the Applicant had contravened:

      (i) s 27A of the PDFA when it submitted notification of its initial information in Intelligent IP beyond the statutory deadline; and

      (ii) s 42 of the PDFA by not providing notification of events affecting previously provided information on at least eight occasions;

   (b) defer its decision as to whether the Applicant had been complying with the PDFA through its investments in Advent Energy and Intelligent IP as it did not have sufficient information to assess compliance; and

   (c) require the Applicant to provide information relating to its investments in Advent Energy and Intelligent IP under s 43 of the PDFA.

10. On 2 October 2020, Mr Bald on behalf of the Applicant, replied to the Department's email stating that he had provided the email from the Department to Robert Marusco and Douglas Verley and that he (Mr Bald) and Anthony Hamilton were *"no longer directors of nor associated with"* the Applicant.[10]

11. In reply on the same day, the Department reminded the Applicant of its obligation to advise the Board as soon as practicable of events including a person becoming, or ceasing to be, a director, and invited the Applicant to participate in a teleconference.[11]

12. On 8 October 2020, the Department notified the Applicant that the Committee had decided to defer its decision under s 47 of the PDFA as to whether the Applicant had been complying with the PDFA and invited the Applicant to participate in a teleconference.[12] On 12 October 2020, the Department provided the Applicant with further information to assist it in providing

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[9] R3, T7/33-6.
[10] R3, T8/37.
[11] R3, T8/37.
[12] R3, T10-1/47-53.

supporting documentation, as requested by the Applicant during a teleconference on 9 October 2020.[13]

13. On 14 October 2020, Andrew Jones, on behalf of the Applicant, provided the Department with the following information:[14]

    (a) a copy of the 2 September 2020 correspondence referred to in [7] above;

    (b) a further letter from the Applicant dated 15 September 2020 listing the balance of its investment in Advent Energy as at 5 August 2020; and

    (c) a table summarising the Applicant's records to that date, type, amount, total shareholder funds, percentage of share capital held by the Applicant, percentage of the Applicant's committed capital represented by the investment, and additional notes, for the Applicant's investment in Intelligent IP.

14. On 30 October 2020, the Applicant notified the Department of appointments made to the Applicant's board of directors on 22 October 2020.[15]

15. On 6 November 2020, the Applicant provided the Department with its response to the Board's request for information on 8 October 2020 comprising:[16]

    (a) a letter from the Applicant to the Department, in which the Applicant:

        (i) stated that the Applicant's investment in Advent Energy had at no time exceeded 30% of its shareholder funds;

        (ii) acknowledged that it had not provided information to the Board regarding its investment in Advent Energy on a quarterly basis as required;

        (iii) conceded that its investment in Intelligent IP did not reach the 10% required by s 27 of the PDFA;

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[13] R3, T11/50-3.
[14] R3, T12/54-6.
[15] R3, T15/75-78.
[16] R3, T17/89-195.

(iv) stated that it would comply with s 27A of the PDFA in future, by informing the Board of future investments as soon as practicable, and in any case within 30 days of the investment; and

(v) stated that it had taken steps to ensure it would comply with its obligations under s 42 of the PDFA to notify the Board of notifiable events.

(b) an application for shares in Intelligent IP made by **Catalyst 1** Pty Ltd, a wholly owned subsidiary of the Applicant;[17]

(c) a letter from RSM Australia Pty Ltd, an audit, tax and consulting firm, to Intelligent IP regarding Intelligent IP's registrations for the Research and Development Tax Incentive and the amount of tax offset Intelligent IP may receive in accordance with those registrations;

(d) two copies of a Deed of Settlement and Release (one signed by Mr Bald for Catalyst 1 and the Applicant and the other signed by Mr Bald and Robert Marusco for Catalyst 1 and by Mr Bald and Michael Sandy for the Applicant), for resolution of a dispute relating to alleged defaults under:

(i) a convertible note deed and a specific security deed entered into between Catalyst 1 and Intelligent IP; and

(ii) a binding term sheet entered into between the Applicant and Intelligent IP.

(e) a copy of the table referred to at [13(c)] above;

(f) a Binding Convertible Notes Term Sheet dated 5 September 2019 signed by Mr Bald on behalf of the Applicant, setting out terms upon which the Applicant agreed to subscribe for an unsecured convertible note in Intelligent IP;

(g) an unsigned circular resolution of three directors of the Applicant dated 31 October 2019, resolving to convert the convertible note into shares in Intelligent IP and to subscribe for a further 108,696 shares in Intelligent IP for $50,000;

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[17] R3, T40/628-637.

(h) a conversion notice dated 31 October 2019 addressed to Intelligent IP, giving notice that the Applicant wished to convert all convertible notes it held in the Applicant into shares;

(i) a signed circular resolution of the directors of the Applicant dated 1 November 2019, resolving to convert its convertible note into 108,696 shares in Intelligent IP;

(j) a signed circular resolution of the directors of the Applicant dated 1 November 2019, resolving to purchase 108,696 shares in Intelligent IP for $50,000;

(k) a Convertible Note Deed between Catalyst 1 and Intelligent IP dated 7 January 2020 setting out the terms and conditions upon which Catalyst 1 agreed to subscribe to a convertible note in Intelligent IP, secured by a tax offset Intelligent IP expected to obtain pursuant to the Research and Development Tax Incentive;

(l) a Specific Security Deed between Catalyst 1 as the secured party and Intelligent IP as the grantor dated 7 January 2020, which noted that the parties had entered into the Convertible Note Deed "whereby the secured party has conditionally agreed to a Convertible Note Loan" which was to be secured by the Specific Security Deed, and set out the terms of the security interest that Intelligent IP granted to Catalyst 1;

(m) a share transfer form for the transfer of 108,696 shares in Intelligent IP from Catalyst 1 to Childress Investments Pty Ltd dated 18 May 2020, signed by Mr Bald as the sole director of Catalyst 1;

(n) a share transfer form for the transfer of 108,696 shares in Intelligent IP from Catalyst 1 to Taplan Pty Ltd as trustee for the Bartle Family Trust dated 18 May 2020, signed by Mr Bald as the sole director of Catalyst 1;

(o) a signed circular resolution of the directors of Intelligent IP dated 1 November 2019, resolving that Catalyst 1 would have its convertible note converted into 108,696 shares;

(p) a signed circular resolution of the directors of Intelligent IP dated 1 November 2019, resolving to accept the request for Catalyst 1 to purchase 108,696 shares;

(q) a letter from STC Partners to Intelligent IP dated 6 November 2019, attaching a change to company details form for signing, minutes of a directors meeting, and a share certificate; and

(r) a letter from STC Partners to Intelligent IP dated 4 November 2019 attaching minutes of a directors meeting, a share certificate, and a statement of changes (form 484).

16. On 9 November 2020, the Applicant provided the Department with a copy of its annual report, which had been lodged with the ASX on 14 October 2020.[18] Among other information, the annual report informed the Applicant's shareholders that the Applicant had acquired 3.19% of the shares in Intelligent IP on 1 November 2019, which it had subsequently divested.

17. On 17 November 2020, the Department requested further information from the Applicant, namely, evidence confirming the details of the Applicant's investment in Advent Energy and the Applicant's annual report for the financial year ending 30 June 2019.[19] The Applicant responded to the Department's request on 19 November 2020, providing annual reports and a letter from Advent Energy stating the number of shares it held in Advent Energy.[20]

18. On 20 November 2020, the Department requested further information from the Applicant regarding discrepancies in the information it had provided about its investment in Advent Energy, as well as information regarding the Applicant's investments in Grandbridge Ltd and Molecular Discovery Systems Ltd.[21] The Applicant provided information in response to that request on 23 November 2020,[22] stating the amount it had paid on shares in Advent Energy, the amount it had lent to Advent Energy that remained unpaid and the number of shares it held in Advent Energy.

[18] R3, T18/196 – 267.
[19] R3, T19/268 – 352.
[20] R3, T19/352.
[21] R3, T20/353 – 359.
[22] R3, T21/360-369.

19. On 25 November 2020, the Department requested further information from the Applicant regarding its investment in Molecular Discovery Systems Ltd, which the Applicant provided on 30 November 2020.[23]

20. On 9 December 2020, the Department notified the Applicant that it intended to recommend that the Committee find the Applicant had breached ss 19(1), 20, 20B, 27 and 27A of the PDFA and revoke the Applicant's registration declaration. The Department invited the Applicant to provide submissions under s 47(3)(a) of the PDFA.[24]

21. On 14 December 2020, the Applicant provided a submission to the Department contending that:[25]

    (a) the unlawful removal of David Breeze as a director of the Applicant and Advent Energy constituted a “force majeure”, and resulted in a number of court proceedings that were resolved pursuant to a settlement deed made on 6 August 2019;

    (b) in addition to the court proceedings, investigations were commenced by ASIC and the Takeovers Panel and a report was made to the Western Australia Police Force;

    (c) the issues had been resolved on 22 October 2020;

    (d) the previous board of the Applicant had been removed, and the new board had adopted a new PDF Management Committee **Charter,** with the PDF Management Committee comprised of David Breeze and Robert Marusco;

    (e) the Applicant was confident there would be no further breaches of the PDFA by the Applicant; and

    (f) the Applicant considered it premature for the Department to recommend that a notice of revocation be issued to the Applicant.

22. On 18 December 2020, the Department informed the Applicant that the Committee had agreed:[26]

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[23] R3, T22/370-380.
[24] R3, T23/381-2.
[25] R3, T24/383–393.
[26] R3, T25/394-6.

(a) that it had reasons to believe the Applicant had contravened ss 19(1), 27, 27A and 42 of the PDFA, as:

(i) it had failed to notify the Board of events affecting information previously given, in contravention of ss 42(2)(a), (c) and (k) of the PDFA on at least eight occasions;

(ii) it provided information about its investment in Intelligent IP beyond the statutory deadline for provision of information about a PDF's investment in a company set out in s 27A of the PDFA; and

(iii) the Applicant's investment in Intelligent IP did not comply with the requirement in s 19(1) of the PDFA to not make an investment other than in accordance with Part 4, Division 1 of the PDFA, because:

A. by entering into a convertible note on 5 September 2019, the Applicant entered into a non-transferrable option under s 20A of the PDFA, but failed to comply with s 20A(2), which states that an option must only be exercisable by the PDF and not be capable of being transferred to another person, but the Respondent was satisfied that this investment satisfied other sections of the PDFA, as:

B. by electing to exercise the option on 1 November 2019, the Applicant acquired ordinary shares in Intelligent IP, complying with the requirements of s 20 of the PDFA;

C. by subscribing for 108,696 shares in Intelligent IP in exchange for $50,000 on 1 November 2019, the Applicant acquired ordinary shares in the company, complying with the requirements of s 20 of the PDFA; and

D. by entering into a convertible note on 7 January 2020, the Applicant entered into a loan under s 20B of the PDFA because the terms of the agreement included debit interest;

(b) that the Applicant's investments in Advent Energy had complied with s 25 of the PDFA since its approval to commit more than 30% of its committed capital to that investment had expired on 5 August 2020 (referred to in [5(b)] above), meaning the Respondent was no longer concerned that this investment contravened the PDFA;

(c) that the Applicant's investments in Molecular Discovery Systems Ltd as a result of an in-specie distribution of shares in BPH Energy Limited, and a loan to Grandbridge Ltd did not require assessments under Part 4, Division 1 of the PDFA; and

(d) to issue a notice of revocation under s 47(3)(a) of the PDFA and invited the Applicant to provide written submissions to the Board.[27]

23. On 14 January 2021, the Applicant made submissions to the Board in relation to the 18 December 2020 notice,[28] in which it contended that:

(a) its breaches of the PDFA were the fault of its previous board members;

(b) it had since remedied those breaches; and

(c) it would not breach the PDFA in future.

24. On 1 February 2021, the Department informed the Applicant that it intended to recommend that the Committee agree to revoke the Applicant's registration declaration under s 47(1)(a) of the PDFA and offered the Applicant an opportunity to discuss the matter.[29]

25. On 2 February 2021, the Applicant replied contending that the contraventions of the PDFA arose from the illegal conduct of previous board members in removing Mr Breeze, that ASIC failed to act in relation to that conduct, that there had been no contraventions since the appointment of the new board of directors and that revocation of the Applicant's registration declaration would therefore be "*the result of a serious failure of public policy regulation.*"[30]

26. On 3 February 2021, the Committee made the **Initial Decision**, agreeing to revoke the Applicant's registration declaration for contravening ss 19(1), 27, 27A and 42 of the PDFA,[31] with that revocation communicated to the Applicant in a letter dated 4 February 2020.[32]

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[27] R3, T25/394-6.
[28] R3, T26/397-408.
[29] R3, T28/410.
[30] R3, T29/412-4.
[31] R3, T30/415.
[32] R3, T31/455-7.

27. On 23 February 2021, the Department informed the Applicant that notice of the revocation of its registration declaration had been published in the Gazette and asked the Applicant to inform the Department when it intended to notify its shareholders of the revocation under s 46(2) of the PDFA.[33]

28. On 26 February 2021, the Applicant applied for review of the Initial Decision, contending that:[34]

    (a) the Applicant's alleged breaches of the PDFA had not been particularised;

    (b) the Committee had characterised the Applicant's conduct as a series of breaches, but it had only been one set of circumstances;

    (c) one set of circumstances cannot constitute separate breaches, so in considering the Applicant's conduct as multiple breaches the Committee had *"entered into legal error;"*

    (d) the Applicant's breaches of the PDFA were temporary and did not go to the heart of the PDFA;

    (e) the Applicant was denied procedural fairness because it was not provided with *"detailed information or material in respect of the Department's assessment on the submissions given to the Committee"* and because the Committee received a "*verbal update*" from the Department on 3 February 2021 that the Applicant was not able to *"interact with;"*

    (f) the Applicant had been denied a "*verbal hearing*";

    (g) the Board had failed to consider whether the individual breaches were sufficient for it to be satisfied that there was a contravention of the PDFA, but had instead relied on the Department;

    (h) the Department intended to phase out PDFs, a contention based on the Applicant having purportedly received a letter from the Committee in February 2013 expressing such an intention;

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[33] R3, T32/458.
[34] R3, T33/460-4.

(i) the Board had failed to exercise its discretion and instead "*a Committee has acted outside of the provisions of the PDFA*"; and

(j) the serious impact of revocation had not been properly considered.

29. On 10 March 2021, the Department acknowledged receipt of the Applicant's application for review and invited the Applicant to provide further information to support its position.[35]

30. On 18 March 2021, the Applicant provided a further submission, providing further detail of the arguments made in its 26 February 2021 submission.[36]

31. On 23 April 2021, a delegate of the Board made the decision affirming the Initial Decision.[37]The decision was communicated to the Applicant by letter dated 30 April 2021, which included an attachment detailing each of the Applicant's breaches of the PDFA.[38]

32. On 12 May 2021, the Applicant applied to the Tribunal for review of the decision to affirm the Initial Decision.

THE HEARING AND EVIDENCE

33. The Applicant made an application under s 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) for a stay of the implementation of the decision. The stay application was heard by me on 18 October 2021. At the time of that hearing, the following documents were admitted into evidence:

(a) Applicant's Statement of Facts, Issues and Contentions dated 26 August 2021 (A1) (**Applicant's SFIC**);

(b) Affidavit of David Leslie Breeze dated 7 September 2021 (**the first affidavit**) (A2);

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[35] R3, T34/465-7.
[36] R3, T35/468-475.
[37] R3, T37/483-508.
[38] R3, T38/509-14.

(c) NAB Direct Credit Report and email exchange from the National Offshore Petroleum Titles Administrator and Response from Mr Breeze dated 19 July 2021 and 15 October 2021 and NAB Connect Direct Credit Report (A3); and

(d) Consideration by the Hon Keith Pitt of Petroleum Exploration Permit 11 (**PEP 11**) Application dated 12 February 2021 (R1).

34. In addition to the above documents, I had before me at the time of the hearing of the stay application the documents lodged by the Respondent pursuant to s 37 of the AAT Act. By decision dated 3 November 2021, I refused the stay application.[39]

35. The substantive application was heard on 27 and 28 January and 9 June 2022. The Applicant was represented by Mr T Houwelling and Mr T Millar and the Respondent was represented by Ms C Thompson (now SC). The only witness to give evidence at the hearing was David Leslie Breeze on behalf of the Applicant.

36. The following documents were admitted into evidence:

(a) Applicant's further submissions in response dated 13 December 2021 (A4);

(b) Extract from the MEC Resources website relating to Mr Breeze's qualifications (A6);

(c) Respondent's Statement of Facts, Issues and Contentions dated 8 November 2021) (**Respondent's SFIC**) (R2);

(d) Documents lodged by the Respondent pursuant to s 37 of the AAT Act s 37 (Volumes 1 and 2) (R3);

(e) Affidavit of David Leslie Breeze dated 13 December 2021 (**the second affidavit**) (A5):

(f) Media Release dated 16 December 2021 by Prime Minister re PEP 11 (R4);

(g) Updated voluntary suspension announcement dated 21 October 2021 (R5);

(h) Updated voluntary suspension announcement dated 14 January 2022 (R6);

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[39] *MEC Resources Ltd and Innovation and Science Australia* [2021] AATA 4030.

(i) Australian Oxford Dictionary definition of “transferable” (R7); and

(j) Australian Securities and Investment Commission (**ASIC**) enforceable undertaking (R8).

THE LEGISLATION

37. Section 3 of the PDFA states the object of the PDFA to be:

> *…to develop, and demonstrate the potential of, the market for providing patient equity capital (including venture capital) to small or medium-sized Australian enterprises that carry on eligible businesses.*

38. This object is achieved through pooled development funds which attract certain tax benefits for those investing.

39. A company may apply to the Board for a registration declaration to be made in relation to the company under s 11 of the PDFA. The Board must grant a registration application and declare the applicant to be registered as a PDF if the Board is satisfied of the factors listed in s 14(1) of the PDFA.

40. Section 10 of the PDFA provides that a company becomes a PDF when a registration declaration in relation to the company comes into force.

41. Section 18 of the PDFA provides that a PDF's registration declaration is subject to conditions, including that the PDF comply with:

(a) The PDFA;

(b) any direction given, or requirement made, by the Board under the PDFA; and

(c) any condition to which an approval given, or determination made, by the Board under the PDFA is subject.

42. Division 1 of Part 4 of the PDFA regulates the kinds of investments that a PDF can make. Relevantly, s 19 of the PDFA provides:

> *(1) A PDF must not make an investment, other than as unregulated investment, except in accordance with this Division.*

(2) There are 3 kinds of investment that a PDF is allowed to make under this Division:

(a) subscribing for or buying shares (see section 20);

(b) acquiring non-transferable options to buy shares (see section 20A);

(c) lending money to companies (see section 20B).

…

43. Sections 20, 20A and 20B of the PDFA define three kinds of investments in which a PDF is allowed to invest (**allowed investments**). Section 20 of the PDFA relevantly defines the first kind of allowed investment as subscribing for or buying ordinary shares in a company or some other kind of shares in a company that the Board approves. The shares must not, unless the Board otherwise approves, be pre-owned shares.

44. Section 20A(1) of the PDFA defines the second kind of allowed investment as acquiring an option to subscribe for or buy shares in a company. The note to s 20A refers to s 27 of the PDFA (see [50] below).

45. Section 20A(2) of the PDFA provides that the option must be exercisable only by the PDF and must not be capable of being transferred to another person. Section 20A(3) provides that:

> *If the PDF later wishes to exercise the option by subscribing for or buying any of those shares, it must comply with section 20 and the other provisions of this Division that relate to section 20 investments: the exercise of the option is treated as a new investment that is separate from the acquisition of the option.*

46. Section 20B of the PDFA defines the third kind of allowed investment, lending money to existing investee companies, as follows:

> *(1) A PDF may make an investment by lending money to a company (in this Division also called the investee company) under an agreement with the investee company.*
>
> *Note: However, section 27 provides that, unless the Board otherwise approves, a PDF cannot make such an investment unless it first holds shares in the investee company. The total of all amounts paid on those shares must be at least 10% of the total of all amounts paid on the issued shares in the investee company.*
>
> *(2) Immediately after the agreement is entered into, the total of the outstanding amounts of loans that the PDF has made (other than the amounts of unregulated investments) must not exceed 20% of the shareholders' funds of the PDF.*

47. Sections 21 to 27 of the PDFA impose requirements regarding the intended use of the invested money by the company in which it is invested (**investee company**), as well as the size and activities undertaken by the investee company and the amount of invested money as a percentage of each of the PDF's and the investee company's capital.

48. Section 25(1) of the PDFA provides:

> *(1) Unless the Board otherwise approves, the investment must be such that, immediately after it is made, the total of:*
>
> *(a) all amounts paid on the shares in the investee company held by the PDF; and*
>
> *(b) all amounts remaining unpaid on those shares; and*
>
> *(ba) all amounts the PDF has paid to acquire options in the investee company that the PDF has not yet exercised; and*
>
> *(bb) all amounts the PDF has lent to the investee company that remain outstanding;*
>
> *does not exceed 30% of the total of:*
>
> *(c) the shareholders' funds of the PDF; and*
>
> *(d) all amounts remaining unpaid on the issued shares in the PDF.*

49. Section 28(2A) of the PDFA requires that an approval under subsection 25(1) must be given subject to a condition that, at the end of a specified period, the total of all amounts paid in the shares in the investee company held by the PDF and all amounts remaining unpaid on those shares must not exceed 30% of the total of the shareholders' funds in the PDF and all amounts remaining unpaid on the issued shares in the PDF.

50. Section 27 of the PDFA provides:

> *Unless the Board otherwise approves, the investment must be such that, immediately after it is made, the total of all amounts paid on the shares in the investee company held by the PDF is at least 10% of the total of all amounts paid on the issued shares in the investee company.*

51. Section 28A of the PDFA provides that the PDFA applies to investments made by a PDF through one or more interposed entities as if the PDF had made the investments directly.

52. Section 27A of the PDFA provides:

> *As soon as practicable, and in any event within 30 days, after a PDF invests in a particular investee company for the first time, the PDF must give the Board a written notice setting out full particulars of the investment.*

53. Section 35 of the PDFA provides:

> *(1) If the Board is satisfied that a PDF has contravened a direction provision, or a previous direction under this section, section 33 or section 34, the Board may, by notice in writing to the PDF, direct the PDF to take such action in relation to the contravention as the Board thinks appropriate, having regard to any relevant matter.*
>
> *(2) A direction must specify a reasonable period within which it must be complied with.*
>
> *(3) A PDF must, within the specified period, comply with a direction given to it.*
>
> *(4) In this section:*
>
> **direction provision** *means:*
>
> *(a) section 19; or*
>
> *(b) subsection 29(1); or*
>
> *(c) subsection 29(2); or*
>
> *(d) subsection 30(1); or*
>
> *(e) section 32.*
>
> (Original emphasis.)

54. Section 42(1) of the PDFA provides:

> *As soon as practicable, and in any event within 30 days, after a PDF knows of an event referred to in subsection (2), the PDF must give the Board a written notice setting out particulars of the event and, in the case of an event referred to in paragraph (2)(a), (d) or (g), the additional particulars referred to in subsection (3).*

55. Relevant to the present case, s 42(2) of the PDFA identifies the following events:

> *(a) a person becoming a relevant officer of the PDF;*
>
> *(b) a change in the name or address of a relevant officer of the PDF;*
>
> *(c) a person ceasing to be a relevant officer of the PDF;*
>
> *…*
>
> *(k) a change in the address of the PDF's registered office;*

56. In relation to the "*additional particulars*" required by s 42(1) of the PDFA, s 42(3) relevantly provides:

> *These are the additional particulars:*
>
> *(a) in the case of an event referred to in paragraph (2)(a) or (g)--the person's name, address, occupation, qualifications and experience; …*

57. Section 43 of the PDFA relevantly provides:

(1) The Board may, for the purposes of this Act, require a PDF, or a present or former officer or investment manager of a PDF:

(a) to provide the Board with information relating to the PDF or to any of the PDF's past or present investments; or

(b) to produce to the Board documents that so relate.

(2) A requirement must be made by notice in writing given to the person of whom it is made.

(3) A requirement must specify a reasonable period within which it must be complied with.

(4) A person must, within the specified period, comply with a requirement made of the person.

58. Section 47 of the PDFA relevantly provides:

(1) Subject to this section, the Board may revoke a PDF's registration declaration if:

(a) the Board is satisfied that a provision of this Act has been contravened by, or in relation to, the PDF; or

(b) the Board is no longer satisfied that the PDF's constitution satisfies the PDF constitution requirements; or

(c) the Board is satisfied that a provision of the PDF's constitution that prohibits as mentioned in subsection 4(3) has been contravened; or

(d) the Board is satisfied that a condition of the PDF's registration has been contravened by, or in relation to, the PDF.

(2) As soon as practicable after revoking a company's registration declaration, the Board must give the company a notice that advises of the revocation and sets out the Board's reasons for deciding to revoke the declaration.

(3) The Board must not revoke a registration declaration unless the Board:

(a) by notice in writing given to the PDF, allows the PDF at least 14 days after the notice is given in which to make written submissions to the Board about the matters specified in the notice that, in the opinion of the Board, may constitute grounds for revoking the declaration; and

(b) considers any such submissions.

59. Section 4 of the PDFA defines a decision under s 47 to revoke a registration declaration as a "*reviewable decision.*"[40]

[40] *Pooled Development Funds Act 1992* (Cth) s 4(1).

60. Section 55 of the PDFA provides for internal review of reviewable decisions and s 56 of the PDFA provides for an application to be made to the Tribunal for review of a reviewable decision of the Board that has been confirmed or varied under s 55.

THE PARTIES' CASES

The Applicant

61. The Applicant's SFIC raised several issues that were not pressed or were relevant only to the stay application.

62. The Applicant's SFIC identified one of the issues for determination in these proceedings as being whether the Committee had the necessary delegated authority to make the decision to revoke the Applicant's PDF registration.[41] At para 2 of its SFIC, the Applicant contended that there was no proper delegation of the powers of the Board to the Committee and in paras 9-13 the Applicant set out the basis for that contention.

63. The Respondent contended that on 18 March 2016, the Minister appointed the Innovation Investment Committee of the Board to provide advice to the Board on matters relating to the operation of the *Industry Research and Development Act 1986* (Cth) (**IRD Act**), the PDFA and the *Venture Capital Act 2002* and to exercise any functions or powers delegated to it by the Board under s 21(1) of the IRD Act. The Respondent further contended that on 6 December 2018, the Board delegated to the Committee and the Department certain functions under the PDFA, including functions relating to revoking the registration of a PDF under s 47 of the PDFA.[42]

64. At the commencement of the substantive hearing on 27 January 2022, Mr Houwelling confirmed that the Applicant no longer made the contention that there had not been a relevant delegation of powers. Mr Houwelling also confirmed that the Applicant no longer sought to argue that the Board failed to consider relevant evidence or that the Board had acted with an ulterior purpose.[43]

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[41] A1/[1a].
[42] Supplementary T-Documents, ST1/1.
[43] Transcript,15.

65. In summarising the Applicant's case I will therefore omit reference to the above issues and contentions formerly raised by the Applicant and the issues and contentions relevant only to the stay application which were dealt with in my decision dated 3 November 2021 referred to in [34] above.

66. The Applicant contended that, in exercising the discretion under s 47 of the PDFA, the Board was required to consider alternative actions under the PDFA to enforce compliance with the provisions of Division 3 of the PDFA[44] citing the Tribunal's decision in ***Austcorp*** *No 500 Pty Ltd v Innovation Australia*.[45]

67. The Applicant contended that it "*accepts that contraventions have occurred but says that the circumstances within which these actions were taken is relevant to the exercising of discretion.*"[46] The Applicant contended that the Applicant has adopted mechanisms to prevent any non-compliance in the future, with the establishment of a new framework where the task of ensuring compliance with the PDFA is assumed by a *"charter body"* with a higher level of accountability.[47]

68. In the circumstances, the approach taken in *Austcorp*, namely the implementation of a trial period, was the appropriate course for the Board to consider given the circumstances as they related to the Applicant. The Department, however, proceeded to recommend the revocation of the Applicant's registration status without proper consideration of the alternative options available to the Board.[48]

69. The Applicant contended that allowing the Applicant to retain its PDF status would be consistent with the objectives of the PDFA. The Applicant had, at all relevant times, continued to carry on the business of making and holding PDF investments in accordance with s 29(1) of the PDFA. The Applicant admitted a period of noncompliance with respect to breaches of the strict compliance required by the PDFA but contended that the circumstances of the breach occurred in the course of a consistent course of action and should be treated as one breach. In that regard, the Board failed to consider the culpability

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[44] A1/[24].
[45] *Austcorp No 500 Pty Ltd v Innovation Australia* [2010] AATA 270.
[46] A1/[31].
[47] A1/[32].
[48] A1/ [33]-[34].

of the company for the conduct of a previous director. The Applicant's contraventions related to administrative requirements.[49]

70. The Applicant contended that the breaches occurred when Mr Breeze had been unlawfully removed from the control of the Applicant and that since the reinstatement of Mr Breeze to the control of the Applicant there has been strict compliance with the PDFA.[50]

71. The Applicant filed further submissions on 13 December 2021 which, amongst other submissions, said that its case "*crisply stated"*[51] was:

> *The correct and preferable decision is to direct the Applicant, pursuant to Section 35 of the PDF Act, that it is to ensure that it complies with all requirements of any investment made, and provide reports every three months to the board and employ an auditor annually to certify that all investments made comply with the provision of the PDF Act, and that upon further breach the Board may act without further warning pursuant to Section 47 of the PDF Act.*

72. The Applicant contended that the above was appropriate because of:[52]

(a) the circumstances of the alleged contraventions;

(b) the seriousness of the alleged contraventions;

(c) the steps taken by the Applicant to ensure the alleged contraventions do not continue; and

(d) possible alternatives to revocation of Registration which ought only to be used as a remedy of last resort in the worst circumstances.

73. The Applicant's submissions of 13 December 2021 further contended as follows:

(e) The purpose of s 47 of the PDFA is not for the application of punishment, but to protect the public against future breaches. Mr Breeze has provided evidence of this compliance framework in support of the Applicant's commitment to preventing any future circumstances where the Applicant could breach the PDFA.

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[49] A1/[40]-[41].
[50] A1/[42]-[46].
[51] A4/[9].
[52] A4/[9].

(f) The Applicant has cooperated with the Department in relation to the breaches of the PDFA.

(g) The breaches were committed by former directors who no longer are associated with the Applicant.

(h) There is no suggestion that the breaches were a deliberate breach of the PDFA.

(i) In effect, there were two separate incidents of breach in respect of investing. The first on 5 September 2019 and 1 November 2019 and the second on 7 January 2020. The first breach resulted from the Applicant entering into a convertible note on 5 September 2019 that was exercised on 1 November 2019 to acquire 108,696 shares in Intelligent IP. This conduct breached s 19 of the PDFA and resulted in a breach of s 27 as well as a failure to notify the Board and, for that reason, a breach of s 27A of the PDFA.

(j) The second potential breach occurred on 7 January 2020 when the Applicant entered into a convertible note that the Respondent says in its true character is a loan. The Applicant disputed that characterisation of the transaction as a loan. The Respondent contends that the issue of the convertible note was a breach of s 19 of the PDFA and further that investments of this nature are able to be made only with the notification to and approval by the Board and that no such application was made contrary to s 27 the PDFA.

(k) The other breach relied on by the Respondent was the Applicant's failure to notify the Board of changes in directors contrary to s 42 of the PDFA.

(l) Section 35(1) of the PDFA provides the Board with the option to provide notice to comply with a direction to a PDF where it has contravened, inter alia, a "direction provision" which includes s 19 (see [53] above).

(m) The PDFA makes clear it is only in the most serious of circumstances should revocation be considered. It is an effective remedy of last resort. This would ordinarily be expected to follow after a direction is made, or the breach is so serious so that it cannot be said to be capable of being remedied.

(n) The Respondent's construction of the PDFA that the only sanction available in this case is revocation of the Applicant's registration is incorrect.

The Respondent

74. As noted at [62]-[64] above, the Applicant no longer contends that the Committee of the Board did not have the necessary delegated authority to make the decision to revoke the Applicant's PDF registration. I therefore ignore the submissions and contentions made by the Respondent in relation to that issue.

75. The Respondent's SFIC made submissions to the following effect:

(a) The Applicant's conduct comprised a continuing course of contraventions of the PDFA over a period of two years between 23 August 2018 and 30 August 2020 including:

(i) Four contraventions of s 19(1) of the PDFA on 5 September 2019, 1 November 2019 and 7 January 2020;

(ii) Four contraventions of s 27 of the PDFA on 5 September 2019, 1 November 2019 and 7 January 2020;

(iii) One contravention of s 27A of the PDFA in September 2019; and

(iv) Eight contraventions of s 42 of the PDFA on 23 August 2018, 18 October 2019, 16 January 2020, 12 March 2020 and 30 August 2020.

(b) The Applicant has admitted that the breaches of the PDFA took place.

(c) In light of the number, nature and range of breaches of the PDFA along with the extended period of time in which the breaches were committed, the only sanction available, in this case is revocation of the Applicant's registration as a PDF. This is clear from a reading of the PDFA, which does not contain a range of penalty provisions enabling the Board to impose one of a number of sanctions for contraventions. Compare for example s 60-125(2) of the *Tax Agent Services Act 2009.*

(d) Specifically, a direction under s 33 of the PDFA is not available in this case because the power to issue a direction only arises if the Board "*considers that a PDF is not implementing its approved investment plan*". The effect of this construction is that

the discretion to be exercised by the decision-maker is the discretion to revoke the registration declaration, or to not impose any sanction.

(e) Revocation is appropriate in this case in light of:

(i) the number of breaches;

(ii) the nature and range of the breaches; and

(iii) the public interest in the proper governance and administration of PDFs.

(f) The starting point for consideration of penalty is that it is the entity which is regulated by the PDFA, not the individual directors from time to time (citing the **Explanatory Memorandum**[53] introducing the Pooled Development Funds Bill 1992 as explained in the **second reading speech**[54]).

(g) That is, the PDF system was established to encourage companies to provide venture capital, in exchange for which the Government regulates the companies and provides a tax benefit to them and their shareholders.

(h) In the two-year period between 23 August 2018 and 30 August 2020, the Applicant committed 11 separate breaches of the PDFA. In total, the individual factual breaches resulted in 17 separate breaches of provisions of the PDFA. This demonstrates a lengthy and substantial history of failure to comply with its obligations.

(i) The range of breaches encompassed both reporting breaches, that is a failure to keep the regulator properly informed of changes in its governance, and investment breaches which were failures of the company to understand the environment in which it operates, including the very purpose of its registration, which has implications for both the capital market and the taxation system.

(j) The public interest in maintaining confidence in the regulation of PDFs, and in particular in ensuring that those companies which attain the benefits associated with registration as a PDF, including the taxation benefits and that they comply with their

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[53] Explanatory Memorandum, *Pooled Development Funds Bill 1992* (Cth).

[54] Hansard 26 May 1992, pg 2757, House of Representatives, Mr Free, Minister for Science and Technology.

obligations, is similar to the public interest in deterrence. It is a substantial consideration. The public interest includes the interest in ensuring that funds raised by PDFs are used in accordance with the intent and objects of the PDFA, which has particular relevance to the investment breaches.

The Applicant's evidence

76. As noted above, the only witness to give evidence at the hearing was Mr Breeze who had also provided two affidavits (A2 and A5). Relevant to matters still in issue, Mr Breeze's first affidavit stated:

(a) The Applicant was registered as a PDF on 19 September 2005.

(b) Mr Breeze commenced as the managing director of the Applicant in 2005. His main functions were as an approved dealer and administrator and he was the nominated person to meet the compliance requirements of the PDFA.

(c) Between 2005 and 2016 there was little turnover of directors of the Applicant. With only a few exceptions, the Applicant remained compliant with the requirements of the PDFA up to August 2018.

(d) In November 2016, the directors of the Applicant purported to remove Mr Breeze from the board of the Applicant. According to Mr Breeze such action was taken without his knowledge and was unlawful.

(e) The then company secretary of the Applicant, Ms Ambrosini, lodged documents with ASIC notifying that Mr Breeze had ceased to be a director of the Applicant in November 2016 and had ceased to be a director of Advent Energy in November 2017.

(f) Mr Breeze was excluded from the management of the Applicant until August 2020 when he was reinstated as the managing director.

(g) Notwithstanding that Ms Ambrosini had resigned as a director/secretary of the Applicant in around June 2019 and had advised the Department that she was not involved in the management of the Applicant, in September 2020 the Department continued to deal with Ms Ambrosini as the representative of the Applicant.

(h) From March to August 2020 Mr Bald was solely responsible for the Applicant's compliance with the PDFA. Mr Bald had limited knowledge of the PDFA which resulted in the Applicant entering into transactions that allegedly breached the PDFA. In his email of 20 August 2020 to the Department (see [6] above), Mr Bald in effect "*claimed ignorance*" in relation to the Applicant's PDFA obligations.

(i) The claimed breaches of the PDFA by the Applicant failing to notify the Board of changes in the particulars of officers and a change of the address of the registered office all occurred when Mr Breeze had been unlawfully removed from management of the Applicant. Mr Bald, who was responsible for PDFA compliance, was not aware of the Applicant's obligation to notify the Board of these changes.

(j) In relation to the claimed breaches of the PDFA relating to investment requirements:

(i) The 5 September 2019 investment in the convertible note which obtained a transferrable option to purchase shares in Intelligent IP, was claimed by the Respondent to be contrary to the prohibition in ss 19(1) and 20A(2) of the PDFA. Mr Breeze is unable to comment on how the board of the Applicant decided to so invest. The board of the Applicant was reliant on the advice of Mr Bald in relation to the investment.

(ii) The 1 November 2019 conversion of the Applicant's option into shares in Intelligent IP resulted in the Applicant holding less than 10% of the shares in Intelligent IP breaching the requirements of s 27 of the PDFA for failure to comply with s 19(1) of the PDFA. This breach was a result of Mr Bald not appreciating the requirements of the PDFA.

(iii) The January 2020 convertible note obtained by Catalyst was treated by the Respondent as a loan to Intelligent IP resulting in the Applicant's loans exceeding 20% of shareholder funds and the total invested in Intelligent IP being less than 10% of shares in Intelligent IP in breach of s 27 for failure to comply with s 19(1) of the PDFA. Mr Breeze is of the view that the convertible note does not constitute a loan as asserted.

(k) Now that the board of the Applicant has changed and Mr Breeze is now back in control, he is able to ensure future compliance with the PDFA. The Applicant now

operates with a committee consisting of the company secretary, a non-executive director and himself to ensure compliance with the PDFA.

77. Relevant to the matters still in issue, Mr Breeze in the second affidavit:

(a) Repeated the contention that the September 2019 convertible note was not a loan;

(b) Submitted that the incidents characterised by the Board as being multiple breaches of the PDFA arose out of a single course of conduct. The Board's characterisation does not accurately reflect the context of the breaches;

(c) Advised that since the first affidavit, he had implemented a new framework and regime intended to ensure compliance with the PDFA. He provided a copy of the Charter to the Board in January 2021. Mr Breeze outlined what he said were the key features of the Charter which were:

(i) Four meetings per year to ensure that the members of the oversight committee are able to undertake their roles effectively;

(ii) The committee to review the Applicant's investment portfolio and reporting functions and report to the Board;

(iii) The oversight committee would *"assume the duties relating to external PDF functions,"* communicate with the Board and assess effectiveness of risk management; and

(iv) Ensure that the members of the oversight committee understood the requirements of the PDFA.

(d) The Charter was not intended to be exhaustive but was indicative of structural reforms which would ensure compliance. Future compliance would also be ensured by the steps that had been taken including:

(i) Removal of the previous board of the Applicant;

(ii) Mr Breeze's reinstatement as managing director; and

(iii) Cooperating with the Department to identify contraventions of the PDFA.

(e) Each of the directors of the Applicant when the breaches occurred, had no experience in PDFs and did not seek relevant advice on the PDFA.

78. Significant portions of the first and the second affidavits set out Mr Breeze's complaints and allegations in relation to the conduct of the officers of the Applicant, in particular Ms Ambrosini, during the period when the breaches of the PDFA occurred. Significant portions of the affidavits were also, in effect, complaints by Mr Breeze as to the conduct of the Department and/or the Board, in particular that the Department and/or the Board continued to deal with Ms Ambrosini when she was not an office holder of the Applicant and had advised the Board that that was the case. I have not reproduced those parts of Mr Breeze's affidavits as they are not relevant to the matters that I have to decide.

The parties' closing submissions

The Applicant

79. The **Applicant's closing submissions** dated 9 March 2022 were to the following effect:

(a) The Respondent's SFIC (para 15) identified claimed breaches of the PDFA. Neither the Respondent's SFIC nor the Respondent's Statement of Findings of Fact and Reasons referred to breaches of ss 20A(2) or 20B(2). The only mention of these claimed breaches *"is found at T2 at paragraphs 20 and 21."*[55] I note that T2 is the Respondent's Statement of Findings of Fact and Reasons which does not have paras 20 and 21. I assume that the reference to *"paragraphs 20 and 21"* is meant to be a reference to pages 20 and 21 of volume 1 of the T documents.[56]

(b) There was significant cross-examination about these provisions which deal with investing in transferable options and 20% limit on PDF loans (see [45] and [46] above). I note that on the second day of the hearing, counsel for the Respondent confirmed that the Respondent did not seek to rely on any claimed breach of s 20B(2) of the PDFA.[57]

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[55] Applicants closing submissions, [2].
[56] R3, T2/20-1.
[57] Transcript, 86.

(c) On the material presented the Tribunal cannot be satisfied that there were four contraventions of ss 19(1) and 27 of the PDFA. While the Applicant accepts the breach of s 27A by the failure to advise the board of the initial investment in Claratti Workspace and the breaches of s 42 by the failure to advise the Board of changes in particulars, these breaches do not go to the heart of the PDFA to justify cancellation of the Applicant's PDF status.

(d) The Applicant's position is that the correct or preferable decision is that the Applicant's PDF status be reinstated with conditions that sufficiently protect the public interest.

(e) The second reading speech made clear that the "*ultimate sanction*" was revocation of PDF status and that *"the board will have other discretionary powers to ensure that the spirit of the program is not breached."*

(f) The discretionary powers are to be exercised in favour of achieving the primary objectives of the program. The reinstatement of the Applicant as a PDF with conditions as proposed by the Applicant would achieve that purpose. In addition to the conditions proposed by the Applicant, the Applicant's PDF status be subject to expiring after five years.

(g) The second reading speech also articulated the primary benefit of the PDFA is the expansion of business activity and growth in employment in PDF investee businesses. The reporting breaches by the Applicant, which are accepted, have been corrected and do not subvert the objects of the PDFA.

(h) The Respondent's SFIC did not suggest that the Applicant had breached s 20A (investment by acquiring a transferable option to buy shares) although there was cross-examination of Mr Breeze on this point.

(i) Section 27 of the PDFA requires a PDF to invest at least 10% of its paid-up capital and to hold at least 10% in the investee company before acquiring a non-transferable option to purchase further shares. A breach of that provision would also constitute a breach of s 19(1) which is a general requirement for PDFs to only make investments in accordance with the PDFA.

(j) Put in proper context, there was one breach which resulted in more than one provision of the PDFA being breached. In relation to the breaches relating to a failure to report, once they were identified they were rectified.

(k) Insofar as the Respondent seeks to argue breaches of ss 20A and 20B, they were not subject to these proceedings. Counsel for the Respondent confirmed that he Respondent no longer pressed a breach of s 20B.[58] The Respondent should have similarly ceased to press breach of s 20A.

(l) Insofar as the Applicant breaching s 20A was put forward as indicative of Mr Breeze not understanding the PDFA, whether the transaction in question was a breach of s 20A is a question of law and was the subject of a legal opinion obtained by the Respondent from a legal adviser within the Department.[59] When taken to the documents in question by the Respondent's counsel, Mr Breeze was unsure whether the transaction constituted a loan.

(m) Insofar as the Respondent now relies on there being breaches of ss 20A and 20B, as distinct from Mr Breeze's view as to whether there were breaches being indicative of his level of understanding of the PDFA, then that is a relevant consideration. Breaches of ss 20A and 20B were not relied on by the Respondent in cancelling the Applicant's PDF status and were not identified as being breaches in the Respondent's SFIC and submissions filed prior to the hearing.

(n) In relation to the so-called reporting breaches, although the Respondent identified five breaches of reporting obligations, they arise out of two courses of conduct. These contraventions were easily remedied and did not offend against the objectives and purpose of the PDFA.

(o) There were three transactions which comprised the investment contraventions:

    (i) Entering into the convertible note on 5 September 2019;

    (ii) Conversion of the convertible note into shares on 1 November 2019; and

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[58] Transcript, 86.
[59] R3, T36/478-482.

(iii) Convertible note obtained by Catalyst (a wholly owned subsidiary of the Applicant) on 7 January 2020, which was treated as a loan by the Applicant.

(p) Transaction identified in [79(o)(i)] above was treated by the Respondent as two breaches of each of ss 19(1) and 27 meaning that there were four breaches arising out of a single course of conduct. Similarly, the breaches identified in [79(o)(ii)] and [79(o)(iii)] were treated as breaches of s 19(1) as well.

(q) The Applicant did not enter into any transactions knowingly in breach of the PDFA and there was no intention to gain a benefit from doing so.

(r) The Respondent criticised the Charter on the following bases:

(i) There was no training manual or program nor a repository of information on which the committee members could rely.

(ii) There was no clear delineation of responsibility for compliance function.

(iii) There was no formal expert training available to committee members.

(s) In answer to those criticisms, the Applicant has prepared a further draft of the Charter which was attached to the Applicant's closing submissions. This draft addressed the criticisms. The new charter does not rely solely on Mr Breeze being available. This Charter may be enforced by conditions on the registration status.

(t) The other board members of the Applicant are suitably qualified as evidenced by their qualifications set out in A6. Mr Breeze held the position of investment manager in the Applicant for 14 years without there being a breach of the PDFA.

(u) The suggestion in cross-examination that Mr Breeze lacked commercial judgment is without foundation.

(v) The Respondent's submission that there is, in effect, only one remedy available, namely, cancellation of the Applicant's PDF status, is incorrect. While it is the case that the PDFA does not contain a range of penalty provisions Part 4, Division 3 of the PDFA in effect provides alternatives to the imposition of the "*ultimate sanction*" that is, cancellation of the PDF status.

(w) The case of *Austcorp* is distinguishable from the present case because the cancellation of *Austcorp's* registration came after it had for an extended period failed to make investments contrary to directions issued by the Board for it to do so. The decision in *Austcorp* crystalises the proposition that cancellation of the PDF status should only be used where the objects of the PDFA are not being fulfilled.

The Respondent

80. The **Respondent's closing submissions** dated 30 March 2022 were to the following effect:

(a) The Applicant breached ss 19, 20A(2), 27 and 42 of the PDFA.

(b) The issues for determination are:

(i) Did the Applicant breach the PDFA as claimed; and

(ii) If the answer to (i) is yes, what is the appropriate sanction.

(c) The Applicant effectively conceded the reporting breaches of ss 42 and 27A of the PDFA. These breaches are also admitted in the Applicant's SFIC.

(d) The Applicant admitted the breach of s 27 (investment of at least 10% of its paid-up capital) in relation to the investment in Claratti.

(e) The breach of s 27 by the investment in a loan in Intelligent IP by Catalyst where the Applicant held less than 10% of the shares in Intelligent IP was confirmed by the Applicant's ASX release of 16 January 2020.

(f) The only breach not the subject of an admission by the Applicant is the breach of s 20A(2). The Board's legal advice, which is of course not binding on the Tribunal, is that the option is in breach of s 20A as it is capable of being transferred to a third party.

(g) The issue for determination by the Tribunal is whether term 21 of the convertible note terms meant entry into it breached s 20A(2), in other words was the note "*capable of being transferred*". Mr Breeze accepted in cross-examination that the note was transferable if both parties to the note agreed.

(h) The Explanatory Memorandum relevant to the introduction of s 20A relevantly provided:

> *This change is being made to enable PDFs to provide tranches of capital as required by the investee when the investee meets pre-determined milestones. Non-transferable options are a mechanism for facilitating follow-on injections of capital.*

(i) The requirement for the non-transferability of the option was intended to enable the PDF to have a secure on-going relationship with the investee, by providing tranches of funds. That would be subverted if the PDF and investee company could contract out and transfer the option to a third party.

(j) In relation to the penalty, a direction under Division 3 of Part 4 can only operate to sanction the investment breaches and does not sanction the breach of s 27A or the multiple breaches of s 42. The breaches of s 42 deserve sanction given their significance in both quantity and in the highlighting of the underlying very poor understanding by the applicant of the obligations imposed on PDFs. The Applicant did not have appropriate procedures or policies in place. Even if there was a "rogue board" in place during the period of the breaches, there were no procedures or protocols in place before that time.

(k) The reporting breaches are still significant because PDFs attain significant tax advantages and, therefore, the public has a real and proper interest in ensuring they are properly managed. Obligations for regular reporting of key personnel changes give the public, through the monitoring role of the Respondent, confidence in the quality of the personnel managing the organisation.

(l) There were multiple breaches that occurred over an extended period of time and were only corrected when the Respondent drew the Applicant's attention to the breaches and asked it to provide the information to correct the breaches.

(m) The Applicant disputing the breach of s 20A(2) suggests that the Applicant "*is merely paying lip service to its obligations and has no real interest in ensuring that it meets them into the future.*"

(n) Mr Breeze's complaints about the conduct of the previous board of directors of the Applicant and the Board's failure to investigate those complaints demonstrates the

Mr Breeze does not understand the PDF and the role of the Respondent. This is a relevant when considering the cancellation of the Applicant's PDF status as a penalty.

(o) Directions under s 35 of the PDFA (as suggested as an alternative by the Applicant) can only be made in respect of breaches of s 19 of the PDFA. Any such course is also dependent on the Tribunal trusting Mr Breeze to implement the Charter. The Tribunal should be cautious in doing that because of Mr Breeze's previous conduct, including:

(i) The consequences that Mr Breeze claimed would flow if the stay was not granted did not occur;

(ii) The Applicant (Mr Breeze) failed to notify the ASX of the outcome of the stay application;

(iii) Mr Breeze could not remember whether the Applicant had made an ASX announcement about PEP 11 notwithstanding the significance of PEP 11 to the Applicant's investments;

(iv) Mr Breeze gave generalised evidence at the hearing about *"changing circumstances";*

(v) No other directors of the Applicant were called to give evidence regarding their knowledge of the applicant's obligations under the PDFA; and

(vi) No action, including training in relation to the requirements of the PDFA, had been done.

(p) The Tribunal should not have confidence that the Applicant will be compliant with the PDFA in the future.

(q) In relation to the Applicant's claims of a lack of procedural fairness in respect to the breach of s 20A(2), the issue had been raised with the Applicant at the time that the decision was being made and in April 2021. The Respondent provided its legal advice relating to whether s 20A had been breached to the Applicant and gave the Applicant an opportunity to make further submissions, which it did. The Applicant's

submissions formed part of the material reviewed on the review decision and were expressly considered in the review.

(r) Whatever the merits of the procedural fairness argument, it does not fall to be decided in these proceedings as these proceedings are a hearing de novo on the evidence before the Tribunal, so it falls to the Tribunal to determine itself if there is a breach of s 19(1) PDFA.

(s) The updated draft of the Charter attached to the Applicant's closing submissions should not be considered. The document was not put into evidence in the hearing and the Respondent was not provided the opportunity to cross-examine Mr Breeze in respect to it. Leave to re-open the applicant's case to tender the document has not been sought.

81. The Applicant's submissions in reply dated 5 May 2022 were to the following effect:

(a) Section 47 of the PDFA uses the word *"may"* and the power to cancel the PDF status is therefore discretionary. Cancellation of PDF status is the last resort.

(b) Even if directions under Division 3 of Part 4 are not available in respect of the reporting breaches, but investment breaches can be dealt with in this manner, then it could not be said that the ultimate sanction is appropriate as suggested by the Respondent as a consequence of the reporting breaches.

(c) The position of the Respondent is fundamentally at odds with the purpose and objectives of the PDFA.

(d) The assertion that the Applicant's response to the claims now made of breaches of ss 20A and 20B is suggestive of a company paying lip service to compliance is without basis.

(e) The Applicant is taken by surprise by the Respondent raising a claimed breach of ss 20A and 20B as they were not identified as a reason for the cancellation of the PDF status and were not referred to in the Respondent's SFIC. The new case put by the Respondent in submissions on Section 20A(2) ought not to be allowed and the Respondent's submissions in that regard ought properly to be withdrawn or ignored by the Tribunal as a clear and apparent breach of procedural fairness.

CONSIDERATION

Procedural fairness

82. The precise basis of the Applicant's complaint in relation to the Respondent raising the claim of a breach of s 20A of the PDFA was not clear to me. I sought clarification of the Applicant's complaint at the time of the oral closing submissions on 9 June 2022. The following exchange occurred:

> *TRIBUNAL: But I am just trying to understand what your – the applicant's position is, is it that you were unaware, the applicant was unaware, that part of the matters to be resolved was whether or not there'd be any breach of section 20A. Or is it your case that whilst you were generally aware of that, there was insufficient detail of the particulars of the breach to enable the applicant to properly respond to that case?*
>
> *MR HOUWELING: Well both…. What occurs from time to time is that a broader context may be put and that, of itself, can't be objectionable. But where that's expressly relied upon, and then used for the purposes of coming to – as if it's the case that is then being put, that is a change of position.*
>
> *Put differently, the case as put needed to be met on the basis of provisions other than section 20A and 20B. But in the general characterisation of the way within which it seemed that the applicant, or the respondent, rather, was putting its case, we needed to address those provisions more broadly.*
>
> *Now what we distil from the materials that are before us, is that the respondent puts its case on the basis of section 20A and we say that that is not the basis on which this tribunal ought properly A, to have regard to the evidence in respect of 20A and the conclusions that are then suggested are appropriate. We would have more to say in respect of the way within which they are framed.*
>
> *And B, we say that section 20A was not the case as put by the respondent in the beginning or at any stage. And so, to raise it in its closings, in effect, we may do so, or it may be done so, for the purposes other than for the tribunal to rely upon. But as I understand it, the position as put by the respondent is to rely on section 20A.*
>
> *Not in the SFIC, not in its opening or in its initial submissions, statements of findings, of reasons, et cetera.*

83. I then pointed out to the Mr Houwelling that Mr Breeze's affidavit dealt with the issue of transferability of the convertible note and that Mr Breeze was cross-examined on the issue at some length.[60] Mr Houwelling further explained the Applicant's position as follows:

> *And then, enabling us, that is the applicant and the tribunal, to review those provisions with forensic detail to understand that that – whether or not there is a breach of those specific provisions. Now we still address it, we say look, this is the issue of transferability but what we say is that it's caught in the broad, it's one of these other type of matters, not the basis on which the tribunal was asked, or*

[60] Transcript,106.

encouraged, or in fact, it wasn't put by the respondent to say that that was the basis on which a finding ought to be made to ground a revocation under section 47. I don't know if I've made that any clearer.

…

So in that respect, we say that it's the change of position, giving section 20A greater weight and prominence through the closing submissions that we say is, in the way that it's characterised and put as firmly as a direct breach of section 20A, on which it was never put as the basis.

84. It is the case that there had been references to a breach of s 20A of the PDFA in certain of the Board's correspondence with the Applicant leading up to the making of the decision to cancel the Applicant's PDF registration and in the correspondence in response from the Applicant. The Notice of revocation of PDF registration declaration under s 47 of the PDFA dated 18 December 2020[61] stated in the first paragraph that:

> *On 16 December 2020, the Innovation Investment Committee of Innovation and Science Australia (the Committee) agreed it has reason to believe that MEC Resources Limited (MEC) has contravened ss19(1), 27, 27A and 42 of the Pooled Development Funds Act 1992 (PDF Act), which are grounds for revocation under s47(1) of the PDF Act…*

85. Page 2 of that notice stated:

> *On 16 December 2020, the Committee reviewed each investment made by MEC into Intelligent IP and is satisfied on:*
>
> - *5 September 2019 by entering into a convertible note for consideration of $50,000 (transaction 1), MEC entered into a non-transferable option under s 20A of the PDF Act, however failed to meet s 20A(2) of the Act.*
> - *1 November 2019 be electing to exercise the option contained within the convertible note from transaction 1 into 108,696 of (sic) ordinary shares in Intelligent IP (transaction 2), MEC acquired ordinary shares in a company meeting the requirement in s20 of the PDF Act.*
> - *1 November 2019 by subscribing for 108,696 shares in Intelligent IP in exchange for $50,000 (transaction 3), MEC acquired ordinary shares from the company to meet the requirement in s2 of the PDF Act; and*

[61] R3, T25.

- *7 January 2020, be entering into a convertible note for consideration of $200,000 (transaction 4), MEC entered into a loan under s20B of the PDF Act because the terms of the agreement exhibit factors of a debt interest.*

The Committee agreed MEC's investments into Intelligent IP outlined in the four transactions above contravened ss19(1), 27, (sic) 27A of the PDF Act. Therefore, the Committee considers transaction 1 contravened ss19(1), 27, (sic) 27A of the PDF Act and transactions 2-4 contravened ss19(1), (sic) 27 of the PDF Act. Consequently, investments into Intelligent IP have contravened ss19(1), 27, (sic) 27A in nine instances.

On the basis of the above, the Committee agreed to issue a notice of revocation under s 47(3)(a) of the PDF Act.

86. While there were references to claimed breaches of s 20A and s 20B (later dropped) of the PDFA, breaches of those sections were not referred to as being the basis of the Committee's decision to issue the notice of revocation under s 47 of the PDFA. As set out above, the decision was stated to be on the basis of the breaches of ss 19(1), 27, 27A and 42. The reference to a breach of s 19(1) is of limited assistance in identifying the conduct comprising the breach given the general nature of s 19 of the PDFA (see [42] above). While the notice specifically identified breaches of ss 27 and 27A, the former of which would also be a breach of s 19(1), it did not identify breaches of ss 20A or 20B, either in their own right or as breaches of s 19(1), as being the basis for the decision to revoke the Applicant's registration declaration.

87. In response to the claims of a lack of procedural fairness, the Respondent pointed to the hearing before the Tribunal being a hearing de novo. That is not to the point. The fact that the hearing before the Tribunal is a hearing de novo or the fact that the Tribunal does not have formal pleadings, does not mean that an applicant in the Tribunal is not entitled to know that case that it has to answer. In *Rio Tinto Ltd v Commissioner of Taxation* [2004] FCA 335 Sundberg J made the following relevant observations:

> *24. In Evans v Federal Commissioner of Taxation (1989) 89 ATC 4540 at 4544 Hill J, referring to the pre-Order 52B practice of ordering a statement of issues, described the practice as "a less formal procedure than would be involved in the filing of pleadings to define the issues". In Saffron v Federal Commissioner of Taxation (1991) 22 ATR 131, decided before the introduction of Order 52B, Beaumont J said at 135:*
>
> > *"Strictly speaking, we are not here concerned with a formal pleading. This is an informal pleading ordered pursuant to the court's general powers to give directions with a view to identifying the real questions in dispute .... The statements of facts, issues and contentions may not be pleadings in a*

> *technical sense. But they are intended to serve the same purpose as pleadings, that is, to identify the real issues."*
>
> *25. In Bartlett v Federal Commissioner of Taxation [2003] FCA 1125; (2003) 54 ATR 261 at 265 Hill J said:*
>
> > *"The court should be able to expect that the issues stated by the parties properly reflect the matters which are to be raised in a tax appeal where the Statement of Facts, Issues and Contentions are intended to take the place of pleadings so that both parties to the litigation know what the case is which they have to meet. Particularly a taxpayer should know in advance what construction of a section is to be advanced by the Commissioner if that construction differs from the construction which the taxpayer has clearly adopted."*

88. While the above cases related to tax appeals, the same general principle applies in the present case. The primary purpose of the parties' respective statements of facts, issues and contentions, is to inform the other party (and to a lesser extent the Tribunal), of the case that they have to answer. Although there was reference in a number of the documents produced by the Respondent before and after the issue of the notice of revocation of PDF registration declaration and in documents filed in the Tribunal to potential breaches of ss 20A and 20B, such breaches were not identified in the notice of 18 December 2020 itself nor in the Respondent's SFIC as being relied on to revoke the Applicant's PDF registration declaration under s 47(1) of the PDFA.

Is revocation of the Applicant's PDF registration declaration appropriate?

89. Whether the fact that a breach of s 20A of the PDFA was not specifically identified by the Respondent as a basis for revoking the Applicant's PDF registration declaration and the fact that such a breach was not referred to in the Respondent's SFIC now precludes the Respondent from relying on claimed breaches of s 20A as contended by the Applicant, is academic in the present case. For reasons set out below, I find that even if a breach of s 20A(2) as claimed did occur, it, together with the breaches specifically relied on by the Respondent for revoking the Applicant's PDF registration declaration, were not sufficient or of such a type to warrant revocation of the PDF registration declaration.

90. As noted at [37] above, s 3 of the PDFA defines its object to be *"…to develop, and demonstrate the potential of, the market for providing patient equity capital (including venture capital) to small or medium-sized Australian enterprises."* How that object is achieved is directed by s 29(1) of the PDFA which provides that "*A PDF must carry on a business of making and holding PDF investments.*"

91. The objects of the PDFA were further explained in the Explanatory Memorandum and in the second reading speech in which the Minister made the following observations:

> *To encourage investment in PDFs, the Government has decided to tax PDFs at 30 per cent rather than at the general company tax rate of 39 per cent,…*
>
> *…*
>
> *… In effect, the Government and the shareholders will share the benefits of the PDFs' activities through a lower tax rate and tax exempt returns to shareholders. The benefits to the Government and the economy will come from the expansion in business activity and growth in employment in the PDF investee businesses.*
>
> *PDFs will be required to comply with certain rules set out in the Bill. The tax benefits are conditional on the PDFs complying with those rules and this will be monitored by the board. While the ultimate sanction for breaking the requirements will be revocation of the PDF status of a particular company, the board will have other discretionary powers to ensure that the spirit of the program is not breached.*

92. While there were admitted breaches of the Applicant's reporting obligations under ss 27A and 42, they were rectified and did not undermine the object of the PDFA. I accept that those breaches, and the potential breaches of ss 20A(2) and 27 (which, if they occurred, also constituted beaches of s 19(1)) were the result of those responsible for the management of the Applicant at the time not being sufficiently aware of the detailed requirements of the PDFA. Any such breaches were not the result of a deliberate disregard for the objects of the PDFA as was the case in *Austcorp* in which the PDF failed to carry out the fundamental obligations of a PDF, namely, to provide patient equity capital to small or medium-sized Australian enterprises.

93. I am also satisfied that the management of the Applicant is now back in the hands of people who understand the requirements of the PDFA. Mr Breeze ran the Applicant for some 14 years without there being a breach. While his management of the Applicant might rightly be criticised for lacking formal procedures, manuals and ongoing training to ensure compliance, those deficiencies are being addressed with the introduction of the Charter. While the Charter may be criticised as being deficient and belated (those criticisms being given support by the Applicant submitting a revised Charter with its closing submissions), I am satisfied that the steps being taken by the Applicant under Mr Breeze are heading in the right direction. I accept Mr Breeze as being someone who understands the requirements of the PDFA both in relation to investing in accordance with the objects of the Act and in relation to reporting obligations and that he will implement procedures to achieve compliance. I do not accept the Respondent's contention that Mr Breeze not conceding the claimed breach of s 20A(2) suggests that the Applicant *"is merely paying lip service to its*

obligations and has no real interest in ensuring that it meets them into the future". Whether the terms of the convertible note meant entry into it breached s 20A(2), in other words the note was *"capable of being transferred,"* was not and is not a straight-forward issue as evidenced by the need for the Respondent to obtain a formal legal advice on that question . Mr Breeze not agreeing with the Respondent's legal argument, even if that argument is correct, is not indicative of Mr Breeze merely paying lip service to the Applicant's obligations under the PDFA.

94. If the requirement for the non-transferability of the option was intended to enable the PDF to have a secure on-going relationship with the investee, by providing tranches of funds, as asserted by the Respondent, I do not accept that that intent would be subverted if the PDF and investee company could, by mutual agreement, transfer the option to a third party. The secure on-going relationship with the investee would continue as long as either the PDF or the investee wanted it to continue. Any contract can be brought to an end or varied by the mutual agreement of the contracting parties. A contract does not require a provision to that effect for that to be the case.

95. The protection of the public and the realisation of the objects of the PDFA do not require, and would not be served by, the revocation of the Applicant's PDF registration declaration. The interests of those members of the public who have invested in good faith in the Applicant on the basis of it being a PDF would be significantly adversely affected if the Applicant's PDF registration were to remain cancelled. I am satisfied that the correct or preferable decision is not to revoke the Applicant's PDF registration declaration under s 47(1) of the PDFA. As the second reading speech made clear, revocation of the registration declaration is the "*ultimate sanction for breaking the requirements*" of the PDFA.

96. The Respondent contended in its SFIC that the PDFA does not "*contain a range of penalty provisions enabling the Board to impose one of a number of sanctions for contraventions of it*" and that *"[s]pecifically, a direction under section 33 of the PDF Act is not available in this case because the power to issue a direction only arises if the Board 'considers that a PDF is not implementing its approved investment plan'".*[62] Those submissions appeared to be responding specifically to the Applicant's SFIC which suggested an order being made by

[62] R2, [53]-[54].

the Tribunal under s 33 of the PDFA "*to implement a trial period during which the Applicant can demonstrate its ability to return to a high standard of compliance with the PDF Act.*"[63] They made no reference to s 35 of the PDFA (see [53] above).

97. In its closing submissions the Respondent contended that a direction could, relevantly, only be made under s 35 of the PDFA in respect of breaches of s 19 of the PDFA, that is investing in accordance with Part 4 Division 1 of the PDFA. The Applicant in its closing submissions in reply contended that a direction could be made under s 35(1) of the PDFA to the effect that the Applicant adopt and implement the "*amended compliance charter of January 2022*" and to provide reports to the Respondent with respect to its investments. It is not clear to which document the Applicant is referring when it refers to the amended compliance charter. There are two documents fitting the charter description, R3, T24 and Annexure A to the Applicant's closing submissions filed 9 on March 2022. Objection was taken by the Respondent to the Applicant relying on the latter document as it was filed after the hearing denying the Respondent the ability to cross-examine Mr Breeze on the document. That is a legitimate objection which I uphold.

98. Irrespective of that, I agree with the Respondent's contention that the directions suggested by the Applicant are not ones that can be made under s 35 of the PDFA. The only "*direction provision*", as defined in s 35(4), to which a direction under s 35 could be made is, as the Respondent contended, s 19(1). There is no suggestion, however, that the Applicant is presently in breach of the investment obligations under s 19(1). The circumstances of the present case are different to the circumstances of *Austcorp* in which the PDF was in breach of the fundamental obligations of a PDF, namely, to invest funds. In those circumstances, it was appropriate to make directions under s 35 "*in relation to the contravention*". It is not in the present case. What the Applicant suggests is more in the nature of the Applicant being monitored for adherence to management practices. That, in my view, falls outside the scope of s 35 which relates to compliance with investment direction provisions as defined in s 35(4) of the PDFA.

[63] A1, [58].

DECISION

99. The Respondent's decision of 23 April 2021 to affirm a decision of 3 February 2021 under s 47 of the PDFA to revoke the Applicant's PDF registration declaration is set aside and in substitution it is decided not to revoke the Applicant's PDF registration under s 47 of the PDFA.

I certify that the preceding 99 (ninety-nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President Boyle

.....[Sgd].....

Associate

Dated: 15 March 2023

Date(s) of hearing:	**27 January 2022, 28 January 2022 & 9 June 2022**
Date final submissions received:	**30 March 2022**
Counsel for the Applicant:	**Cornerstone Legal**
Solicitors for the Applicant:	**Mr T Houwelling & Mr T Millar**
Counsel for the Respondent:	**Clayton UTZ**
Solicitors for the Respondent:	**Ms C Thompson (now SC)**