IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S143 of 2018**

BETWEEN: **BIANCA HOPE RINEHART**

First Applicant

JOHN LANGLEY HANCOCK

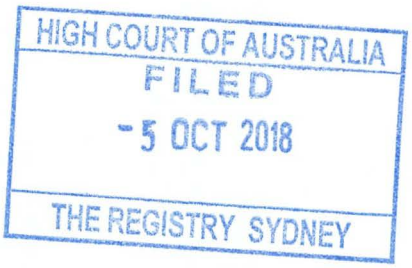
Second Applicant

and

HANCOCK PROSPECTING PTY LTD ACN 008 676 417

10 **AND OTHERS NAMED IN THE SCHEDULE**

Respondents



FIRST TO EIGHTH RESPONDENTS' SUBMISSIONS IN RESPONSE TO INTERVENER'S AMENDED SUBMISSIONS

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Part I: Certification

1. These submissions[1] are in a form suitable for publication on the Internet.

Part II: Introduction

2. These submissions are made by the first to eighth respondents (**HPPL Respondents**) in opposition to the application by Wright Prospecting Pty Ltd (**WPPL**) for leave to intervene in this appeal, and in response to the submissions advanced by WPPL as a would-be intervener.

3. WPPL seeks leave to intervene in this appeal to make submissions on two grounds:

   (a) first, WPPL seeks to contend that cl 20 of the Hope Downs Deed does not cover the appellants' "substantive claims" and that the "substantive claims" are therefore not arbitrable: WS [3]. This construction argument was not advanced by the appellants or by WPPL as an intervener in the proceeding below, and is not the subject of the grant of special leave. It is essentially a fresh argument sought to be raised for the first time in this Court by a non-party to the agreement in issue; and

   (b) secondly, WPPL seeks to contend that RHIO, HDIO and MDIO are not within the scope of the extended definition of "party" under s 2(1) of the CA Act (which definition includes "any person claiming through or under a party to the arbitration agreement"): WS [5]. Whilst WPPL was granted leave to intervene by the Full Court to make submissions on this issue, the circumstances in which leave was granted are very different to the present circumstances. Moreover, that issue is to be addressed by the appellants as respondents to the proposed cross-appeal.

4. For the reasons set out in Part III, leave should not be granted to WPPL to intervene in this appeal (or the proposed cross-appeal). Part IV below then briefly addresses the substance of WPPL's two grounds.

Part III: Leave to intervene should not be granted

5. The principles governing leave to intervene are set out in *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37 at [2]-[3]:

> "In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be

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[1] These submissions adopt the terms defined in the HPPL Respondents' submissions dated 3 August 2018 and the proposed cross-appellants' submissions dated 14 September 2018.

affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose."

6. WPPL does not suggest that it has any legal interest which would be directly affected by a decision in this appeal, such that it would be *entitled* to intervene. Rather, WPPL seeks *leave* to intervene in this appeal on the basis that it is "a non-party whose legal rights in pending litigation before the Supreme Court of Western Australia ... are likely to be affected by the outcome of this appeal": WS [2]. Curiously, WPPL's articulation of the test in *Roadshow Films* omits the qualification that the non-party's legal interest be affected "*substantially*" by the outcome of the proceedings.

7. It is first necessary to put WPPL's application for leave to intervene in the appeal in context.

The context of the application for leave to intervene

8. WPPL originally commenced proceedings against HPPL in the Supreme Court of Western Australia in 2010 (**WA Proceedings**). In the WA Proceedings WPPL claims royalties payable upon iron ore from the Hope Downs mine and a 50% ownership interest in the Hope Downs tenements: FC [285]. In September 2016, just prior to the trial of the WA Proceedings, and some six years after the proceedings were commenced, WPPL successfully applied to join the appellants and their sisters to the proceedings: *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 7)* [2016] WASC 305.

9. WPPL's joinder application was made after the HPPL Respondents' stay application was heard and determined by Gleeson J, but before the hearing of the appeal by the Full Court. Upon the joinder of the appellants and their sisters to the WA Proceedings, HPPL and HDIO applied to refer the parties to the WA Proceedings to arbitration under s 8(1) of the CA Act. Importantly for present purposes, at that time HPPL and HDIO sought a mandatory stay against WPPL under s 8(1) on the basis that although WPPL was not a party to the Hope Downs Deed (and is not otherwise referred to in the

Hope Downs Deed)[2], it was claiming "through or under" HPPL and therefore fell within the extended definition of "party" under s 2(1).[3] Le Miere J ordered that the HPPL Respondents' application be heard after the determination of the appeal by the Full Court: *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 8)* [2016] WASC 361 at [10], [17].

10. Shortly after that order was made by Le Miere J, WPPL applied to intervene in the hearing of the appeal by the Full Court. WPPL had not applied to intervene in the hearing before Gleeson J, despite representatives of WPPL's solicitors having attended the hearing before her Honour.[4]

11. In applying to intervene in the appeal to the Full Court, WPPL made it clear that it did not seek to rely upon the Hope Downs Deed as against the appellants.[5] WPPL also made it clear that it did not seek to make submissions in relation to the proper construction of cl 20 of the Hope Downs Deed, on the basis that WPPL was "neutral" on "the issues relating to the proper construction of the [Hope Downs Deed]".[6] WPPL further stated that it did not seek to "make submissions on the issue of the proper construction of the arbitration agreements relied on by the HPPL Parties."[7]

12. The Full Court granted WPPL leave to intervene on a very limited basis: FC [281]. Although WPPL sought and obtained leave to intervene to make submissions on the question of whether certain of the HPPL Respondents fell within the extended definition of "party" under s 2(1) of the CA Act[8], it was not permitted to make, and did not seek to advance, submissions as to the proper construction of cl 20 of the Hope Downs Deed.[9]

13. After the hearing of the appeal by the Full Court, but before the delivery of judgment, and in the light of WPPL's stated position that it did not seek to rely upon the Hope Downs Deed as against the appellants, HPPL and HDIO amended their stay application in the WA Proceedings so as to not contend that WPPL fell within the extended definition of "party" under s 2(1) of the Act and could therefore be subject to a

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[2] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [6(a)].
[3] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(b)].
[4] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [6(b)].
[5] WPPL's written submissions dated 20 January 2017 at [17]: Exh MAW-5.
[6] Affidavit of Peter Stuart Speed dated 13 September 2018 at [32]
[7] WPPL's written submissions dated 20 January 2017 at [29]: Exh MAW-5.
[8] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [6(d)].
[9] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [6(e)]-[6(f)].

mandatory stay under s 8(1).[10] Other HPPL Respondents brought a stay application against WPPL on the same basis.

14. The Full Court delivered its judgment on 27 October 2017. In that judgment, the Full Court stated that it was "not dealing with the rights and obligations of WPPL": FC [287].

15. Following the delivery of judgment by the Full Court, on 30 and 31 May 2018, Le Miere J heard the HPPL Respondents' stay application in the WA Proceedings.[11] At that hearing, WPPL did not seek to advance any submissions as to the proper construction of cl 20 of the Hope Downs Deed.[12] In fact, WPPL reiterated its position that it was "neutral as to the outcome of the application by the HPPL parties (and Mrs Rinehart and 150 Investments) under s 8 of the [CA Act] to refer the Counterclaim to arbitration and to stay the Counterclaim pending determination of the arbitration".[13] Nor did WPPL seek to advance any submissions as to the question of whether any of the HPPL Respondents fell within the extended definition of "party" under s 2(1) of the CA Act, because the hearing proceeded on the express basis that the HPPL Respondents did not contend that WPPL fell within that extended definition.[14]

16. The only stay sought by the HPPL Respondents against WPPL at that hearing was a discretionary stay of the proceedings consequential upon the mandatory referral of the appellants and their sisters to arbitration under s 8(1) of the CA Act. Le Miere J is presently reserved on the HPPL Respondents' applications.

Clause 20 of the Hope Downs Deed

17. Dealing first with the application to intervene to make submissions as to the construction of cl 20 of the Hope Downs Deed, as WPPL candidly accepts, this is the first time that such an argument has been sought to be advanced, either by the parties to the appeal or by WPPL as intervener (WS [3]), and for that reason it does not seek to support either the appellants' or the HPPL Respondents' submissions on the appeal (WS [4]). WPPL's reason for seeking leave to intervene to make submissions in relation to the construction of cl 20 of the Hope Downs Deed now is that, if the

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[10] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(d)]; amended chambers summons dated 19 April 2017: Exh MAW-6.
[11] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(g)].
[12] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(g)].
[13] WPPL submissions dated 11 May 2018 at [3]; Exh PSS-14.
[14] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(g)].

argument is accepted, then the basis of the HPPL Respondents' application to stay WPPL's claims in the WA Proceedings "falls away": WS [4], [11].

18. This Court would not grant leave to intervene on such a basis for the following reasons.

19. *First*, the sole question this Court is being asked to determine in the appeal is whether the "validity claims" are covered by cl 20 of the Hope Downs Deed (and cl 9 of the April 2007 HD Deed).

20. This appeal does not relate at all to whether or not the "substantive claims" fall within the scope of cl 20 of the Hope Downs Deed, as the Full Court's finding that the "substantive claims" are covered by (amongst other things) the Hope Downs Deed was not the subject of any application for special leave to appeal: cf. WS [22]. WPPL's misconceived and failed attempt to file a notice of contention in this appeal, in which it sought to set aside the Full Court's finding that the "substantive claims" were covered by cl 20 of the Hope Downs Deed[15], was perhaps an attempt to address this fundamental problem.

21. *Secondly*, WPPL has failed to grapple with the operation of cl 7(b) of the Hope Downs Deed. By cl 7(b), the appellants undertook "not to challenge the right of any member of the Hancock Group to any of the Hancock Group Interests at any time". It was common ground before Gleeson J and the Full Court that cl 7(b) could operate to preclude the bringing of any substantive claims in respect of the Hope Downs tenements. It therefore cannot be said that the Full Court's determination that the substantive claims in respect of the Hope Downs tenements were arbitrable was attended by error.

22. *Thirdly,* the only purported "legal interest" of WPPL said to be affected substantially by the outcome of this appeal is WPPL's prospects of success on the stay applications in the WA Proceedings, in that if leave is granted and WPPL's construction argument is accepted by this Court, the basis for the HPPL Respondents' stay application against it "falls away".

23. The mere possibility that the outcome of the appeal might indirectly affect WPPL's prospects of success on an interlocutory application in an unrelated proceeding which has already been heard should not ground a basis for granting leave to intervene in this Court. That is particularly the case where, as here, WPPL's legal rights in the WA Proceedings will not be affected by the outcome of this appeal. It is also unclear

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[15] Notice of contention served (but not filed) on the parties to this appeal dated 17 August 2018.

whether the outcome of this appeal would cause any substantive delay in the determination of the WA Proceedings (cf. WS [31]), particularly where those proceedings concern events of several decades ago and have been on foot for some time. In any event, a potential procedural delay is not a legal interest that is capable of being substantially affected.

24. *Fourthly*, WPPL's application for leave to intervene relies upon the existence of an argument, purportedly raised by the HPPL Respondents in the hearing before Le Miere J, to the effect that the stay of WPPL's claims in the WA Proceedings was not a matter of discretion, but rather the Court was somehow bound to stay those claims because "the legislative policy of s 8 demanded" it (WS [10]), and there was a "statutory constraint on the exercise by the WA Court of its case management powers" (WS [31]). WPPL places particular emphasis on the submission made by senior counsel for the HPPL Respondents that the stay of WPPL's claims in the WA Proceedings was "inevitable" (WS [10]).

25. However, the HPPL Respondents' position in the hearing before Le Miere J was that the Court should, *in the exercise of its discretion*, stay WPPL's claims in the WA Proceedings pending the outcome of the arbitral reference the subject of the referral orders made by the Full Federal Court (or, alternatively, any arbitral reference ordered in those proceedings).[16] As WPPL accepts at WS [6], the HPPL Respondents did not apply for a mandatory stay of the proceedings brought by WPPL under s 8(1) of the CA Act.

26. *Fifthly*, WPPL only seeks to advance an argument as to the proper construction of cl 20 of the Hope Downs Deed; it does not seek to advance any arguments in relation to the other deeds to which Mr John Hancock is a party, and which the Full Court accepted render Mr Hancock's substantive claims arbitrable: FC [208]-[215], [254]-[268]. Thus, Mr Hancock's substantive claims will still be referred to arbitration irrespective of the success or otherwise of WPPL's construction argument.

27. *Sixthly,* it cannot be said that WPPL's submissions are "submissions which the Court should have to assist it to reach a correct determination". It is not correct that "there is no contradictor to the proposition that the 'substantive claims' ought be characterised as a 'dispute under the deed'" (WS [12]), because as noted above that issue does not arise in the appeal. Further, WPPL's submissions that it can make a contribution in

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[16] HPPL Respondents' submissions in reply dated 28 May 2018 at [4]; transcript of hearing before Le Miere J dated 30 May 2018, at T.1712; T.1718; T.1719.

this appeal because "[t]he parties to the appeal seem to accept that the word 'under' should be construed as 'governed or controlled'" (WS [12]) is completely incorrect. The HPPL Respondents submit that the words "under dispute under this deed" in cl 20.2 of the Hope Downs Deed should not be construed to mean "governed or controlled" and that the Full Federal Court was correct to reject that construction.

28. *Seventhly*, WPPL raises its construction argument in this appeal for the first time, notwithstanding it had every opportunity to do so at an earlier time, including at the hearing of the stay application before Le Miere J on 30 and 31 May 2018. It is also not an argument that has been previously advanced by the parties in the proceeding below. In circumstances where the construction argument raised by WPPL relies on, amongst other things, the "context" in which the Hope Downs Deed was entered into (WS [17], [18], [22]), HPPL Respondents could suffer significant prejudice if WPPL is given leave to intervene.

Section 2(1) of the CA Act

29. WPPL should also not be granted leave to intervene in relation to the proposed cross-appeal in relation to whether HDIO, RHIO and MDIO fall within the extended definition of "party" under s 2(1) of the CA Act.

30. *First*, as noted above, the HPPL Respondents no longer contend that WPPL falls within the extended definition of "party" under s 2(1) of the CA Act. That is significant, because it means that the circumstances in which WPPL was granted leave to intervene at the hearing of the Full Court appeal (at which time the HPPL Respondents did contend, in the WA Proceedings, that WPPL fell within the extended definition of "party") are materially different to the present circumstances. The suggestion at WS [2] that its application for leave to intervene in this appeal is "similar" to its application to intervene in the proceedings before the Full Court ought not be accepted.

31. In the absence of a contention that WPPL falls within the extended definition of "party" under s 2(1) of the CA Act, it cannot be said that WPPL has "a legal interest ... in other pending litigation [the WA Proceedings] which is likely to be affected substantially" by the outcome of the proceedings in the proposed cross-appeal.

32. *Secondly*, WPPL need not be "concerned that the respondents will seek to renew the s 8 application in the WA Court if this Court were to grant special leave and find in the respondents' favour on the 'through or under' issue": WS [6]. Once WPPL indicated that it did not intend to rely on the Hope Downs Deed as against the appellants and

their siblings, the HPPL Respondents dropped their contention that WPPL fell within the extended definition of "party" under s 2(1) of the CA Act.[17] The hearing of the HPPL Respondents' stay applications before Le Miere J on 30 and 31 May 2018 took place on that express basis.[18]

33. Indeed, to remove any doubt as to their position (to the extent there was any), the HPPL Respondents have offered to undertake not to contend that WPPL is a "party" within the meaning of section 2(1) of the CA Act so long as WPPL maintains its position that it does not seek to rely on any of the deeds the subject of the proceeding below, and does not raise any defence or claim based upon any rights, immunities, representations or releases derived from one or more of those deeds.[19] WPPL has declined to accept that undertaking.

34. Thus, as matters currently stand, there is simply no "possibility that WPPL might be treated as a statutory party to [the Hope Downs Deed]": WS [13].

35. *Thirdly*, WPPL's submissions on the "through or under" issue are essentially directed towards upholding the decision of the Full Court. WPPL asserts that the reasons of the Full Court are "not attended by any error" and further that they are "clearly correct": WS [36]. The correctness of the Full Court's reasoning is repeatedly emphasised by WPPL: WS [41], [46], [49]-[51], [57]-[58].

36. Indeed, WPPL's central argument, that RHIO, HDIO and MDIO are not claiming "through or under" the parties to the Hope Downs Deed because their defences will involve "distinct and separate defences from any defence available to, say, HPPL or Mrs Rinehart" and "[t]his is necessarily the case because the claims against a knowing recipient for accessorial liability are directed to the knowing recipient as an independent and self-standing cause of action" (WS [40]) is captured in the reasons of the Full Court at FC [316]. So much is acknowledged by WPPL: WS [41].

37. *Fourthly*, there is already a contradictor to the proposed cross-appeal. In this regard, the Full Court found the positions taken by WPPL and the appellants on the "through or under" issue to be sufficiently similar that it was unnecessary to differentiate between the submissions of WPPL and those of the appellants on that issue: FC [288].

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[17] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(c)].
[18] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [10(g)].
[19] Affidavit of Mark Anthony Wilks dated 6 September 2018 at [12]; letter from Corrs Chambers Westgarth to Clayton Utz dated 6 September 2018: Exh MAW-8.

Part IV: Response to WPPL's submissions

38. In the light of the above, WPPL's substantive submissions can be dealt with briefly. If, however, leave to intervene is granted, HPPL Respondents will wish to supplement these submissions orally.

Clause 20.2 of the Hope Downs Deed

39. WPPL advances a novel argument that whilst the Hope Downs Deed was a "settlement agreement", and the parties to the Hope Downs Deed intended to "compromise" their disputes (WS [17]-[18]), the parties did not intend that any substantive claims brought in contravention of that settlement agreement would be resolved by confidential arbitration: WS [3], [18]-[19].

40. As noted above, this is not an argument that was advanced by the appellants, or even by WPPL when it was granted leave to intervene by the Full Court. It is also inconsistent with the approach taken by the NSW Court of Appeal[20], and the Full Court, in respect of the operation of cl 20.2 of the Hope Downs Deed, and runs counter to the presumption that the parties to an arbitration agreement would not have intended their disputes to have been resolved in more than one forum: FC [166], [185]-[186].

41. Moreover, neither of the reasons given by WPPL as to why cl 20.2 of the Hope Downs Deed - which required "any dispute under this deed" to be resolved by confidential arbitration - does not extend to the substantive claims, can be accepted.

42. The first reason given by WPPL is that cl 20 is "only apt to cover a dispute as to the nature or extent of any rights and obligations created by the Deed": WS [3]. However, a dispute as to whether a substantive claim is the subject of the releases and covenants not to sue in the Hope Downs Deed is still a "dispute as to the nature or extent of any rights or obligations created by the Deed", since that dispute concerns the scope and effect of those releases and covenants not to sue.

43. The second reason given by WPPL is that cl 20 is directed to "future disputes", and not the disputes resolved by the Hope Downs Deed itself: WS [20], [26]. A dispute as to whether a substantive claim was (or was not) resolved by the Hope Downs Deed is still a "dispute under this deed" for the purposes of cl 20, even if that dispute arose after the Hope Downs Deed was entered into.

44. These obvious weaknesses in the argument advanced by WPPL are an additional

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[20] *Rinehart v Welker* (2012) 95 NSWLR 221; *Rinehart v Hancock* [2013] NSWCA 326.

reason why leave to intervene ought not be granted on this ground.

Section 2(1) of the CA Act

45. Given that WPPL has not yet been granted leave to intervene in relation to the proposed cross-appeal, and HDIO, RHIO and MDIO are not due to file and serve submissions in reply to the appellants' submissions in relation to the proposed cross-appeal until 12 October 2018, it is not appropriate to deal with the substance of WPPL's argument in detail at this stage. Moreover, as noted above, the submissions advanced by WPPL in relation to the proposed cross-appeal are primarily directed towards upholding the Full Court's findings. Nevertheless, three observations may be made.

46. *First*, *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 (WS [40]-[45]) was not a case concerning the application of the "through or under" test in s 2(1), and therefore did not consider whether reliance upon an acknowledgment, release or covenant not to sue by a non-party to the arbitration agreement would constitute a derivative ground of defence in the manner described by Brennan and Dawson JJ in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342.

47. *Secondly*, HDIO, RHIO and MDIO do not contend for any general proposition that a related company will be treated as a party to the arbitration agreement on the "through or under" principle: cf. WS [55]-[56]. These companies contend that they are claiming through or under parties to the Hope Downs Deed because they will advance a derivative defence to the appellants' claim that they only received legal title to certain mining tenements.

48. *Thirdly*, WPPL fails to deal with the gravamen of the proposed cross-appeal arising from FC [317].

Part V: Time for oral argument

49. The HPPL Respondents estimate that 15 minutes will be required for the presentation of oral argument on their behalf in relation to the question of whether WPPL should be granted leave to intervene in the appeal.

Dated 5 October 2018

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SCHEDULE

HANCOCK MINERALS PTY LTD (ACN 057 326 824)

Second Respondent

TADEUSZ JOSEF WATROBA

Third Respondent

WESTRAINT RESOURCES PTY LTD (ACN 009 083 783)

Fourth Respondent

HMHT INVESTMENTS PTY LTD (ACN 070 550 104)

Fifth Respondent

ROY HILL IRON ORE PTY LTD (ACN 123 722 038)

Sixth Respondent

HOPE DOWNS IRON ORE PTY LTD (ACN 071 514 308)

Seventh Respondent

MULGA DOWNS IRON ORE PTY LTD (ACN 080 659 150)

Eighth Respondent

GEORGINA HOPE RINEHART (IN HER PERSON CAPACITY AND AS TRUSTEE OF THE HOPE MARGARET HANCOCK TRUST AND AS TRUSTEE OF THE HFMF TRUST

Ninth Respondent

HANCOCK FAMILY MEMORIAL FOUNDATION LTD (ACN 008 499 312)

Tenth Respondent

150 INVESTMENTS PTY LTD (ACN 070 550 159)

Eleventh Respondent

HOPE RINEHART WELKER

Twelfth Respondent

GINIA HOPE FRANCES RINEHART

Thirteenth Respondent

MAX CHRISTOPHER DONNELLY (IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF THE LATE LANGLEY GEORGE HANCOCK)

Fourteenth Respondent

MULGA DOWNS INVESTMENTS PTY LTD (ACN 132 484 050)

Fifteenth Respondent