In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua O Aotearoa
Te Whanganui-ā-Tara Rohe

CIV-2025-485-142

in the matter of: a scheme of arrangement under Part 15 of the Companies Act 1993

and: **Foundation Life (NZ) Limited**

Applicant

Memorandum of counsel for applicant regarding appointment of amicus curiae

Dated: 7 March 2025

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MEMORANDUM OF COUNSEL FOR APPLICANT REGARDING APPOINTMENT OF AMICUS CURIAE

May it please the Court:

1 On 27 February 2025 the applicant filed an originating application seeking orders approving a scheme of arrangement under Part 15 of the Companies Act. It also filed a without notice interlocutory application seeking directions providing for policyholders to be notified of the proposed scheme, the scheme meeting and the hearing date for the originating application.

2 By the Court's minute of 6 March, the Court indicated that it would appoint an amicus curiae to assist in determining both the interlocutory and originating applications. It directed the applicant to propose suitable counsel, propose the scope of the reports required at stages 1 and 2, and propose reporting dates.

3 The applicant's proposals are set out in this memorandum. The memorandum has been countersigned by the proposed amicus to indicate his consent to the appointment, and to the proposed timetable and report scope.

Proposed amicus – Adam Ross KC

4 The applicant proposes that Adam Ross KC be appointed as amicus. Mr Ross has relevant experience in dealing with schemes of arrangement,[1] and has considerable experience in insurance matters.

5 Mr Ross KC has advised counsel for the applicant that he will consent to the appointment and the timetable set out below. This memorandum is copied to Mr Ross KC.

Proposed scope of reports

6 The appointment of an amicus curiae is rare in part 15 applications (which is why the applicant did not seek any such appointment in its application). Counsel for the applicant is aware of an amicus appointment in only two cases under s236.[2] Each of those cases was unusual in that no meeting of policyholders was held. The applicants in those cases therefore sought appointment of independent counsel.

7 In the present case:

7.1 Policyholders will receive the material explaining the proposed scheme. They will have the opportunity to arrange an

[1] For example acting for the Takeovers Panel in *Re Metlifecare* [2020] NZHC 2752.

[2] *Re Lifetime Income Ltd* [2022] NZHC 810 and *Re Farmers Mutual Insurance* CIV-2006-485-966 26 June 2006.

opposition in the court if they wish. There are approximately 27,588 affected policyholders so there will be opportunities for them to gather together, share costs and obtain legal advice on a collective basis if any group of them so wishes.

7.2 An Independent Actuary has considered the matter and has given a report.[3]

7.3 The Reserve Bank has been consulted as the scheme has been developed and has advised the Court that it requires no changes to the materials to be put to policyholders.[4]

7.4 The Court will be assisted by knowing the wishes of those policyholders sufficiently interested to vote.

7.5 The Court is able to supervise the process (eg by reviewing the scheme materials and notice of meeting).

8 The applicant considers, therefore, that the scale and breadth of the report required from independent counsel will be less than would be required in a case where those features were not present.

9 The applicant proposes that amicus curiae be asked to report as set out below.

- Stage 1

10 In the without notice application for directions, the question for the Court is whether the nature of the Scheme and the proposed procedure is such that the Court would have *jurisdiction* to approve the Scheme at the second hearing. The amicus should therefore report on:

10.1 whether there is any apparent reason why the Scheme itself is not capable of approval; and

10.2 whether there is any apparent reason why the proposed procedure proposed will not:

(a) properly inform shareholders; and

(b) provide for an appropriate meeting, especially in relation to class composition.

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[3] Sole affidavit, exhibit 6.

[4] Sole affidavit, exhibit 7 (page 3 of the letter).

- Stage 2

11 Second, in relation to the on notice application for approval of the scheme whether:[5]

11.1 there had been compliance with the statutory provisions in the course of the process;

11.2 the scheme had been fairly put to the class or classes concerned, and whether sufficient information was provided to those affected to judge and vote upon the arrangement;

11.3 the scheme was such that an intelligent and honest business person, a member of the class concerned, and acting in respect of that interest, might reasonably approve it; and

11.4 the proposal is "fair and equitable".[6]

Proposed timing

12 The interlocutory application seeks a direction that the Scheme meeting be held on 9 June 2025, and that materials be sent (in hard copy) to policyholders at least 28 days prior to that meeting. Those materials can be printed only after the Court has ruled on the interlocutory application. The task of printing is of course significant for ~27,588 policyholders. The applicant therefore respectfully seeks a resolution of its interlocutory application within the month of March.

13 With that in mind, the applicant proposes directions that:

13.1 The appointed amicus curiae report to the Court by Monday 17 March in relation to stage 1;

13.2 The court convene a telephone conference (counsel for applicant and amicus curiae) on the earliest available date after the amicus report is filed, and in any event no later than Friday 21 March, for the purpose of further addressing the interlocutory application;

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5 *Re Lifetime Income Ltd* [2022] NZHC 810 at [37]–[38] (**BoA Tab 7**). See also *Re C M Banks Limited* [1944] NZLR 248 (SC); *Re Milne & Choyce Limited* [1953] NZLR 724 (CA).

6 *Weatherston v Waltus Property Investments Limited* [2001] 2 NZLR 103 (CA) (**BoA Tab 13**). See also *Re ACS (NZ) Ltd* [2012] NZHC 1396 (**BoA Tab 4**) and *Re PrefSure Life Ltd* HC Auckland CIV-2004-404-6066, 5 November 2004 (**BoA Tab 9**) of application of the test in an insurance context.

13.3 The appointed amicus curiae report to the Court in relation to stage 2 by the same date set for notices of opposition (currently proposed to be 5 working days before the hearing of the originating application set under 1.2 of the interlocutory application).

Dated: 7 March 2024

M D Arthur / J Marcetic
Counsel for applicant