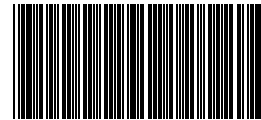




Filed: 27 September 2019 3:25 PM



D00016RT4Q

Commercial List Response

COURT DETAILS

| | |
|-------------|----------------------|
| Court | Supreme Court of NSW |
| Division | Equity |
| List | Commercial |
| Registry | Supreme Court Sydney |
| Case number | 2019/00114608 |

TITLE OF PROCEEDINGS

| | |
|-----------------|--|
| First Plaintiff | RK Doudney Pty Ltd ACN 619 152 975, as Trustee for the RK Doudney Superannuation Fund ACN 619152975 |
| First Defendant | IOOF HOLDINGS LTD ABN 49100103722 |

FILING DETAILS

| | |
|--------------------------------|--------------------------------|
| Filed for | IOOF HOLDINGS LTD, Defendant 1 |
| Legal representative | Domenic Gatto |
| Legal representative reference | |
| Telephone | 0396434460 |

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Commercial List Response (2019.09.27 - Doudney v IOOF - Commercial List Response.pdf)

[attach.]

COMMERCIAL LIST RESPONSE

COURT DETAILS

| | |
|-------------|----------------------------------|
| Court | Supreme Court of New South Wales |
| Division | Equity |
| List | Commercial List |
| Registry | Sydney |
| Case number | 2019/00114608 |

TITLE OF PROCEEDINGS

| | |
|-----------|--|
| Plaintiff | RK Doudney Pty Ltd ACN 619 152 975, as Trustee for the RK Doudney Superannuation Fund |
| Defendant | IOOF Holdings Limited ABN 49 100 103 722 |

PREPARATION DETAILS

| | |
|--------------------------------|---|
| Prepared for | IOOF Holdings Limited ABN 49 100 103 722, the Defendant |
| Legal representative | Domenic Gatto King & Wood Mallesons |
| Legal representative reference | MBS/DXG |
| Contact name and telephone | Matthew Spain (03) 9643 4199 |
| Contact email | matthew.spain@au.kwm.com |

COMMERCIAL LIST RESPONSE

Preliminary Matters

- 1 This Commercial List Response (**Response**) responds to the plaintiff's Amended Commercial List Statement filed on 10 August 2019 (**CLS**).
- 2 This Response uses headings for convenience only. The headings do not form part of the defendant's response to the CLS.
- 3 In this Response, the defendant (**IFL**) uses some of the defined terms set out in the CLS, but it does not admit any of the factual assertions contained in or implied by any such defined terms used in the CLS.

A. NATURE OF THE DISPUTE

- 1 IFL agrees with the description of the proceeding set out in paragraph 1.
- 2 IFL does not agree that paragraph 2 contains an accurate description of the nature of the dispute. As to the specific matters raised in paragraph 2:
 - (a) as to the Royal Commission:
 - (i) some of the claims made in this proceeding relate to matters the subject of evidence given at the Royal Commission by Mr Kelaher on behalf of Questor and IIML;
 - (ii) that evidence did not include any admissions by IFL of the matters alleged in this proceeding;
 - (b) as to the APRA Proceedings:
 - (i) the respondents to those proceedings were Questor, IIML, Kelaher, Venardos, Coulter, Riordan and Vine. IFL was not a respondent;
 - (ii) APRA alleged that IIML, Questor, Kelaher and Venardos contravened covenants contained or taken to be contained in the governing rules of the IPS Fund and the TPS Fund by reason of (amongst other things):
 - (A) the CMT Overpayment and the CMT Compensation Plan;
 - (B) the Pursuit Breach and the Pursuit Compensation Plan; and
 - (C) the Sweep Breach and the Sweep Compensation Plan;
 - (iii) APRA also alleged that Kelaher, Venardos, Coulter, Riordan and Vine ought to be disqualified from acting as a trustee of a superannuation entity or responsible officer of a corporate trustee of a superannuation entity;
 - (iv) the plaintiff in this proceeding makes the same allegations as those made by APRA identified above at subparagraph 2 (b) (ii) and (iii);
 - (v) by judgment delivered on 20 September 2019, the Federal Court dismissed the APRA Proceedings, holding that none of APRA's claims were sustainable (**APRA Judgment**).

- 3 IFL agrees with the matters stated in paragraph 3.
- 4 IFL agrees that the allegations set out in paragraph 4 are allegations made by the plaintiff in this proceeding, which are denied by IFL. IFL says that the nature of the dispute arising from those allegations concerns the source of compensation payments made by Questor and IIML to superannuation beneficiaries. In particular:
- (a) in the period February 2010 to January 2015, IIML and Questor became aware of a limited number of errors in relation to:
 - (i) the processing of certain investment instructions of investors utilising the Pursuit Select Investment Service (ie, the Pursuit Breach) and certain investment instructions of investors who transferred from the United Funds to the Multimix Trusts (ie, the Sweep Breach); and
 - (ii) an over-distribution of income to investors in the CMT Scheme (ie, the CMT Overpayment);
 - (b) after discovering these errors, Questor and IIML compensated all affected investors for any loss caused;
 - (c) the amounts of compensation paid were immaterial, as the amounts of loss were immaterial;

Particulars

The compensation payments (including interest) totalled \$4,879,549.

In 2015, at the time it is alleged that the compensation plans for the Pursuit Breach, Sweep Breach and CMT Overpayment were approved Boards of Questor and IIML:

- (a) IFL was an ASX 100 company with more than \$123.6 billion in funds under management, administration, advice and supervision, and for the year ended 30 June 2015, the IOOF Group earned revenue of approximately \$938 million;
- (b) the total members' funds in TPS Super was approximately \$6.36 billion;
- (c) the total amount of compensation paid to superannuation members in respect of the Sweep Breach was approximately \$1,027,129, which represented 0.016% of the total members' funds in TPS Super as at 30 June 2015;
- (d) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment was approximately \$2.8 million, which represented 0.044% of the total members' funds in TPS Super as at 30 June 2015;

- (e) the total members' funds in IPS Super was approximately \$18.04 billion;
 - (f) the total amount of compensation paid to superannuation members in respect of the Pursuit Breach was approximately \$696,436, which represented 0.039% of the total members' funds in IPS Super as at 30 June 2015.
- (d) the compensation payments were funded by a variety of sources, including payments by Questor, IIML, third-party contractors, and the proceeds of insurance claims;
- (e) in addition, a portion of the compensation payments in relation to the Pursuit Breach and the CMT Overpayment was sourced from reserves maintained by the superannuation trustees, namely, the TPS General Reserve maintained by Questor and the IPS Operational Risk Financial Requirement reserve (**ORFR**) maintained by IIML (collectively, **the Reserves**). IIML subsequently replenished the Reserves in full in respect of these amounts.

Particulars

The total combined amount initially sourced from the Reserves in order to make compensation payments in relation to the Pursuit Breach and the CMT Overpayment was approximately \$2.4 million.

In particular:

- (a) The ORFR reserve in the IPS Fund was initially used on 24 July 2017 to pay approximately \$773,700 to superannuation members as compensation for the Pursuit error.
- (b) The TPS General Reserve was initially used in April 2016 and April 2017 to pay a total of approximately \$1.616 million to superannuation members as compensation in relation to the CMT Overpayment error.

The Reserves were subsequently replenished as follows:

- (a) The ORFR reserve in the IPS Fund was replenished by the following payments made by IIML in its corporate capacity:
 - (i) a payment of \$677,734.83 made on or about 27 September 2017 from insurance proceeds received by IIML; and
 - (ii) a payment of \$95,962 (plus interest) made on or about 19 January 2019 from IIML's own funds.
 - (b) The TPS General Reserve was replenished on or about 5 October 2018 by a payment made by IIML in its corporate capacity in the amount of \$1.616 million (plus interest).
- (f) the amounts of compensation paid from the Reserves were immaterial.

Particulars

In 2015, at the time it is alleged that the compensation plans for the Pursuit Breach, Sweep Breach and CMT Overpayment were approved Boards of Questor and IIML:

- (a) IFL was an ASX 100 company with more than \$123.6 billion in funds under management, administration, advice and supervision, and for the year ended 30 June 2015, the IOOF Group earned revenue of approximately \$938 million;
- (b) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment which was sourced from the TPS General Reserve was approximately \$1.616 million, which represented 0.0254% of the total members' funds in TPS Super as at 30 June 2015;
- (c) the total amount of compensation paid to superannuation members in respect of the Pursuit Breach and which was initially sourced from the ORFR was approximately \$696,436, which represented 0.039% of the total members' funds in IPS Super as at 30 June 2015.

4AA The plaintiff alleges that the conduct of Questor and IIML in utilising the Reserves to compensate superannuation beneficiaries without first giving adequate consideration to pursuing all other arguable alternative sources of compensation amounted to breaches of covenants contained or taken to be contained in the governing rules of the IPS Fund and the TPS Fund.

4AB The defendant denies the plaintiff's allegations, and maintains that:

- (a) the propriety of the use of the Reserves is to be determined by the relevant statutory scheme and the instruments and policies which regulate the use of those Reserves;
- (b) the relevant statutory scheme, instruments and policies:
 - (i) permitted the use of the Reserves to compensate superannuation beneficiaries for the losses relating to the CMT Overpayment and the Pursuit Breach;

Particulars

- (a) SIS Act, sections 52(8) and 115.
- (b) Prudential Standard SPS 114.
- (c) IPS Trust Deed, clause 8.18; TPS Trust Deed, clauses 10.10 and 10.11.
- (d) IIML's ORFR Policy and Questor's Reserves Policy.

- (ii) did not impose any requirement that a trustee may only utilise the Reserves to compensate superannuation beneficiaries after first giving adequate consideration to pursuing all other arguable alternative sources of compensation;
 - (c) the Reserves were established for the purpose of providing a source of compensation to beneficiaries who suffered loss due to administrative or operational errors, and using the Reserves for a purpose for which they were established cannot amount to a failure to act in the best interests of beneficiaries.
- 4A IFL agrees that the plaintiff contends in this proceeding that the conditions precedent to disqualification under s 126H of the SIS Act were satisfied as set out in 4A, but IFL denies that they were, and the Federal Court, in the APRA Judgment, found that they were not.
- 5 IFL agrees that the allegations set out in paragraph 5 are made by the plaintiff in this proceeding. In summary, the plaintiff alleges that IFL contravened its continuous disclosure obligations under the ASX Listing Rules by its alleged failure to disclose information relating to the matters summarised in paragraphs 4 and 4A. IFL disputes that it did so.
- 6 IFL agrees that the allegations set out in paragraph 6 in relation to continuous disclosure allegations are allegations made by the plaintiff in this proceeding. IFL denies those allegations. The APRA Judgment confirms that the information and matters alleged by the plaintiff to have been required to be disclosed did not exist and thus were not required to be disclosed. Furthermore, even if the information and matters alleged by the plaintiff to have been required to be disclosed did exist, IFL denies that the disclosure alleged by the plaintiff was required to be made.
- 7 IFL agrees that the allegations set out in paragraph 7 in relation to alleged misleading or deceptive conduct are allegations made by the plaintiff in this proceeding. IFL says that the statements made by IFL which are relied upon by the plaintiff as giving rise to the alleged representations were accurate statements. Further, IFL says that and none of the matters on which the plaintiff relies as falsifying the alleged representations in fact do so.
- 8 IFL agrees that the allegations set out in paragraph 8 in relation to alleged unconscionable conduct are allegations made by the plaintiff in this proceeding. IFL denies those allegations.
- 9 IFL agrees that the plaintiff seeks damages for the losses referred to in paragraph 9, but denies those allegations, including because IFL has not breached any of the obligations alleged by the plaintiff.

B. ISSUES LIKELY TO ARISE

- 1 IFL agrees with the description of the issues likely to arise set out in paragraph 1, but denies the allegations assumed by the posed questions, or implicitly made in that paragraph.
- 2 IFL agrees with the description of the issues likely to arise set out in paragraph 2, but denies the allegations assumed by the posed questions, or implicitly made in that paragraph.
- 3 The following additional issues are likely to arise in the proceeding:
 - (a) whether the matters allegedly comprising the Questor Compensation Information, the IIML Compensation Information, the APRA Guidance Information or the Announcement Information existed or occurred;
 - (b) whether IFL became aware, within the meaning of Rule 19.12 of the Listing Rules, of the Questor Compensation Information, the IIML Compensation Information, the APRA Guidance Information or the Announcement Information;
 - (c) if the Questor Compensation Information, the IIML Compensation Information, the APRA Guidance Information or the Announcement Information was Material Non Public Information which required disclosure under Listing rule 3.1 (which IFL denies), whether that information fell within any of the exceptions to Listing Rule 3.1 as set out in Listing Rule 3.1A, and in particular whether the information:
 - (i) concerned an incomplete proposal or negotiation;
 - (ii) concerned matters of supposition or that were insufficiently definite to warrant disclosure;
 - (iii) was generated for internal management purposes;
 - (iv) was confidential;
 - (v) was information that a reasonable person would not expect to be disclosed.

C. PLAINTIFF'S CONTENTIONS

To the contentions in the CLS, IFL says as follows by way of response:

I. PARTIES AND RELEVANT PERSONS

(A) The Plaintiff and Group Members

1 As to paragraph 1, IFL:

- (a) admits that the plaintiff has purported to commence this proceeding as a representative proceeding pursuant to Part 10 of the CPA;
- (b) admits that the proceedings have been purportedly commenced on behalf of a group of persons with the characteristics pleaded in subparagraphs 1.1 to 1.4;
- (c) denies that there are any persons who in fact have each of the characteristics pleaded in subparagraphs 1.1 to 1.4.

2 IFL denies the allegations in paragraph 2.

3 IFL does not admit the allegations in paragraph 3.

4 IFL does not admit the allegations in paragraph 4.

5 IFL does not plead to paragraph 5 which contains no allegations against it.

(B) The Defendant

6 As to paragraph 6, IFL:

- (a) says that IFL, together with its subsidiaries, carries on a financial services business;
- (b) says that IFL and its subsidiaries provide services and products relating to superannuation, investment management and administration, and financial advice;
- (c) otherwise does not admit the allegations in paragraph 6.

7 As to paragraph 7, IFL:

- (a) admits the allegations in subparagraphs 7.1, 7.2, 7.3 and 7.5;
- (b) in relation to subparagraph 7.4, does not admit and denies (in accordance with the balance of this Response) that it engaged in all the conduct described in the CLS, but

admits that if it had engaged in such conduct, it would have been a person that, in trade or commerce, engaged in conduct in relation to financial services within the meaning of the ASIC Act;

- (c) in relation to subparagraph 7.6, does not admit and denies (in accordance with the balance of this Response) that it engaged in all the conduct described in the CLS, but admits that if it had engaged in such conduct, it would have been a person that, in trade or commerce, engaged in conduct within the meaning of the ACL.

(C) Application of section 674(2) of the Corporations Act to IFL

8 As to paragraph 8, IFL:

- (a) admits the allegations subparagraphs 8.1 and 8.2;
- (b) as to subparagraph 8.3:
 - (i) admits that ASX Listing Rule 3.1 is substantially to the same effect as pleaded, and says that it will refer at trial to the full terms and effect of ASX Listing Rule 3.1;
 - (ii) says further ASX Listing Rule 3.1 does not apply to information if the information:
 - (A) concerns an incomplete proposal or negotiation, is confidential (and ASX has not formed the view that it has ceased to be confidential), and a reasonable person would not expect the information to be disclosed; or
 - (B) comprises matters of supposition or is insufficiently definite to warrant disclosure, is confidential (and ASX has not formed the view that it has ceased to be confidential), and a reasonable person would not expect the information to be disclosed; or
 - (C) is generated for the internal management purposes of the entity, is confidential (and ASX has not formed the view that it has ceased to be confidential), and a reasonable person would not expect the information to be disclosed.

Particulars

ASX Listing Rule 3.1A.

- (c) as to subparagraph 8.4, admits that ASX Listing Rule 19.12 defines 'aware' for the purposes of the ASX Listing Rules to substantially the same effect as pleaded, and says that it will refer at trial to the full terms and effect of ASX Listing Rule 19.12;
- (d) as to subparagraph 8.5, admits that s 674 (2) of the Corporations Act applied to IFL by reason of the matters pleaded, subject to reference at trial to the full terms and effect of the ASX Listing Rules and s 674 of the Corporations Act.

(D) IFLs Business & Structure

9 IFL admits the allegations in paragraph 9.

10 As to paragraph 10, IFL:

- (a) admits the allegations in subparagraphs 10.1 and 10.2;
- (b) denies the allegations in subparagraph 10.3, and says that Questor was the trustee and RSE Licensee of TPS Super from approximately 1992 until June 2016;
- (c) admits the allegations in subparagraph 10.4;
- (d) save to say that the correct name of the Registered Scheme is The Cash Management Fund (ARSN 089 508 636), admits the allegations in subparagraph 10.5.

11 As to paragraph 11, IFL:

- (a) admits the allegations in subparagraphs 11.1, 11.2, 11.3, 11.4 and 11.6;
- (b) admits the allegations in subparagraphs 11.5(a), (b), (c), (e), (f), (g) and (i);
- (c) denies the allegation in subparagraph 11.5(d), and says that IIML has been the RE of the IOOF MultiMix Moderate Trust (ARSN 100 071 332) Registered Scheme since 22 August 2011;
- (d) save to say that the correct name of the Registered Scheme is IOOF MultiMix Diversified Fixed Interest Trust (ARSN 130 092 787), admits the allegation in subparagraph 11.5(h);
- (e) denies the allegations in subparagraph 11.7, and says that;
 - (i) the customer accounts of the TPS Scheme were transferred from the TPS Scheme to Pursuit Select on or around June 2016;

- (ii) there was no change to the RE of the TPS Scheme as a result of that transfer; and
 - (iii) the TPS Scheme was registered on 7 May 2017;
- (f) denies the allegations in subparagraph 11.8, and says that:
- (i) the member accounts of the TPS Fund were transferred from the TPS Fund to the IPS Fund via a Successor Fund Transfer around June 2016;
 - (ii) the trustee and RSE Licensee of the TPS Fund did not transfer from Questor to IIML in that process; and
 - (iii) the TPS Fund was subsequently wound up effective 30 June 2016.

12 As to paragraph 12, IFL:

- (a) admits the allegations in subparagraphs 12.1, 12.2 (b), 12.2 (c) and 12.3;
- (b) as to subparagraph 12.2 (a):
 - (i) admits that Mr Kelaher was the Managing Director of IFL from 30 April 2009 to 10 December 2018;
 - (ii) says that Mr Kelaher was the Managing Director of Questor from October 2006 to June 2018;
 - (iii) otherwise denies the allegations in subparagraph 12.2 (a).

13 As to paragraph 13, IFL:

- (a) admits the allegations in subparagraphs 13.1, 13.2 (a), 13.2 (b) and 13.3;
- (b) as to subparagraph 13.2 (c):
 - (i) admits that Mr Venardos was the Chairman of IIML from 24 November 2016 to 13 September 2018;
 - (ii) otherwise denies the allegations subparagraph 13.2 (c).

14 IFL admits the allegations in paragraph 14.

- 15 As to paragraph 15, IFL:
- (a) admits the allegations in subparagraph 15.1;
 - (b) denies the allegations in subparagraph 15.2, and says further that Mr Vine held the position of General Manager Legal, Risk and Compliance between August 2014 and November 2015, then General Manager Legal, Risk and Compliance & Company Secretary until October 2017, and from then on Group Company Secretary for the IOOF Group, including IIML, Questor and IOOF Service Co;
 - (c) denies the allegations in subparagraph 15.3, and says that Mr Vine has since December 2015 been an officer of IFL within the meaning of s 9 of the Corporations Act and Listing Rule 19.12.
- 16 As to paragraph 16, IFL:
- (a) denies the allegations in subparagraph 16.1, and says that Mr Riordan has been the General Counsel of IFL, Questor, IIML and IOOF Service Co since May 2009;
 - (b) denies the allegations in subparagraph 16.2.

II. DUTIES

(A) Duties of Questor and IIML

16A IFL admits the allegations in paragraph 16A.

16B IFL admits the allegations in paragraph 16B.

16C IFL admits the allegations in paragraph 16C.

(B) Duties of Kelaher and Venardos

16D IFL admits the allegations in paragraph 16D.

16E IFL admits the allegations in paragraph 16E.

16F IFL admits the allegations in paragraph 16F.

16G IFL admits the allegations in paragraph 16G.

16H IFL admits the allegations in paragraph 16H.

16I IFL admits the allegations in paragraph 16I.

16J IFL admits the allegations in paragraph 16J.

III. HISTORICAL BREACHES & REMEDIATION PLANS

(A) The Overpayment

17 IFL admits the allegations in paragraph 17.

18 As to paragraph 18, IFL:

- (a) admits the allegations;
- (b) says further that the CMT Scheme was governed by a constitution styled the Wholesale Trusts Constitution (**Wholesale Trusts Constitution**).

18A As to paragraph 18A, IFL:

- (a) as to subparagraph 18A.1, admits that Questor used and relied upon services provided by employees of IOOF Service Co (which was from on or about 1 May 2009 a wholly owned subsidiary of IFL and a member of the IOOF Group), but otherwise does not admit the allegations;
- (b) as to subparagraph 18A.2:
 - (i) admits that, from 2003 to 2010, Questor as RE of the CMT relied upon the National Australia Bank Ltd (**NAB**) to provide custodial services to Questor as RE of the CMT pursuant to an agreement dated 16 September 2003;
 - (ii) says that NAB was the custodian of the CMT Scheme from 2003 to 2010;
 - (iii) says that National Custodial Services (**NCS**) was a subsidiary or business unit of NAB which was involved in the provision of those custodial services by NAB to Questor as RE of the CMT;
 - (iv) says that the remainder of this Response pleads to the allegations in the CLS as if the references to 'NCS' were references to NAB.

Particulars

Deed of Novation dated 16 September 2003 between NAB, Questor and Commonwealth Custodial Service Limited, attaching the custody agreement as Annexure A (**Custody Agreement**).

Under the Custody Agreement, NAB was appointed custodian of the CMT to act in the acquisition, holding and dealing with the money and assets of the CMT, including the distribution of income from assets or investments held in the CMT, and to provide reporting and valuation services in connection with such custody: Custody Agreement, clauses 3.1, 3.2, 3.7 and 3.8.

18B As to paragraph 18B, IFL admits that Questor used and relied upon services provided by employees of IOOF Service Co, but otherwise does not admit the allegations in that paragraph.

19 IFL denies the allegations in paragraph 19 and says further that:

- (a) NAB's responsibilities as custodian of the CMT Scheme included the distribution to unitholders in the CMT Scheme of income earned from assets or investments held in the CMT Scheme;

Particulars

Custody Agreement, clauses 3.1, 3.2, 3.7 and 3.8.

- (b) in June 2009, NAB made a distribution to the unitholders on behalf of Questor as RE of the CMT for May 2009, which included income distributions;
- (c) in calculating the amount of the May 2009 distribution, NAB incorrectly accounted for term deposit maturities as income instead of capital;

Particulars

The amount of the relevant term deposit maturity was \$6.16 million.

- (d) this resulted in an overpayment by NAB to the unitholders in the CMT of an amount of \$6.16 million;
- (e) in the premises, in this Response IFL will treat references to 'Overpayment' as though they referred to the overpayment described in this paragraph of the Response;
- (f) the proceeds of the Overpayment were distributed:
 - (i) by Questor as RE of the TPS Scheme to investors of the TPS Scheme as part of their quarterly cash account distributions; and
 - (ii) by Questor as trustee of TPS Super to beneficiaries of the TPS Fund as part of their quarterly cash account distributions.

19A IFL denies the allegations in paragraph 19A.

19B IFL denies the allegations in paragraph 19B.

19C As to paragraph 19C, IFL:

(a) denies the allegations in subparagraph 19C.1, and refers to and repeats paragraph 19A above;

(b) says further that Questor in its capacity as RE of the CMT Scheme:

(i) had no liability for any such loss or damage that may have been suffered as it:

(A) relied upon information received from NAB and did not have reasonable grounds to believe that that information was not genuine;

Particulars

Wholesale Trusts Constitution, clause 16.7.

(B) acted in good faith in reliance upon the opinion, advice, statements and information provided by NAB, who Questor believed to be expert in relation to the provision of custodial services, and was independent of Questor;

Particulars

Wholesale Trusts Constitution, clause 16.4.

(C) acted in good faith and without default or negligence;

Particulars

Wholesale Trusts Constitution, clause 16.3.

(ii) in any event, was entitled to an indemnity out of the assets of the CMT Scheme for any liability it incurred in performing or exercising any of its powers or duties in relation to the CMT Scheme;

Particulars

Wholesale Trusts Constitution, clause 9.3.

(c) denies the allegations in subparagraph 19C.2, refers to and repeats paragraph 19A above, and says further that Questor as trustee of the TPS Fund:

(i) had no liability unless the alleged loss resulted from the trustee's dishonest or reckless failure to exercise the degree of care and diligence required of it (which is not alleged):

Particulars

TPS Trust Deed, clause 15.4.

- (ii) further or alternatively, had the benefit of an indemnity from the TPS Fund in relation to any such loss it was liable for;

Particulars

TPS Trust Deed, clause 15.5.

- (d) as to subparagraph 19C.3, IFL:
 - (i) denies that the Overpayment caused loss or damage as alleged, and refers to and repeats paragraph 19A above;
 - (ii) admits that it was reasonably arguable that NAB was liable to compensate or indemnify Questor as RE of the CMT Scheme for any loss or damage in fact caused by the Overpayment (which loss or damage is denied);
 - (iii) otherwise denies the allegations in subparagraph 19C.3.
- (e) as to subparagraph 19C.4, IFL:
 - (i) denies that IOOF Service Co was liable, or that it was reasonably arguable that IOOF Service Co was liable, to compensate or indemnify Questor as RE of the CMT Scheme and/or Questor as trustee of the TPS Fund for any loss and damage that may have been caused by the Overpayment;
 - (ii) refers to and repeats paragraph 19A above;
 - (iii) says further or alternatively that the loss and damage allegedly caused by the Overpayment:
 - (A) was indirect or consequential loss within the meaning of the relevant agreements between Questor and IOOF Service Co, such that IOOF Service Co had, or reasonably arguably had, no liability to IIML for that loss;

Particulars

The relevant agreements as between Questor and IOOF Service Co were:

- (a) the Service and Resources Support Deed dated 19 July 2005, which relevantly applied between 1 July 2009 and 1 April 2013; and

(b) the Service and Resources Support Deed dated 1 April 2013 which applied from April 2013 (and as amended by a Deed of Variation dated 30 June 2014).

(together, the **Questor/Service Co Agreements**).

Clause 11.2 of the Questor/Service Co Agreements provided that IOOF Service Co had no liability indirect or consequential loss.

(B) was not direct loss and accordingly is not, or was reasonably arguably not, covered by the indemnity in the Questor/Service Co Agreements.

Particulars

Clause 11.1 of the Questor/Service Co Agreements.

20 IFL denies the allegations in paragraph 20 and says further that:

- (a) in February 2010, BNP Paribas Securities Services (**BNP**) replaced NAB as the custodian pursuant to the Custody Agreement with Questor;
- (b) shortly thereafter, BNP informed Questor that, as part of the transfer and reconciliation process it was undertaking, it had noted term deposit maturities which had been accounted for as an asset, and BNP queried the continued existence of the asset;
- (c) in September 2011, NAB confirmed that term deposit maturities had been incorrectly accounted for as income instead of capital, which resulted in the Overpayment.

21 IFL admits the allegations in paragraph 21.

22 As to paragraph 22, IFL:

- (a) denies the allegations in subparagraph 22.1, and says further that:
 - (i) from September 2011, Questor commenced implementing a plan for reversing the effect of the Overpayment, which plan comprised the following elements:
 - (A) remediation of the Overpayment, to be effected by Questor as RE of the CMT Scheme reducing distributions to its unitholders over a three year period to 30 June 2014 in order to write back the Overpayment, which it was authorised to do;

Particulars

The reduced distributions were intended to recover for the CMT Scheme the amount of \$6.16m, being the amount of the Overpayment.

It was necessary to apply the reduced distributions across all units held in the CMT Scheme by its unitholders. This would include units held on behalf of investors in the TPS Scheme and units held on behalf of members of the TPS Fund who acquired their units in the CMT Scheme after the Overpayment was made and who therefore did not benefit from the Overpayment.

The reduced distributions were authorised by the Wholesale Trusts Constitution (Clause 12 of the Fifth Schedule).

- (B) Compensation payments to those investors in the TPS Scheme and members of the TPS Fund who acquired their units in the CMT Scheme after the Overpayment was made and who therefore did not benefit from the Overpayment, so that those members or investors were returned to the same position they would have been in had the Overpayment not occurred and the remediation not been undertaken;

Particulars

The purpose of the compensation referred to in this subparagraph was to compensate those members and investors for the total amount necessary to return them to the same position they would have been in had the Overpayment not occurred and the remediation not been undertaken, which amount was determined to be \$3.18m.

- (ii) Ernst & Young (EY) was subsequently engaged to conduct an independent review of the approach to compensation referred to above, and EY expressed the opinion that the approach would materially return relevant affected member and investor balances to the financial position that would have existed had the Overpayment not occurred and the remediation not been undertaken;

Particulars

EY Report entitled 'TPS Remediation Assessment' dated 10 December 2014 (**EY Report**).

- (iii) compensation was paid to all affected members and investors, with the compensation being funded by NAB and Questor;
- (iv) as a result of the compensation paid, all affected members and investors were returned to the financial position that would have existed had the Overpayment not occurred and the remediation not been undertaken;

Particulars

As a result of Questor pursuing a claim against the NAB from February 2014 to March 2015 in relation to the Overpayment, and despite the limitation of liability and indemnity provisions in favour of NAB in the Custody Agreement, NAB paid an amount of \$1.565 million to IIML as RE of the CMT Scheme (at that time) in full and final settlement of the claim by Questor (**NAB Settlement Amount**).

NAB agreed to pay the NAB Settlement Amount to IIML on 11 March 2015, which is documented in a letter from NAB dated 23 March 2015.

The NAB Settlement Amount represented 50% of the total amount of compensation to be paid to affected investors and beneficiaries.

Affected investors in the TPS Scheme were compensated by Questor as RE of the TPS Scheme paying those investors a total amount of \$392,400 on or around 11 September 2015. This compensation payment was sourced from the NAB Settlement Amount.

Affected members of the TPS Fund were compensated by Questor as trustee of TPS Super paying those members a total amount of \$2,788,875 (comprised of \$2.775 million plus interest of \$13,875). This compensation payment was sourced from the NAB Settlement Amount as to \$1,172,875, and the remaining payment of \$1,616 million was initially sourced from the General Reserve of TPS Super, which was later replenished by IIML in full.

- (b) admits the allegations in subparagraph 22.2, and says further that Questor as trustee of the TPS Fund was required to pay all income distributions it received on behalf of members of TPS Super into the Cash Management Accounts of those members.

Particulars

Product Disclosure Statement dated 14 April 2008 issued by Questor as trustee of the TPS Fund.

Product Disclosure Statement dated 21 December 2005 issued by Questor as RE of the CMT Scheme.

- 23 IFL denies the allegations in paragraph 23 and refers to and repeats subparagraph 22 (a) above.
- 23A IFL denies the allegations in paragraph 23A.
- 23B In relation to paragraph 23B, IFL:
- (a) admits that it was aware of the matters pleaded in paragraph 22(a)(i) above from September 2011;
- (b) otherwise denies the allegations.

23C IFL denies the allegations in paragraph 23C, and says further that:

- (a) as to subparagraph 23C.1:
 - (i) the existence and nature of any conflict depends upon the particular circumstances, and the matters pleaded in the paragraph would not, without more, necessarily give rise to a conflict as pleaded;
 - (ii) at all times in the Relevant Period, Questor had in place practices, policies and procedures that complied with the requirements of any applicable Prudential Standards and relevant guidance provided by APRA in its Prudential Guidelines;

Particulars

Superannuation (prudential standard) determination No. 7
of 2012, Prudential Standard SPS 521 Conflicts of Interest
Prudential Practice Guide SPG 521 Conflicts of Interest
July 2013.

- (b) as to subparagraph 23C.2:
 - (i) it refers to and repeats the matters set out above at paragraph 22;
 - (ii) to the extent that the CMT Remediation was comprised of decisions made by Questor in its capacity of RE of the CMT Scheme, Questor was not subject to the covenants owed to beneficiaries of TPS Super as alleged in subparagraph 23C.2;
- (c) as to subparagraph 23C.3:
 - (i) to the extent that there would otherwise have been such a liability, it was excluded by clause 15.4 of the TPS Trust Deed;
 - (ii) says further that to the extent that there was such a liability that was not excluded, it had a right of indemnity out of the assets of the TPS Fund against any loss or expense incurred by it in relation to the TPS Fund under clause 15.5 of the TPS Trust Deed.

23D IFL denies the allegations in paragraph 23D.

24 As to paragraph 24, IFL:

- (a) says that Questor as RE of the CMT Scheme negotiated with NAB from February 2014 to March 2015 in relation to the Overpayment and the payment of compensation to disadvantaged members and investors to return them to the same position they would have been in had the Overpayment not occurred and the remediation not been undertaken;
- (b) Questor as RE of the CMT conducted the negotiations with NAB because it was in that capacity that Questor was the entity to whom NAB owed obligations under the Custody Agreement;
- (c) otherwise denies the allegations in paragraph 24.

25 IFL admits the allegations in paragraph 25.

26 As to paragraph 26, IFL:

- (a) says that on 11 March 2015, NAB agreed to pay an amount of \$1.565 million in full and final settlement of the claims made by Questor, which represented 50% of the total amount of the claim;

Particulars

The total amount of the claim which Questor as RE of the CMT Scheme pursued against NAB was \$3.18 million, being the total amount necessary to return disadvantaged members and investors to the same position they would have been in had the Overpayment not occurred and the remediation not been undertaken.

Letter from NAB dated 23 March 2015.

- (b) admits that by this time IIML had determined that the amount of compensation required to be paid so that all members and investors were returned to the same position they would have been in had the Overpayment not occurred and the remediation not been undertaken would be approximately \$3.13 million;
- (c) otherwise denies the allegations in paragraph 26.

27 As to paragraph 27, IFL:

- (a) admits that, on 28 October 2015, there was a meeting of the board of Questor in its capacity as trustee of the TPS Fund (**Questor Board**);

- (b) says that Erica Clark and Vincent Rossitto prepared a paper for that Board meeting, and Mr Coulter and Mr Vine endorsed the paper, which was dated 16 October 2015 (**October 2015 Board Paper**);
- (c) says that the October 2015 Board Paper:
 - (i) summarised the key elements of Questor’s approach to remediation and compensation in relation to the Overpayment, and noted that Questor’s focus had been to ensure that any current or existed members of the TPS Funds were treated fairly and equitably and that decisions were made in members’ best interests;
 - (ii) informed the Questor Board that Questor in its capacity as RE of the TPS Scheme had fully compensated investors in the TPS Scheme to the value of \$392,000, using the proceeds of the NAB Settlement Amount;
 - (iii) informed the Questor Board that, as regards compensation to be paid to TPS Super members, a number of potential sources of that compensation had been considered, including damages from third parties, use of the ORFR reserve or the TPS General Reserve, and an insurance claim;
 - (iv) recommended to the Questor Board that the following sources of funds be used to pay compensation in the total amount of \$2,775,000 plus interest to TPS Super members:
 - (A) the remaining proceeds of the NAB Settlement Amount, being \$1.173 million;
 - (B) the TPS General Reserve, as to the remaining amount of \$1.616 million;
 - (v) informed the Questor Board that it was considered appropriate to utilise the TPS General Reserve as:
 - (A) all other viable sources of compensation had been explored;
 - (B) the proposal accorded with the TPS Trust Deed and Questor’s Reserves Policy; and
 - (C) the use of Reserves to compensate fund loss was not excluded by APRA.

- (d) says that, on 28 October 2015, the Questor Board approved the recommendation set out above at subparagraph 27 (c) (iv);
- (e) otherwise denies the allegations in paragraph 27.

27A Further to paragraph 27 above, IFL says that:

- (a) the TPS Trust Deed permitted Questor to use the TPS General Reserve to compensate beneficiaries for loss;

Particulars

TPS Trust Deed, clauses 10.10 and 10.11.

- (b) Questor was required by s 52 (2) (i) of the SIS Act to formulate, review regularly and give effect to a strategy for the prudential management of any reserves held by Questor;
- (c) consistently with Questor's obligation to formulate and give effect to a strategy for the prudential management of reserves, Questor maintained a Reserves Policy;
- (d) the Questor Reserves Policy provided that the General Reserve may be utilized for any purpose that the Trustee deems appropriate and within the parameters disclosed by the TPS Trust Deed.

28 IFL denies the allegations in paragraph 28 and says further that:

- (a) in April 2016, active members of TPS Super with open accounts were paid compensation in the amount of \$2,528,825;
- (b) in April 2017, exited members of TPS Super with closed accounts were paid compensation in the amount of \$298,387 ;
- (c) in total, TPS Fund members or former members were paid compensation of approximately \$2.8 million (including interest), which included an amount of \$1.616 million sourced from the TPS General Reserve;
- (d) the amount of \$1.616 million sourced from the TPS General Reserve represented:
 - (i) approximately \$69 per member/former member;
 - (ii) approximately 0.03% of the total assets of TPS Fund of \$6.1 billion as at 31 March 2016;

- (iii) approximately 0.006% of the total assets of the IPS Fund of \$23,851,960,000 as at 30 June 2016 (following the successor fund transfer of the TPS Fund to the IPS Fund on 17 June 2016 pursuant to the Successor Fund Transfer Deed entered into by Questor and IIML on 27 January 2016).

29 IFL denies the allegations in paragraph 29, and refers to and repeats the matters set out above at paragraph 28.

30 IFL admits the allegations in paragraph 30 and says further that:

- (a) members were entitled to a beneficial interest in the TPS Fund in accordance with and subject to the limitations contained in the TPS Trust Deed;
- (b) individual members had no right to access and had no personal interest in any funds held in the TPS General Reserve, and funds held in TPS General Reserve were not allocated to member accounts.

31 IFL denies the allegations in paragraph 31, and says further that on or about 5 October 2018, the TPS General Reserve was replenished by a payment made by IIML in its corporate capacity in the amount of \$1.616 million.

31A IFL denies the allegations in paragraph 31A.

31B As to paragraph 31B, IFL:

- (a) denies the allegations in paragraph 31B;
- (b) refers to and repeats paragraph 23C (a) above.

31C IFL denies the allegations in the first-appearing paragraph 31C.

31C IFL denies the allegations in the second-appearing paragraph 31C.

31D IFL denies the allegations in paragraph 31D.

(B) Pursuit Breach

32 IFL admits the allegations in paragraph 32.

33 As to paragraph 33, IFL says that:

- (a) it admits that, from 2007 to August 2014, IIML was the service operator and custodian of the “Pursuit Select Investment Service” (**Pursuit**), which was an Investor Directed Portfolio Service;

- (b) Pursuit provided an investment and administration service to superannuation and non-superannuation investors, giving them access to term deposits, fixed-term annuities, managed investments and listed investments;
- (c) investors who invested through Pursuit included superannuation beneficiaries of IPS Super, of which IIML was the trustee;
- (d) investors who wished to invest through Pursuit were required to:
 - (i) open an investment account with an initial investment, at which time a Cash Account was automatically established for the investor and their initial investment credited to the Cash Account;
 - (ii) select the investment options they wished to invest in;
 - (iii) provide IIML with instructions in relation to administering those investments;
- (e) the Cash Account was used to process all cash transactions that occurred within the investors' investment account, including all money paid into the investors' investment account, any earnings from the investors' chosen investment options, and the payment of all fees and taxes payable by the investor;
- (f) any income distributed by the investment options chosen by the investor were automatically credited to the investors' Cash Account, and the investor was able to determine how that income was to be dealt with by selecting one of the following four options:
 - (i) reinvest 100% of the income distribution back into the same managed investment that made the income distribution (**Reinvestment Option**);
 - (ii) leave the income distribution in the Cash Account;
 - (iii) invest the income distribution in accordance with another distribution instruction; or
 - (iv) withdraw the income distribution from the Cash Account by having it credited electronically to another nominated account with a financial institution;

Particulars

IOOF Pursuit Select Pursuit Select Investment Service IDPS
Guide dated 25 October 2006.

IOOF Pursuit Select Investment Instructions form dated 1
October 2007.

- (g) if an investor did not select an option for managing an income distribution, then the Reinvestment Option would automatically apply as the default option;

Particulars

IOOF Pursuit Select Investment Instructions form dated 1
October 2007.

- (h) each investor's Cash Account holding was pooled with that of other investors, and invested in a range of interest bearing assets, including (but not limited to) deposits with Australian banks, cash management schemes and other deposit taking institutions selected by IIML;
- (i) each investor's Cash Account was credited monthly with interest from the investments referred to above at (h), based on the interest generated by the underlying investments less any associated fees, costs and charges;
- (j) it otherwise denies the allegations in paragraph 33.

33A As to paragraph 33A, IFL:

- (a) admits that from 1 July 2009 to August 2014, IIML used and relied upon services provided by employees of IOOF Service Co to administer the Pursuit Service and process redistribution instructions;
- (b) otherwise does not admit the allegations.

34 As to paragraph 34, IFL:

- (a) admits that, between 2007 and August 2014, IIML did not give effect to some instructions from some investors who had selected the Reinvestment Option in relation to income distributions they received, resulting in a total loss of \$927,734;
- (b) says further that all investors were fully compensated for that loss by IIML;

Particulars

The ORFR reserve in the IPS Fund was initially used on 24 July 2017 to pay approximately \$773,700 to superannuation members as compensation for the Pursuit error.

The ORFR was subsequently replenished by the following payments made by IIML in its corporate capacity:

- (a) a payment of \$677,734.83 made on or about 27 September 2017 from insurance proceeds received from IIML; and
- (b) a payment of \$95,962 (plus interest) made on or about 19 January 2019 from IIMLs own funds.

Compensation to non-superannuation investors in the aggregate amount of \$154,028 was paid by IIML.

- (c) the amount of \$773,700 million initially sourced from the ORFR represented:
 - (i) approximately \$55 per investor;
 - (ii) approximately 0.003% of the total assets of the IPS Fund of \$25,618,104,005 as at 30 June 2017;
- (d) otherwise denies the allegations.

34AA Further to paragraph 34 above, IFL says that:

- (a) Pursuit was launched in October 2006;
- (b) a computer application called ORION was used to administer Cash Accounts held within Pursuit, including to process income distributions paid into those accounts;
- (c) ORION was developed by the IIML IT team in or about 2002 and updated in 2006 to adapt it for use with the Pursuit Service;
- (d) ORION was configured so that, if an investor selected the Reinvestment Option for any income distributed by the investment options chosen by the investor, then, upon the processing of the income distribution by IIML's finance team in the same calendar month as the income distribution was made, an automatic distribution reinvestment process would apply so that the reinvestment was made;
- (e) the automatic distribution reinvestment process within ORION was not configured to apply to an income distribution made in one calendar month but not processed until a subsequent calendar month;
- (f) accordingly, prior to September 2014 when ORION was reconfigured, if an income distribution was processed by IIML in a calendar month subsequent to the calendar month in which the distribution was received, the automatic distribution reinvestment

process would not apply to the income distribution, and the income distribution would not be reinvested but instead remain in the investor's Cash Account;

- (g) in July 2014, an investor in Pursuit made an enquiry of IIML via her financial advisor as to why asset purchases for three particular transactions had not shown up on her transaction report, despite the dividends being recorded;
- (h) as a result of receiving this enquiry, IIML undertook an investigation into the issue raised by the member, and in mid-August 2014, it determined that:
 - (i) the Reinvestment Option which had been selected for the member's income distributions was not being applied;
 - (ii) this was because the income distributions paid into the member's Cash Account were being processed in calendar month subsequent to the calendar month in which they were received;
 - (iii) the automatic distribution reinvestment process in ORION did not apply in these circumstances, such that the income distributions remained in the Cash Account;
- (i) ORION was reconfigured in September 2014 so that the automatic distribution reinvestment process would apply to an income distribution received in a one calendar month and processed in a subsequent calendar month.

34A As to paragraph 34A, IFL:

- (a) as to subparagraph 34A.1, it:
 - (i) denies the allegations;
 - (ii) says further or alternatively that the loss and damage allegedly caused by the Pursuit Breach:
 - (A) was indirect or consequential loss within the meaning of the relevant agreements between IIML and IOOF Service Co, such that IOOF Service Co had, or reasonably arguably had, no liability to IIML for that loss;

Particulars

The relevant agreements as between IIML and IOOF Service Co were:

- (a) the Service and Resources Support Deed dated 19 July 2005, which IIML became a party to from 1 July 2009 pursuant to the Supplemental Deed dated 1 July 2009, and which relevantly applied between 1 July 2009 and 1 April 2013; and
- (b) the Service and Resources Support Deed dated 1 April 2013, which applied from April 2013 (and from 30 June 2014, applied as amended by a Deed of Variation dated 30 June 2014),

(together, the **IIML/Service Co Agreements**).

Clause 11.2 of the IIML/Service Co Agreements provided that IOOF Service Co had no liability indirect or consequential loss.

- (B) was not direct loss and accordingly is not, or was reasonably arguably not, covered by the indemnity in the IIML/Service Co Agreements;

Particulars

Clause 11.1 of the IIML/Service Co Agreements.

- (b) denies the allegations in subparagraph 34A.2;
- (c) denies the allegations in subparagraph 34A.3;
- (d) as to subparagraph 34A.4, it:
 - (i) denies the allegations;
 - (ii) says further that to the extent that there would otherwise have been such a liability, it was excluded by clause 11.5 of the IPS Trust Deed;
 - (iii) says further that to the extent that there was such a liability which was not excluded, it had a right of indemnity out of the assets of the IPS Fund against all liabilities and expenses incurred by it in the execution of its duties under clause 11.7 of the IPS Trust Deed and it had a lien on the Fund for such indemnity.

35 IFL admits the allegations in paragraph 35.

36 IFL admits the allegations in paragraph 36.

37 IFL admits the allegations in paragraph 37.

38 As to paragraph 38, IFL:

- (a) admits that, on 27 May 2015, there was a meeting of the board of IIML in its capacity as trustee of IPS Super (**IIML Board**);
- (b) admits that, in a Board paper dated 13 May 2015 and prepared for the 27 May 2015 Board meeting (**Pursuit Board Paper**), Vine and Riordan recommended to the IIML Board that:
 - (i) IIML compensate investors for losses suffered by reason of IIML not giving effect to instructions from investors who had selected the Reinvestment Option in relation to income distributions, as referred to above at paragraph 34;
 - (ii) the compensation be effected by:
 - (A) paying compensation to affected IPS Super members by means of funds taken from the ORFR for IPS Super;
 - (B) paying affected IDPS investors from IIML's own funds;
- (c) says further that, as stated in the Pursuit Board Paper, IIML management considered that it was in members' best interests to access the ORFR to ensure that loss is remedied on a timely basis, and that APRA had agreed with that position, subject to later consideration of other sources of funding;

Particulars

At a meeting on 2 March 2015 between representatives of APRA and representatives of IIML (being Mr Vine and Mr Riordan):

- (a) Vine and Riordan informed APRA that IIML was seeking input from APRA on the proposed compensation strategy before taking it to IIML's board;
- (b) the source of compensation payments was discussed, and Vine and Riordan informed APRA that it was their intention to propose that IIML pay compensation from the ORFR initially and then consider other sources of compensation with a view to replenishing the ORFR at a later stage;
- (c) APRA stated to Vine and Riordan that APRA agreed that this proposal was appropriate, and that it was in members' best interests to pay compensation from the ORFR now so long as other sources of compensation were considered and, if appropriate and successful, used to replenish the ORFR;

- (d) in response to a query raised APRA, Vine and Riordan explained why IIML was not pursuing IOOF Service Co for compensation.
- (d) admits that, in the Pursuit Board Paper, Vine and Riordan recommended that IIML not pursue legal action against IOOF Service Co, for the reasons set out in the Pursuit Board Paper;
- (e) admits that on, 27 May 2015, the IIML Board (which included Kelaher and Venardos) approved the recommendation set out above at subparagraph 38 (b);
- (f) denies that Vine or Riordan recommended - or that the IIML Board approved a recommendation or plan - that IIML would not replenish the ORFR in respect of funds used to compensate affected beneficiaries of the IPS Fund;
- (g) says that Vine and Riordan had not ruled out compensation by IIML or IOOF Service Co if the view was taken that they were liable for the loss;
- (h) otherwise denies the allegations in paragraph 38.

38A Further to paragraph 38 above, IFL says that:

- (a) IIML was required by s 52 (8) (b) of the SIS Act to maintain an ORFR to cover operational risk, and it did so;
- (b) the purpose of the ORFR was to provide a means of compensation against an operational risk events, being events which result from inadequate or failed internal processes, people or systems (including failed transaction processing and process management) which causes one or more beneficiaries in an RSE to sustain a loss, or to be deprived of a gain to which they otherwise would have been entitled, in relation to their benefits in that RSE;

Particulars

APRA Prudential Standard SPS 114 (*‘Operational Risk Requirements’*).

APRA Prudential Standard Guides SPG 114 (*‘Operational Risk Financial Requirement’*) and SPG 220 (*‘Risk Management’*).

- (c) the IPS Trust Deed conferred a discretion on IIML to use the ORFR to make any compensation or adjustment that IIML considered necessary or appropriate;

Particulars

IPS Trust Deed, clause 8.18.

- (d) consistently with IIML's obligation to formulate and give effect to a strategy for the prudential management of the ORFR, IIML maintained an 'Operational Risk and Financial Requirement Policy' (**ORFR Policy**);

Particulars

Section 52(2)(i) of the SIS Act and clause 12.1 of the IPS Trust Deed required IIML formulate and give effect to a strategy for the prudential management of any reserves of IIML.

The ORFR Policy was introduced in December 2013.

- (e) the ORFR Policy provided that:
- (i) the ORFR was to be used to fund losses resulting from operational risk events, accordingly those losses translated into paying current members or former members for losses incurred and / or restoring current members back to the position they would have been in had the operational risks not occurred;
 - (ii) prior to any payment from the ORFR being made, certain minimum information must be gathered, being the amount of loss suffered, the impact on the Fund as a whole, the number of members affected, the impact on individual members, confirmation that loss was caused by an operational risk event, and sources of compensation available to the Trustee.

39 As to paragraph 39, IOOF:

- (a) denies the allegations;
- (b) refers to and repeats the matters set out above in subparagraph 34(b).

40 IFL admits the allegations in paragraph 40 and says further that:

- (a) members were entitled to a beneficial interest in the IPS Fund in accordance with and subject to the limitations contained in the IPS Trust Deed;
- (b) members had no right to access and had no personal interest in any funds held in the ORFR, and funds held in the ORFR were not allocated to member accounts.

41 IFL denies the allegations in paragraph 41, and says further IIML fully replenished the funds drawn from the ORFR for the IPS Fund.

Particulars

IFL refers to and repeats the particulars to subparagraph 34(b) above.

41A IFL denies the allegations in paragraph 41A.

41B IFL denies the allegations in paragraph 41B, and says further that:

(a) as to subparagraph 41B.1:

(i) the existence and nature of any conflict depends upon the particular circumstances, and the matters pleaded in the paragraph would not, without more, necessarily give rise to a conflict as pleaded; and

(ii) at all times in the Relevant Period, IIML had in place practices, policies and procedures that complied with the requirements of any applicable Prudential Standards and relevant guidance provided by APRA in its Prudential Guidelines;

Particulars

Superannuation (prudential standard) determination No 7 of 2012, Prudential Standard SPS 521 Conflicts of Interest July 2013.

(b) as to subparagraph 41B.2, it refers to and repeats the matters set out above at paragraphs 34, 38, 38A, 40 and 41.

41C IFL denies the allegations in paragraph 41C.

(C) Sweep Breach

42 IFL admits the allegations in paragraph 42.

42A As to paragraph 42A, IFL:

(a) admits that Questor relied upon services provided by employees of IOOF Service Co to:

(i) transfer the investments of the Transferring Investors; and

(ii) ensure that investment instructions of the Transferring Investors (including Sweep instructions) were being actioned;

(b) otherwise does not admit the allegations in paragraph 42A.

42B Further to paragraph 42A, IFL says that:

- (a) at all material times until 30 September 2011:
 - (i) United Funds Management Ltd was the manager of a managed investment scheme known as the 'United Funds' (**United Funds**), and Australian Executor Trustees Ltd was the RE of United Funds;
 - (ii) United Funds Management Ltd and Australian Executor Trustees Ltd were both members of the IOOF Group;
 - (iii) Questor as trustee of TPS Super held units in the United Funds on behalf of beneficiaries of TPS Super who had instructed Questor to invest in the United Funds;
 - (iv) Questor as RE of the TPS Scheme held units in the United Funds on behalf of investors in the TPS Scheme who had instructed Questor to invest in the United Funds;
 - (v) beneficiaries of TPS Super and investors in the TPS Scheme who held investments in the United Funds by reason of the matters pleaded in subparagraphs (iii) and (iv) above (**United Funds Investors**) could elect to establish a '*Regular Investment Sweep*' (**Sweep**), so that any cash in excess of their minimum required cash management account balance was automatically re-invested into the United Funds on a monthly basis;
- (b) the United Funds were closed by Australian Executor Trustees Ltd on 30 September 2011;
- (c) prior to the closure of the United Funds, United Funds Investors were given the option by Questor to have their investments transferred into the MultiMix Trusts, of which IIML was the RE;
- (d) Questor advised the United Funds Investors that, if they chose to have their investments transferred into the Multimix Trusts, their existing Sweep instructions in the United Funds would be applied to their investments in the MultiMix Trusts;
- (e) approximately 1,300 United Funds Investors elected to have their investments in the United Funds transferred to the Multimix Trusts (**Transferring Investors**).

43 As to paragraph 43, IFL:

- (a) admits that, following the completion of the closure of the United Funds and transfer of investments to the MultiMix Trust on 30 September 2011:
 - (i) the pre-existing Sweep instructions of the Transferring Investors in respect of the United Funds were cancelled;
 - (ii) the Sweep instructions of the Transferring Investors were not reinstated to their investments in the MultiMix Trust until 21 January 2015;
- (b) admits that the Sweep Breach resulted in a loss of \$771,457.41, comprised of:
 - (i) a total loss of \$796,359.66 to 811 TPS Super member accounts;
 - (ii) a total loss of \$2,097.75 to 8 TPS Scheme investor accounts;
- (c) says that IIML fully compensated all TPS Super member accounts and TPS Scheme investor accounts on or around 13 June 2017 for the amount of \$771,457.41;
- (d) otherwise denies the allegations.

43A As to paragraph 43A, IFL:

- (a) as to subparagraph 43A.1:
 - (i) denies the allegations;
 - (ii) refers to and repeats the matters set out above at paragraph 43;
 - (iii) says further that:
 - (A) between approximately January 2015 and May 2015, Questor undertook an investigation into the cause of, and relevant circumstances relating to, the Sweep Breach;
 - (B) as a result of that investigation, Questor was unable to determine the cause of, and all of the relevant circumstances relating to, the Sweep Breach;
 - (C) in the circumstances referred to in subparagraphs (A) and (B) above, Questor was unable to establish that the Sweep Breach occurred as a result of a breach of contract or negligence by IOOF Service Co;

(iv) says further or alternatively that the loss and damage allegedly caused by the Sweep Breach:

(A) was indirect or consequential loss within the meaning of Questor/Service Co Agreements, such that IOOF Service Co had, or reasonably arguably had, no liability to IIML for that loss;

Particulars

Clause 11.2 of the Questor/Service Co Agreements provided that IOOF Service Co had no liability indirect or consequential loss.

(B) was not direct loss and accordingly is not, or was reasonably arguably not, covered by the indemnity in the Questor/Service Co Agreements.

Particulars

Clause 11.1 of the Questor/Service Co Agreements.

(b) denies the allegations in subparagraph 43A.2;

(c) denies the allegations in subparagraph 43A.3;

(d) as to subparagraph 43A.3:

(i) denies the allegations;

(ii) say further that, to the extent that there would otherwise have been such a liability, it was excluded by clause 15.4 of the TPS Trust Deed;

(iii) say further that, to the extent there was such a liability which was not excluded, Questor had a right under clause 15.5 of the TPS Trust Deed to recover from the TPS Fund any loss or expense incurred in relation to the Fund.

44 As to paragraph 44, IFL:

(a) denies the allegations;

(b) says that Questor first detected the Sweep Breach in January 2015.

45 As to paragraph 45, IFL:

- (a) admits that Questor reported the Sweep Breach to APRA in February 2015;
- (b) denies that Questor reported the Sweep Breach to ASIC.

46 IFL admits the allegations in paragraph 46.

47 As to paragraph 47, IFL:

- (a) admits that, on 27 May 2015, there was a meeting of the Questor Board;
- (b) admits that, in a Board paper dated 15 May 2015 prepared for the 27 May 2015 Board meeting (**Sweep Board Paper**), Vine and Riordan recommended to the Questor Board that Questor compensate persons who had been adversely affected by the Non-Reinstatement of Sweep Instructions as follows:
 - (i) in respect of affected TPS Scheme investors, compensation to be paid from Questor's own funds;
 - (ii) in respect of affected TPS Super members, compensation to be funded by the ORFR;
- (c) says further that, as stated in the Sweep Board Paper, Questor management considered that it was in members' best interests to access the ORFR to ensure that loss is remedied on a timely basis, and that APRA was likely to agree with that position (in light of its position in relation to the pursuit breach referred to above at subparagraph 38 (c));

Particulars

At a meeting on 2 March 2015 between representatives of APRA and representatives of IIML (being Mr Vine and Mr Riordan):

- (a) Vine and Riordan informed APRA that IIML was seeking input from APRA on the proposed compensation strategy before taking it to IIML's board;
- (b) the source of compensation payments was discussed, and Vine and Riordan APRA that it was their intention to propose that IIML pay compensation from the ORFR initially and then consider other sources of compensation with a view to replenishing the ORFR at a later stage;
- (c) APRA stated to Vine and Riordan that APRA agreed that this proposal was appropriate, and that it was in members' best interests to pay compensation from

the ORFR now so long as other sources of compensation were considered and, if appropriate and successful, used to replenish the ORFR;

- (d) in response to a query raised APRA, Vine and Riordan explained why IIML was not pursuing IOOF Service Co for compensation.

- (d) refers to and repeats paragraph 38A above;
- (e) admits that, in the Sweep Board Paper, Vine and Riordan recommended that Questor not pursue legal action against IOOF Service Co, for the reasons set out in that Board paper;
- (f) admits that on 27 May 2015, the Questor Board (which included Kelaher and Venardos) approved the Sweep Compensation Plan;
- (g) denies that Vine or Riordan recommended - or that the Questor Board approved a recommendation or plan - that Questor would not replenish the ORFR in respect of funds used to compensate affected beneficiaries of the TPS Fund;
- (h) says that Vine and Riordan had not ruled out compensation by IIML or IOOF Service Co if the view was taken that they were liable for the loss;
- (i) otherwise denies the allegations in paragraph 47.

48 IFL denies the allegations in paragraph 48, and says further that no funds were drawn from the ORFR of the TPS Fund at any time to compensate beneficiaries of the TPS Fund for losses caused by the Sweep Breach.

49 IFL admits the allegations in paragraph 49 and says further that:

- (a) members were entitled to a beneficial interest in the TPS Fund in accordance with and subject to the limitations contained in the TPS Trust Deed;
- (b) individual members had no right to access and had no personal interest in any funds held in the ORFR, and funds held in the ORFR were not allocated to member accounts.

50 As to paragraph 50, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 48 above.

50A IFL denies the allegations in paragraph 50A.

50B IFL denies the allegations in paragraph 50B and says further that:

- (a) as to subparagraph 50B.1, it refers to and repeats paragraph 23C (a) above;
- (b) as to subparagraph 50B.2, it refers to and repeats paragraphs 42, 43, 43A, 47, 48 and 49 above.

50C IFL denies the allegations in paragraph 50C.

50D As to paragraph 50D, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 48 above.

50E IFL denies the allegations in paragraph 50E.

50F IFL denies the allegations in paragraph 50F.

50G IFL denies the allegations in paragraph 50G.

IV. DISCLOSURES AT THE ROYAL COMMISSION

(A) Admissions made by IFL to the Royal Commission

51 IFL admits the allegations in paragraph 51.

52 As to paragraph 52, IFL:

- (a) admits that the fifth round of hearings conducted by the Royal Commission considered the conduct of entities that provide superannuation services;
- (b) admits that a case study examined in that round concerned IIML and Questor;
- (c) otherwise denies the allegations.

53 IFL denies the allegations in paragraph 53 and says further that:

- (a) the Royal Commission required Questor and IIML to give statements in writing to the Commissioner;

Particulars

Pursuant to the power granted by s 2 of the *Royal Commission Act 1902 (Cth) (RCA)*, the Royal Commission required that IIML and Questor provide witness statements addressing specific matters identified by the Royal Commission. IIML and Questor provided the following statements to the Royal Commission in response to these requests:

- (a) Witness Statement of Mark Oliver dated 26 July 2018 on behalf of IIML in respect of Rubric 5-38 (**Oliver WS**), marked exhibit 5.99.
- (b) Witness Statement of Chris Kelaher dated 26 July 2018 on behalf of IIML in respect of Rubric 5-19 (**First Kelaher WS**), marked exhibit 5.115.
- (c) Witness Statement of Chris Kelaher dated 26 July 2018 on behalf of IIML in respect of Rubric 5-58, (**Second Kelaher WS**) marked exhibit 5.116.

- (b) the Royal Commission summonsed Mr Kelaher and Mr Oliver to appear before the Royal Commission to give evidence;

Particulars

Summonses to Mr Kelaher dated 30 July 2018 to give evidence at the Royal Commission, marked exhibit 5.114 (**Kelaher Summonses**).

Summonses to Mr Oliver dated 1 August 2018 to give evidence at the Royal Commission, marked exhibit 5.98 (**Oliver Summonses**).

Each Summons was issued by the Commission pursuant to s 2 of the RCA.

- (c) in response to the Oliver Summons, Mr Oliver appeared before the Royal Commission to give evidence, during the course of which:
 - (i) the Oliver WS) was tendered and marked exhibit 5.99;
 - (ii) Mr Oliver was examined by the Commissioner and cross-examined by Counsel Assisting the Commission;

Particulars

Mr Oliver appeared before the Commission on 9 and 10 August 2018 and he was examined by the Commissioner pursuant to s 2 of the RCA and cross-examined by Counsel Assisting pursuant to s 6FA of the RCA.

- (d) in response to the Kelaher Summons, Mr Kelaher appeared before the Royal Commission to give evidence, during the course of which:
 - (i) the First and Second Kelaher WSs were tendered and marked exhibits 5.115 and 5.116 respectively;

- (ii) Mr Kelaher was examined by the Commissioner and cross-examined by Counsel Assisting the Commission.

Particulars

Mr Kelaher appeared before the Commission on 10 August 2018 and he was examined by the Commissioner pursuant to s 2 of the RCA and cross-examined by Counsel Assisting pursuant to s 6FA of the RCA.

54 IFL admits the allegations in paragraph 54.

55 As to paragraph 55, IFL:

(a) as to subparagraph 55.1:

(i) refers to the evidence given by Kelaher at the Royal Commission;

(ii) otherwise denies the allegations;

(b) as to subparagraph 55.2:

(i) refers to the evidence given by Kelaher at the Royal Commission;

(ii) refers to and repeats paragraphs 22, 23C (a), 27, 27A and 31 above;

(iii) otherwise denies the allegations;

(c) as to subparagraph 55.3:

(i) refers to the evidence given by Kelaher at the Royal Commission;

(ii) refers to and repeats paragraphs 33, 34, 34AA, 38, 38A, 40, 41 and 41B above;

(iii) otherwise denies the allegations;

(d) as to subparagraph 55.4:

(i) refers to the evidence given by Kelaher at the Royal Commission;

(ii) refers to and repeats paragraphs 42, 43, 43A, 47, 48 and 49 above;

(iii) otherwise denies the allegations.

(B) Further disclosures

56 As to paragraph 56, IFL:

- (a) as to subparagraph 56.1:
 - (i) refers to the evidence given by Kelaher at the Royal Commission;
 - (ii) refers to and repeats paragraphs 22, 27 and 27A above;
 - (iii) says further that none of the steps taken by Questor in relation to the remediation and compensation referred to in paragraphs 22, 27 and 27A above was contrary to any of the Prudential Standards made by APRA or any of the Prudential Guidelines issued by APRA;
 - (iv) to the extent that the plaintiff relies upon the alleged guidance given by APRA in relation to the Pursuit Breach, IFL refers to and repeats paragraph 38 (c) above and the particulars thereto;
 - (v) otherwise denies the allegations.
- (b) as to subparagraph 56.2:
 - (i) refers to the evidence given by Kelaher at the Royal Commission;
 - (ii) refers to and repeats paragraphs 34, 38 and 38A above;
 - (iii) otherwise denies the allegations.
- (c) as to subparagraph 56.3:
 - (i) refers to the evidence given by Kelaher at the Royal Commission;
 - (ii) refers to and repeats paragraphs 43, 47, 48 and 50D above;
 - (iii) otherwise denies the allegations.

V. SHARE PRICE DECLINE

57 As to paragraph 57, IFL:

- (a) does not admit the allegations in subparagraph 57.1;
- (b) as to subparagraph 57.2:

- (i) admits that, on 6 December 2018, APRA commenced the APRA Proceedings against Mr Kelaher, Mr Venardos, Mr Coulter, Mr Vine, Mr Riordan, IIML and Questor;
- (ii) admits that, in the APRA Proceedings, APRA alleged that IIML, Questor, Kelaher and Venardos contravened covenants contained or taken to be contained in the governing rules of the IPS Fund and the TPS Fund by reason of (amongst other things):
 - (A) the CMT Overpayment and Compensation Plan;
 - (B) the Pursuit Breach and Compensation Plan; and
 - (C) the Sweep Breach and Compensation Plan;
- (iii) says that on 20 September 2019 the Federal Court dismissed the APRA Proceedings with costs, holding that *'none of APRA's claims of contraventions of the SIS Act against the respondents are sustainable with the consequence that there is no foundation for the making of any disqualification orders'* (APRA Judgment at [7]);
- (c) as to subparagraph 57.3, admits that on 6 December 2018 APRA notified IIML that APRA was considering imposing conditions upon the RSE licences on IIML and issuing directions to IIML to compliance with licence conditions;
- (d) as to subparagraph 57.4, admits that on 7 December 2018, IFL's share price declined;
- (e) admits the allegations in subparagraph 57.5, and says that it will refer at trial to the full terms and effect of the ASX Announcement dated 10 December 2018;

Particulars

ASX Announcement of IFL dated 10 December 2018.

- (f) admits the allegations in subparagraph 57.6, and says that it will refer at trial to the full terms and effect of the ASX Announcement dated 4 April 2019;

Particulars

ASX Announcement of IFL dated 4 April 2019.

- (g) otherwise denies the allegations in paragraph 57.

VI Information of which IFL was aware

(A) Questor Compensation Information

58 As to paragraph 58, IFL:

- (a) denies the allegations; and
- (b) refers to and repeats paragraphs 17-31B, 42-50C and 50F-50G above.

59 As to paragraph 59, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 58 above;
- (c) says further or alternatively that, that to the extent that the plaintiff relies on matters or information in the nature of an opinion which it alleges IFL or officers of IFL ought to have (but did not) in fact hold, then IFL was not aware of such matters or information for the purposes of Listing Rule 3.1 which is therefore not engaged.

(B) HML Compensation Information

60 As to paragraph 60, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 17-50G above.

61 As to paragraph 61, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 60 above;
- (c) says further or alternatively that, that to the extent that the plaintiff relies on matters or information in the nature of an opinion which it alleges IFL or officers of IFL ought to have (but did not) in fact hold, then IFL was not aware of such matters or information for the purposes of Listing Rule 3.1 which is therefore not engaged.

(C) APRA Guidance Information

62 As to paragraph 62, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 27, 27A, 47, 38 and 38A above;
- (c) says further or alternatively that, to the extent that the use of the assets of the IPS Fund in the manner pleaded in paragraph 38 was contrary to guidance provided by APRA to IOOF, the guidance provided by APRA did not reflect a correct application of the law to the circumstances.

63 As to paragraph 63, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 62 above;
- (c) says further or alternatively that, that to the extent that the plaintiff relies on matters or information in the nature of an opinion which it alleges IFL or officers of IFL ought to have (but did not) in fact hold, then IFL was not aware of such matters or information for the purposes of Listing Rule 3.1 which is therefore not engaged.

(D) Announcement Information

63A IFL admits the allegations in paragraph 63A.

63B As to paragraph 63B, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 81, 87, 93 and 99 below.

63C As to paragraph 63C, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 63B above;
- (c) says further or alternatively that, that to the extent that the plaintiff relies on matters or information in the nature of an opinion which it alleges IFL or officers of IFL ought to

have (but did not) in fact hold, then IFL was not aware of such matters or information for the purposes of Listing Rule 3.1 which is therefore not engaged.

VII BREACH OF CONTINUOUS DISCLOSURE OBLIGATIONS

(A) Questor Compensation Information Contravention

64 As to paragraph 64, IFL:

- (a) as to subparagraph 64.1:
 - (i) refers to and repeats paragraph 58 above;
 - (ii) otherwise does not admit the allegations;
- (b) as to subparagraph 64.2:
 - (i) refers to and repeats paragraph 58 and subparagraph 64 (a) above;
 - (ii) says that, to the extent that the pleaded Questor Compensation Information existed (which is denied) and was information of which IFL was aware (which is denied), the Questor Compensation Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of s 674 (2)(c) of the Corporations Act, including because:
 - (A) the Questor Compensation Information related to errors in the processing of investment instructions and the overpayment of income in the limited circumstances referred to in paragraphs 19 and 43 above;
 - (B) all beneficiaries affected by the errors relating to the Questor Compensation Information were fully compensated as referred to at paragraphs 22 and 43 above;
 - (C) in 2015 at the time it is alleged that the Sweep Compensation Plan and the CMT Compensation Plan were approved by the Questor Board, the total members' funds in TPS Super was approximately \$6.36 billion (as at 30 June 2015);

- (D) the total amount of compensation paid to superannuation members in respect of the Sweep Breach was approximately \$1,027,129, which represented 0.016% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount;
 - (E) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment was approximately \$2.8 million, which represented 0.044% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount
 - (F) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment which was sourced from the TPS General Reserve was approximately \$1.616 million, which represented 0.0254% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount;
 - (G) in the year ended 30 June 2015, IFL was an ASX 100 company with more than \$123.6 billion in funds under management, administration, advice and supervision, and for the year ended 30 June 2015, the IOOF Group earned revenue of approximately \$938 million;
 - (H) the Questor Compensation Information was disclosed to APRA in 2015 and was the subject of ongoing discussions with APRA from that time;
 - (I) the Questor Compensation Information related to circumstances that ceased to exist in April 2016;
 - (J) in the premises, the risk that the matters the subject of the Questor Compensation Information would cause any significant financial consequences for IFL was low;
- (iii) otherwise denies the allegations subparagraph 64.2;
- (c) as to subparagraph 64.3:
- (i) refers to and repeats paragraph 58 and subparagraph 64 (a) above;
 - (ii) says that, to the extent that the pleaded Questor Compensation Information existed (which is denied) and was information of which IFL was aware

(which is denied), the Questor Compensation Information was not information that as at and from the commencement of the Relevant Period, would, or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of IFL shares, within the meaning of s 677 of the Corporations Act, including for the reasons identified above in subparagraph 64 (b) (ii);

(iii) otherwise denies the allegations subparagraph 64.3;

(d) as to subparagraph 64.4:

(i) refers to and repeats paragraph 58 and subparagraph 64 (a) above;

(ii) says that, to the extent that the pleaded Questor Compensation Information existed (which is denied) and was information of which IFL was aware (which is denied), the Questor Compensation Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, including for the reasons identified above in subparagraph 64 (b) (ii);

(iii) says that, even if the Questor Compensation Information was information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, the Questor Compensation Information fell within an exception to Listing Rule 3.1 as set out in Listing Rule 3.1A, because the Questor Compensation Information as pleaded:

(A) concerned incomplete proposals; and/or

(B) comprised matters of supposition or that are insufficiently definite to warrant disclosure; and/or

(C) was generated for internal management purposes; and

(D) was confidential and the ASX had not formed the view that it had ceased to be confidential; and

(E) was information that a reasonable person would not expect to be disclosed.

(iv) otherwise denies the allegations subparagraph 64.4.

65 As to paragraph 65, IFL:

- (a) refers to and repeats paragraphs 58, 59 and 64 above;
- (b) otherwise denies the allegations.

66 As to paragraph 66, IFL:

- (a) refers to and repeats paragraphs 58, 59, 64 and 65 above;
- (b) otherwise denies the allegations.

67 IFL denies the allegations in paragraph 67.

(B) IIML Compensation Information Contravention

68 As to paragraph 68, IFL:

- (a) refers to and repeats paragraph 60 above:
- (b) says that, to the extent that the pleaded IIML Compensation Information existed (which is denied) and was information of which IFL was aware (which is denied), the IIML Compensation Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of s 674 (2)(c) of the Corporations Act, including because:
 - (i) the IIML Compensation Information related to errors in the processing of investment instructions and the overpayment of income in the limited circumstances referred to in paragraphs 19, 34 and 43 above;
 - (ii) all beneficiaries affected by the errors relating to the IIML Compensation Information were fully compensated as referred to at paragraphs 22, 34 and 43 above;
 - (iii) in 2015 at the time it is alleged that the Pursuit Compensation Plan, the Sweep Compensation Plan and the CMT Compensation Plan were approved by the Questor Board and the IIML Board, the total members' funds in TPS Super was approximately \$6.36 billion and the total members' funds in IPS Super was approximately \$18.04 billion (as at 30 June 2015);

- (iv) the total amount of compensation paid to superannuation members in respect of the Sweep Breach was approximately \$1,027,129, which represented 0.016% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount;
 - (v) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment was approximately \$2.8 million, which represented 0.044% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount;
 - (vi) the total amount of compensation paid to superannuation members in respect of the CMT Overpayment which was sourced from the TPS General Reserve was approximately \$1.616 million, which represented 0.0254% of the total members' funds in TPS Super as at 30 June 2015, a financially immaterial amount;
 - (vii) the total amount of compensation paid to superannuation members in respect of the Pursuit Breach and which was initially sourced from the ORFR was approximately \$696,436, which represented 0.039% of the total members' funds in IPS Super as at 30 June 2015, a financially immaterial amount;
 - (viii) in the year ended 30 June 2015, IFL was an ASX 100 company with more than \$123.6 billion in funds under management, administration, advice and supervision, and for the year ended 30 June 2015, the IOOF Group earned revenue of approximately \$938 million;
 - (ix) the IIML Compensation Information was disclosed to APRA in 2015 and was the subject of ongoing discussions with APRA from that time;
 - (x) the IIML Compensation Information related to circumstances that ceased to exist in April 2016;
 - (xi) in the premises, the risk that the matters the subject of the IIML Compensation Information would cause any significant financial consequences for IFL was low;
- (c) says that, to the extent that the pleaded IIML Compensation Information existed (which is denied) and was information of which IFL was aware (which is denied), the IIML Compensation Information was not information that as at and from the commencement of the Relevant Period, would, or would be likely to influence persons who commonly

invest in securities in deciding whether to acquire or dispose of IFL shares, within the meaning of s 677 of the Corporations Act, including for the reasons identified above in subparagraph 68 (b);

- (d) says that, to the extent that the pleaded IIML Compensation Information existed (which is denied) and was information of which IFL was aware (which is denied), the IIML Compensation Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, including for the reasons identified above in subparagraph 68 (b);
- (e) says that, even if the IIML Compensation Information was information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, the IIML Compensation Information fell within an exception to Listing Rule 3.1 as set out in Listing Rule 3.1A, because the IIML Compensation Information as pleaded:
 - (i) concerned incomplete proposals; and/or
 - (ii) comprised matters of supposition or that are insufficiently definite to warrant disclosure; and/or
 - (iii) was generated for internal management purposes; and
 - (iv) was confidential and the ASX had not formed the view that it had ceased to be confidential; and
 - (v) was information that a reasonable person would not expect to be disclosed;
- (f) otherwise denies the allegations in paragraph 68.

69 As to paragraph 69, IFL:

- (a) refers to and repeats paragraphs 60, 61 and 68 above;
- (b) otherwise denies the allegations.

70 As to paragraph 70, IFL:

- (a) refers to and repeats paragraphs 60, 61 and 68 and 69 above;

(b) otherwise denies the allegations.

71 IFL denies the allegations in paragraph 71.

(C) APRA Guidance Information Contravention

72 As to paragraph 72, IFL:

(a) refers to and repeats paragraph 62 above:

(b) says that, to the extent that the pleaded APRA Guidance Information existed (which is denied) and was information of which IFL was aware (which is denied), the APRA Guidance Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of s 674 (2)(c) of the Corporations Act, including because:

(i) the APRA Guidance Information related to the use of Reserves as a source of compensation for errors in the processing of investment instructions and the overpayment of income in the limited circumstances referred to in paragraphs 19, 34 and 43 above;

(ii) IFL refers to and repeats the matters pleaded above at subparagraphs 68(b)(iv) – (ix);

(iii) in the premises, the risk that the matters the subject of the APRA Guidance Information would cause any significant financial consequences for IFL was low;

(c) says that, to the extent that the pleaded APRA Guidance Information existed (which is denied) and was information of which IFL was aware (which is denied), the APRA Guidance Information was not information that as at and from the commencement of the Relevant Period, would, or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of IFL shares, within the meaning of s 677 of the Corporations Act, including for the reasons identified above in subparagraph 72 (b);

(d) says that, to the extent that the pleaded APRA Guidance Information existed (which is denied) and was information of which IFL was aware (which is denied), the APRA Guidance Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the

price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, including for the reasons identified above in subparagraph 72 (b);

- (e) says that, even if the APRA Guidance Information was information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, the APRA Guidance Information fell within an exception to Listing Rule 3.1 as set out in Listing Rule 3.1A, because the APRA Guidance Information as pleaded:
 - (i) concerned incomplete proposals; and/or
 - (ii) was generated for internal management purposes; and
 - (iii) was confidential and the ASX had not formed the view that it had ceased to be confidential; and
 - (iv) was information that a reasonable person would not expect to be disclosed;
- (f) otherwise denies the allegations in paragraph 72.

73 As to paragraph 73, IFL:

- (a) refers to and repeats paragraphs 62, 63 and 72 above;
- (b) otherwise denies the allegations.

74 As to paragraph 74, IFL:

- (a) refers to and repeats paragraphs 62, 63, 72 and 73 above;
- (b) otherwise denies the allegations.

75 IFL denies the allegations in paragraph 75.

(C1) Announcement Information Contravention

75A. As to paragraph 75A, IFL:

- (a) refers to and repeats paragraphs 63A and 63B above;
- (b) says that, to the extent that the pleaded Announcement Information existed (which is denied) and was information of which IFL was aware (which is denied), the Announcement Information was not information that as at and from the commencement

of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of s 674 (2)(c) of the Corporations Act, including because:

- (i) the Announcement Information concerns the use of Reserves by IIML and Questor as a source of compensation for errors in the processing of investment instructions and the overpayment of income in the limited circumstances referred to in paragraphs 19, 34 and 43 above;
 - (ii) IFL refers to and repeats the matters pleaded above at subparagraphs 68(b)(iv) – (ix);
 - (iii) in the premises, the risk that the matters the subject of the Announcement Information would cause any significant financial consequences for IFL was low;
- (c) says that, to the extent that the pleaded Announcement Information existed (which is denied) and was information of which IFL was aware (which is denied), the Announcement Information was not information that as at and from the commencement of the Relevant Period, would, or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of IFL shares, within the meaning of s 677 of the Corporations Act, including for the reasons identified above in subparagraph 75A (b);
- (d) says that, to the extent that the pleaded Announcement Information existed (which is denied) and was information of which IFL was aware (which is denied), the Announcement Information was not information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, including for the reasons identified above in subparagraph 75A (b);
- (e) says that, even if the Announcement Information was information that as at and from the commencement of the Relevant Period, a reasonable person would expect to have a material effect on the price or value of IFL shares, within the meaning of ASX Listing Rule 3.1, the Announcement Information fell within an exception to Listing Rule 3.1 as set out in Listing Rule 3.1A, because the Announcement Information as pleaded:
- (i) concerned incomplete proposals; and/or
 - (ii) was generated for internal management purposes; and

- (iii) was confidential and the ASX had not formed the view that it had ceased to be confidential; and
- (iv) was information that a reasonable person would not expect to be disclosed;
- (f) otherwise denies the allegations in paragraph 75A.

75B As to paragraph 75B, IFL:

- (a) refers to and repeats paragraphs 63A, 63B, 63C, 64 and 75A above;
- (b) otherwise denies the allegations.

75C As to paragraph 75C, IFL:

- (a) refers to and repeats paragraphs 63A, 63B, 63C, 64, 75A and 75B above;
- (b) otherwise denies the allegations.

75D IFL denies the allegations in paragraph 75D.

(D) The Disclosure Contraventions were continuing

76 IFL denies the allegations in paragraph 76

VIII. MISLEADING AND DECEPTIVE CONDUCT

(A) IFL's public statements

77 As to paragraph 77, IFL:

- (a) admits that that it made the statements set out in Schedule 3 to the CLS at paragraphs 2, 4, 6, 8, 10, 12, 14, 16, 18, 19, 20, 23, 25, 27, 28, 29, 30, 31, 32, 33, 35, 38, 39, 40, 41, 44, 46, 48, 50, 51, 53 and 54;
- (b) otherwise does not admit the allegations and says further that:
 - (i) the statements set out in paragraphs 22 and 37 of Schedule 3 were not in the 28 August 2015 Media Release but in the IFL 2015 Annual Report;
 - (ii) as to paragraph 26 of Schedule 3, there was no 2017 Code of Conduct;
 - (iii) paragraphs 47 and 49 of Schedule 3 contain typographical errors;

- (iv) the statement in subparagraph 55.2 of Schedule 3 does not appear in the 2018 IOOF Code of Conduct;
- (c) will rely upon the full terms, effect and relevant context of each of the statements at trial.

(B) Continuous Disclosure Representation

78 As to paragraph 78, IFL:

- (a) admits that, throughout the Relevant Period, it represented to the Affected Market that it had procedures in place to ensure that it acted in accordance with the ASX Listing Rule requirements as to continuous disclosure;
- (b) admits that, in its 2016 Disclosure and Communications Policy, IFL represented that it complied with the continuous disclosure obligations in the ASX Listing Rules;
- (c) says that IFL complied with its continuous disclosure obligations throughout the Relevant Period;
- (d) further or alternatively, says that to the extent that the Continuous Disclosure Representation was made (which is denied), any such representation was a representation of opinion and IFL had reasonable grounds for that opinion;
- (e) otherwise does not admit the allegations in paragraph 78.

79 As to paragraph 79, IFL:

- (a) refers to and repeats paragraph 78 above; and
- (b) otherwise denies the allegations.

80 As to paragraph 80, IFL:

- (a) refers to and repeats paragraph 78 above;
- (b) says that the representations referred to above at subparagraphs 78 (a) and (b) were continuing representations from the time they were made;
- (c) says further or alternatively that, if the Continuous Disclosure Representation was implied from the statements at Schedule 3 paragraph 1 – 16 of the CLS (which is

denied), then it admits that the Continuous Disclosure Representation was a continuing representation in the Relevant Period;

(d) otherwise denies the allegations.

81 As to paragraph 81, IFL:

(a) denies the allegations;

(b) refers to and repeats paragraphs 64 to 76 above.

82 In relation to paragraph 82, IFL:

(a) admits that its conduct in making the statements set out in schedule 3 to the CLS was conduct which met the descriptions alleged in subparagraphs 82.1, 82.2 and 82.3;

(b) further or alternatively, says that if the conduct pleaded in paragraphs 77 to 79 was conduct engaged in by IFL (which is denied), that conduct would meet the descriptions alleged in subparagraphs 82.1, 82.2 and 82.3;

(c) otherwise denies the allegations.

83 IFL denies the allegations in paragraph 83.

(C) Regulatory Engagement Representation

84 As to paragraph 84, IFL:

(a) admits the allegations;

(b) says that the Regulatory Engagement Representation was a statement of opinion for which it had reasonable grounds.

85 As to paragraph 85, IFL:

(a) says that it dealt with ARPA in an open and cooperative manner throughout the Relevant Period in relation to the matters alleged, and accordingly the Regulatory Engagement Representation did not require correction or qualification;

(b) otherwise denies the allegations.

86 IFL admits the allegations in paragraph 86.

87 As to paragraph 87, IFL:

- (a) denies the allegations;
- (b) refers to and repeats the paragraphs 55, 56, 62 and 63 above.

88 Subject to the matters pleaded above at paragraph 85, IFL admits the allegations in paragraph 88.

89 IFL denies the allegations in paragraph 89.

(D) Corporate Governance Representation

90 IFL admits the allegations in paragraph 90.

91 As to paragraph 91, IFL:

- (a) says that it maintained the highest standards of corporate governance within the IOOF Group throughout the Relevant Period in relation to the matters alleged, and accordingly the Corporate Governance Representation did not require correction or qualification;
- (b) otherwise denies the allegations.

92 IFL admits the allegations in paragraph 92.

93 As to paragraph 93, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 55, 58 to 63C and 102 -104 above.

94 Subject to the matters pleaded above at paragraph 91, IFL admits the allegations in paragraph 95.

95 IFL denies the allegations in paragraph 95.

(E) Ethical Standards Representation

96 IFL admits the allegations in paragraph 96.

97 As to paragraph 97, IFL:

- (a) says that it was committed to conducting its business ethically throughout the Relevant Period in relation to the matters alleged, and accordingly the Ethical Standards Representation did not require correction or qualification;
- (b) otherwise denies the allegations.

98 IFL admits the allegations in paragraph 98.

99 As to paragraph 99, IFL:

- (a) denies the allegations;
- (b) refers to and repeats paragraphs 55, 58 to 63 and 102 -104 above.

100 Subject to the matters pleaded above at paragraph 97, IFL admits the allegations in paragraph 100.

101 IFL denies the allegations in paragraph 101.

IX UNCONSONCIONABLE CONDUCT

102 As to paragraph 102, IFL:

- (a) refers to and repeats paragraphs 17 to 50E above; and
- (b) otherwise denies the allegations.

103 IFL does not admit the allegations in paragraph 103.

104 As to paragraph 104, IFL:

- (a) refers to and repeats paragraphs 17 to 50E above; and
- (b) otherwise denies the allegations.

X CAUSATION, INCLUDING INDIRECT (MARKET-BASED) CAUSATION

105 As to paragraph 105, IFL:

- (a) admits the allegations in subparagraphs 105.1 and 105.2;
- (b) does not admit the allegation in subparagraph 105.3; and

(c) otherwise denies the allegations.

106 IFL denies the allegations in paragraph 106.

107 IFL denies the allegations in paragraph 107.

108 IFL denies the allegations in paragraph 108.

109 IFL denies the allegations in paragraph 109.

110 As to paragraph 110, IFL:

(a) does not admit subparagraph 110.1;

(b) denies the allegations in subparagraph 110.2.

XI LOSS AND DAMAGE

111 IFL denies the allegations in paragraph 111.

D QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

There are no questions in this matter appropriate for referral to a referee.

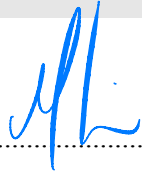
E A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION AT AN APPROPRIATE TIME

The parties have not attempted mediation.

The defendant is willing to proceed to mediation.

SIGNATURE

Signature of solicitor



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Name

Domenic Gatto by his employed solicitor Matthew Spain

Solicitor for

IOOF Holdings Limited

Date

27 September 2019

This pleading was prepared by Nicholas Owens SC, Brad Holmes and King & Wood Mallesons.