



## Supreme Court New South Wales

**Medium Neutral Citation:**

**Richmond Valley Council v JLT Risk Solutions Pty Ltd  
[2022] NSWSC 1761**

**Hearing dates:**

11, 12, 13, 14, 15, 18, 19, 21, 22, 25, 26, 27, 28 and 29  
October and 2, 3, 4, 9, 10, 11 and 12 November 2021

**Date of orders:**

19 December 2022

**Decision date:**

19 December 2022

**Jurisdiction:**

Equity - Commercial List

**Before:**

Williams J

**Decision:**

See paragraph [\[665\]](#)

**Catchwords:**

CONTRACT – where plaintiff and defendant were parties to a deed establishing a mutual risk scheme for the pooling of local councils’ property and public liability/professional indemnity risks and the insurance of those pooled risks – where plaintiff was a local council whose risks had been pooled and insured in accordance with the deed since 2000 and defendant was the manager of the scheme – where plaintiff and each other party to the deed appointed the defendant to advise the Board of the scheme in relation to the insurance to be obtained for the pooled risks and to negotiate and place that insurance on the instructions of the Board – where that insurance was renewed annually – where annual renewal practices included the defendant seeking information from the plaintiff in relation to its property and public liability/professional indemnity risks and issuing a renewal report naming the scheme as the “*recommended insurer*” or “*recommended provider*” for the plaintiff’s property and public liability/professional indemnity cover - where renewal report and other annual renewal documentation issued by the defendant also addressed the renewal of the plaintiff’s insurance policies that were outside the scope of the scheme and in respect of which the defendant acted as the plaintiff’s insurance broker – where, at the time the defendant issued the annual renewal documentation to the plaintiff, the plaintiff was required by

the deed to pay contributions to the scheme in respect of property and public liability/professional indemnity cover for the immediately forthcoming insurance year by reason of not having given the requisite period of notice of retirement from the scheme – whether the defendant acted as the plaintiff’s insurance broker in respect of property and public liability/professional indemnity cover during each annual renewal process and whether the defendant recommended to the plaintiff during each annual renewal process that the plaintiff’s property and public liability/professional indemnity cover for the immediately forthcoming insurance year should be arranged within the rubric of the scheme – whether the defendant and the plaintiff entered into a contract during each annual renewal process for the provision of such insurance broking services to the plaintiff, including an implied term requiring the defendant to exercise reasonable care and skill in providing such services – whether alleged contracts inconsistent with deed – whether alleged contracts breached – whether any such breach caused loss of opportunity for plaintiff to obtain alternative suitable property and public liability/professional indemnity insurance in the market at lower cost than its contributions to the scheme and/or loss of opportunity to negotiate or “*obtain*” lower contributions payable to the scheme - whether causes of action barred by application of s 14 of the *Limitation Act 1969* (NSW).

TORT – whether, in the circumstances referred to above, the defendant acted as the plaintiff’s insurance broker in respect of property and public liability/professional indemnity cover during each annual renewal process and whether the defendant recommended to the plaintiff during each annual renewal process that the plaintiff’s property and public liability/professional indemnity cover for the immediately forthcoming insurance year should be arranged within the rubric of the scheme – whether the defendant owed a duty to the plaintiff to exercise reasonable care and skill in providing any such broking services and in making any such recommendations to the plaintiff - whether alleged duty of care inconsistent with deed – whether known reliance by the plaintiff on any such recommendations - whether alleged duty of care breached – whether such any breach caused loss of opportunity for plaintiff to obtain alternative suitable property and public liability/professional indemnity insurance in the market at lower cost than its contributions to the scheme and/or loss

of opportunity to negotiate or “*obtain*” lower contributions payable to the scheme - whether causes of action barred by application of s 14 of the *Limitation Act 1969* (NSW).

EQUITY – fiduciary duties – whether, in the circumstances referred to above, the defendant acted as the plaintiff’s insurance broker in respect of property and public liability/professional indemnity cover during each annual renewal process and whether the defendant recommended to the plaintiff during each annual renewal process that the plaintiff’s property and public liability/professional indemnity cover for the immediately forthcoming insurance year should be arranged within the rubric of the scheme – whether defendant owed fiduciary duties to plaintiff – “no conflict” and “no profit” rules - where defendant entitled under the deed referred to above to such fees and remuneration as determined by the Board for the defendant’s services in relation to the scheme – whether conflict at the time of the alleged recommendations between defendant’s interests in earning fees under the deed and plaintiff’s interests in obtaining suitable property and public liability/professional indemnity insurance at best premium rates reasonably available to it in the market – whether the alleged recommendations (if made) were made in breach of fiduciary duties owed by defendant to plaintiff – whether causes of action barred by application of ss 14-15 of the *Limitation Act 1969* (NSW) applied by analogy.

REPRESENTATIVE PROCEEDINGS – where plaintiff brought proceedings on own behalf and on behalf of nineteen local councils who were also parties to the deed – common questions answered.

PRACTICE AND PROCEDURE – pleadings – amendment – where proposed amendments incoherent – leave to amend refused.

PRACTICE AND PROCEDURE – pleadings – essential function of pleadings – disputes about scope of pleaded causes of action – whether defendant required to read plaintiff’s pleading in a manner contrary to its plain terms and including certain unstated matters as a matter of “*necessary*” inference in order for the pleading to make “*coherent sense*” and to avoid fundamental difficulties that otherwise beset the plaintiff’s pleaded causes of action –

whether plaintiff entitled to run a case at final hearing that defendant had made the alleged recommendations with the intention of maintaining or maximising its fees to the detriment of the plaintiff – whether allegation amounts to an allegation of fraud – whether proper notice of the allegation given by the statement in the pleading that the defendant “pursued or advanced its own interests” by making the alleged recommendations – whether defendant taken by surprise.

**Legislation Cited:**

*Civil Procedure Act 2005* (NSW), ss 56-58, s 64  
*Limitation Act 1969* (NSW), ss 14-15

**Cases Cited:**

*Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1; [2018] HCA 43  
*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27  
*Badenach v Calvert* (2016) 257 CLR 440; [2016] HCA 18  
*Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11  
*Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151; (2020) 381 ALR 427; [2020] HCA 27  
*Branir Pty Ltd v Owiston Nominees (No. 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833  
*Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185  
*Caldwell v J A Neilson Investments Pty Ltd* (2007) 69 NSWLR 120; [2007] NSWCA 3  
*Chan v Zacharia* (1984) 154 CLR 178; [1984] HCA 36  
*CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121  
*Dansar Pty Ltd v Byron Shire Council* (2014) 89 NSWLR 1; [2014] NSWCA 364  
*Derry v Peek* (1889) 14 App Cas 337  
*DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd* [2022] NSWCA 165  
*English v Vantage Holdings Group Pty Ltd* [2021] WASCA 47  
*Forrest v Australian Securities and Investment Commission* (2012) 247 CLR 486; [2012] HCA 39  
*Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181  
*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1994] HCA 64  
*Ku-ring-gai Council v Chan* [2017] NSWCA 226

*Miles v Luneburger Franchising Pty Ltd* [2021] NSWCA 248  
*Mutual Life & Citizens Assurance Company Limited v Evatt* (1968) 122 CLR 556  
*Nadinic v Drinkwater* (2017) 94 NSWLR 518; [2017] NSWCA 114  
*Norwest Refrigeration Services Pty Ltd v Bain Daws (WA) Pty Ltd* (1984) 157 CLR 149  
*Norwich Fire Insurance Society Ltd v Brennans (Horsham) Pty Ltd* [1981] VR 981  
*PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd* (2020) 379 ALR 732; [2020] FCA 137  
*RinRim Pty Ltd v Deutsche Bank AG* [2017] NSWCA 169  
*Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No. 7)* [2019] QSC 241  
*Stewart v Australia and New Zealand Banking Group Ltd* [2020] NSWSC 1787  
*Taheri v Vitek* (2014) 87 NSWLR 403; [2014] NSWCA 209  
*Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192  
*YTO Construction Pty Ltd v Innovative Civil Pty Ltd* [2019] NSWCA 110

**Texts Cited:**

J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (5<sup>th</sup> ed, 2015)

**Category:**

Principal judgment

**Parties:**

Richmond Valley Council (Plaintiff)  
JLT Risk Solutions Pty Ltd (Defendant)

**Representation:**

Counsel:  
Mr C. Withers SC with Mr R. Yezerski, Mr P. Gaffney, Mr D. Barnett and Mr C. Mitchell (Plaintiff)  
Mr M. Darke SC with Mr I. Ahmed, Ms J. Findlay and Ms A. Hammond (Defendant)

Solicitors:

Quinn Emanuel Urquhart & Sullivan (Plaintiff)  
Herbert Smith Freehills (Defendant)

**File Number(s):**

2018/00371447

**Publication restriction:**

N/A

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# JUDGMENT

## I INTRODUCTION

- 1 These proceedings are representative proceedings commenced under Part 10 of the *Civil Procedure Act 2005* (NSW).
- 2 The plaintiff, Richmond Valley Council (**RVC**), is a local council constituted under the *Local Government Act 1993* (NSW). RVC was formed following the amalgamation of the Casino and Richmond River areas in accordance with that Act in February 2000.
- 3 The period of time relevant to RVC's claims in these proceedings is from 1 January 2009 to 3 December 2018 (the **Relevant Period**).
- 4 The defendant in these proceedings, JLT Risk Solutions Pty Ltd (**JLT**), was the manager of a mutual risk pool known as the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme (**Statewide** or the **Scheme**) during the Relevant Period. JLT also carried on business as an insurance broker.
- 5 The Scheme was established by a deed dated 22 March 1994 (the **Deed**) between JLT and the local councils named in Schedule 1 to the Deed (referred to as the **Members**). In broad terms, the Scheme was governed by a Board of Management (the **Board**) which established several funds to provide protection and indemnity for Members in respect of specific classes of liability or loss (**Funds**), including public liability and professional indemnity (the **Liability Fund** or **Liability Scheme**) and loss and damage to property (the **Property Fund** or **Property Scheme**). Members of each fund were obliged to contribute money to the Fund. The contributions paid to each Fund were pooled and applied in accordance with the Deed, including to purchase insurance on behalf of the Members collectively. Under the Deed, each Member appointed JLT to undertake several functions, including advising the Board in relation to the insurance to be purchased in respect of each Fund and placing that insurance on the instructions of the Board.
- 6 During the Relevant Period, the Members of the Scheme included RVC and the nineteen local councils on whose behalf it brings these proceedings (the **group members**). RVC was a Member of the Liability Fund and the Property Fund and each group member was a Member of one or both of those Funds.
- 7 In these proceedings, RVC alleges that JLT provided insurance broking services to it and to each group member individually in each year during the Relevant Period, including services in relation to their public liability and professional indemnity insurance and their property insurance. RVC claims that, in the course of providing those services to it and to each group member, JLT recommended to each of them that their public liability and professional indemnity insurance and property insurance be placed "*with Statewide*". RVC claims, that in providing those insurance broking services and making those recommendations to it and to each group member, JLT breached a duty of care owed to each of them in tort and pursuant to an implied term in broking

- services contracts said to have been entered into annually between JLT and RVC (and, separately, each group member). RVC also claims that JLT breached fiduciary duties allegedly to it and to each group member as their insurance broker.
- 8 Each of the alleged breaches is said to have occurred in the course of the renewal process undertaken during the period from March to June each year in respect of RVC's insurance program and each group member's insurance program for the forthcoming year commencing on 30 June.
- 9 RVC claims that each breach caused it and each group member to lose a valuable opportunity to obtain suitable public liability and professional indemnity insurance and property insurance independently of the Scheme at the best premium rates that were then reasonably available to them in the insurance market or, alternatively, the opportunity to negotiate a reduced level of contributions that each of them were required to pay to the Statewide Liability Fund and Property Fund. RVC claims damages for the alleged breaches of contract and general law duty of care and equitable compensation or an account of profits for the alleged breaches of fiduciary duty.
- 10 These reasons for judgment concern RVC's case against JLT and the questions common to RVC and the group members that are to be determined pursuant to orders made on 3 September 2021.
- 11 For the reasons that follow, each of RVC's three causes of action fails. The common questions are to be answered "no", with the exception of questions 1 and 2 which are to be answered: *"Yes, in the context of performing services for the renewal of the Primary Insurance for the Statewide Funds operated pursuant to the Deed dated 22 March 1994 establishing the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme, on the instructions of the Statewide Board and in circumstances where the group members were parties to that Deed and members of one or more of those Funds and were required by the Deed to pay contributions to those Funds as determined by the Board for the forthcoming insurance year."* In coming to those conclusions, I have considered all of the parties' extensive written and oral submissions, irrespective of whether the substance of each submission is expressly referred to in these reasons.
- 12 It is convenient to structure the balance of these reasons as follows:

## **Section II: Local Government**

This section sets out my findings about certain budgetary and financial constraints applicable to New South Wales local councils, drawing on unchallenged aspects of the evidence of Professor Joseph Drew, Mr Nicholas Tobin and Mr Gary Murphy. These constraints form part of the context in which other evidence in these proceedings falls to be considered.

Professor Drew is an Associate Professor of Public Policy and Local Government in the Institute for Public Policy & Governance at the University of Technology, Sydney, who was called by JLT as an expert witness in these proceedings.<sup>[1]</sup>

Mr Tobin became a member of the Statewide Board in June 1999, prior to the commencement of the Relevant Period. He remained on the Board until September 2014, holding the position of Deputy Chairman from March 2005 until December 2012 and then serving as Chairman until September 2014. During the whole of his time on the Board, Mr Tobin was Willoughby City Council's Director of Corporate Services until December 2007 and its General Manager between December 2008 and October 2014.<sup>[2]</sup>

During the Relevant Period, Mr Murphy was the General Manager of Lismore City Council from July 2011 to June 2018 and a member of the Statewide Board from December 2015 until June 2018.<sup>[3]</sup>

### **Section III: The Scheme**

This section sets out my findings about the nature of the Scheme and the manner in which it operated. Those findings are based on the provisions of the Deed, the report of Professor Pamela Hanrahan, the expert evidence of Mr Neil Donlevy, and evidence of Mr Leo Demer, Mr Naamon Eurell, Mr Adrian Jones, Mr William Warne, Mr Tobin and Mr Murphy.

Professor Hanrahan is Professor of Commercial Law and Regulation at the UNSW Business School in Sydney. JLT tendered a report of Professor Hanrahan which addressed the regulatory characterisation of mutual risk products and the relationship between the operator of a scheme for mutual risk products and members of such a scheme. Professor Hanrahan's report was admitted on the basis that it would be read as a legal submission.<sup>[4]</sup>

Mr Donlevy is an actuary with 25 years' experience working in the area of general insurance. JLT tendered three reports of Mr Donlevy.<sup>[5]</sup>

Mr Leo Demer was the Chief Executive Officer of JLT Australia & New Zealand during the Relevant Period. Mr Demer was not called to give evidence, but each party tendered (without opposition from the other) extracts from his affidavit served by the defendants in which Mr Demer described in broad terms the annual process involved in renewing the Primary Insurance for the Scheme's Annual Funds.<sup>[6]</sup> Thus, the limited evidence of Mr Demer that was admitted in the proceedings is unchallenged.

Mr Naamon Eurell has been employed by JLT since January 2010 and has held the role of the Executive Officer of Statewide since about January 2014. JLT read four affidavits of Mr Eurell.<sup>[7]</sup>

Mr Adrian Jones is the National Finance Manager of the Public Sector division of JLT. Mr Jones gave evidence in relation to financial aspects of the operation of the Scheme, including the fees paid to JLT and its wholly owned subsidiary Echelon Pty Limited.<sup>[8]</sup>



Mr William Warne was a member of the Executive Team of Queanbeyan City Council, which was a Member of the Scheme. Mr Warne was a member of the Statewide Board from September 2010 to July 2019. Mr Warne was the Acting Chair of the Board from December 2014 to June 2015 and the Chair of the Board from June 2015 to July 2019.  
[9]

#### **Section IV: The pleaded case**

This section provides a detailed summary of RVC's claims as stated in the Third Further Amended Commercial List Statement filed on 30 June 2021, JLT's defences to those claims as stated in the Second Further Amended Commercial List Response filed on 1 September 2021 and the common questions to be determined in these proceedings.

This section also explains my reasons for refusing an application made by RVC shortly before the commencement of the final hearing for leave to further amend its claims, and addresses several disputes that arose during the final hearing about the scope and substance of RVC's pleaded claims.

#### **Section V: Annual Renewals and Relevant Contemporaneous Events**

This section summarises the extensive evidence concerning the annual renewal process in respect of RVC's Statewide lines of cover during the Relevant Period, including documentary evidence and the evidence of three persons who held the position of General Manager of RVC during the Relevant Period: Mr Brian Wilkinson until March 2012,<sup>[10]</sup> Mr John Walker from March 2012 until February 2016,<sup>[11]</sup> and Mr Vaughan Macdonald from February 2016.<sup>[12]</sup>

The summary of the renewal process evidence also incorporates in chronological order evidence of various other matters and events relied on by RVC. Those matters emerge from contemporaneous documents, the evidence of RVC's General Manager and former General Managers, the evidence of Mr Eurell, and the evidence of Mr Warne. Aspects of the expert evidence of Mr John Saunders and Mr Paul Ellison are also relevant to some of those matters. RVC relied on the expert evidence of Mr Saunders, who is an insurance broker and insurance consultant with more than 40 years' experience.<sup>[13]</sup> JLT relied on the expert evidence of Mr Ellison, who has 44 years' experience working in the insurance industry, including in the insurance broking sector.

This section also refers to evidence concerning RVC's insurance arrangements in the period after it retired from the Scheme with effect from 30 June 2017. RVC relies on its insurance arrangements in that period as indicating that, in previous years, cheaper liability insurance and property insurance was available to it in the insurance market independently of the Scheme and/or cheaper Scheme Contributions could have been negotiated for it.

## **Section VI: The Alleged Broking Services and Recommendations**

This section considers the parties' submissions and sets out my findings about whether JLT provided the broking services and made the alleged recommendations that are the key premises of each of RVC's causes of action in these proceedings.

## **Section VII: The causes of action in contract and tort**

This section addresses the elements of RVC's causes of action in contract and tort, including RVC's claims for losses of opportunity said to have been caused by JLT's alleged breaches of contract and breaches of duty of care.

This section refers to aspects of the expert evidence of Mr John Saunders, Mr Paul Ellison, Mr Colin Fagen and Mr Neil Donlevy, who gave their oral evidence concurrently.<sup>[14]</sup> Mr Fagen was called by JLT and has extensive experience in senior management roles within insurers, including roles with QBE during the Relevant Period as CEO for Australia and New Zealand and as Group Head of Strategy and Chief Operational Officer.<sup>[15]</sup> I have introduced Mr Saunders, Mr Ellison and Mr Donlevy above.

This section also refers to the evidence of Mr Andrew Armitstead, the Chief Executive Officer of CivicRisk Mutual Ltd,<sup>[16]</sup> and Mr David Minty, an actuary who provides services to the mutual risk pools operated by CivicRisk Mutual Ltd.<sup>[17]</sup> Both of these witnesses were called by RVC.

## **Section VIII: The cause of action for breach of fiduciary duties**

This section addresses the elements of RVC's causes of action for alleged breach of fiduciary duties.

## **Section IX: Common questions**

This section sets out the answers to the common question.

## **Section X: Conclusion and orders**

This section sets out the orders of the Court in relation to RVC's claims.

## **II LOCAL GOVERNMENT**

- 13 Local councils have a wide remit, including the provision of local transport infrastructure, the provision of community recreation facilities such as parks and swimming pools, and the provision of domestic waste services.<sup>[18]</sup>
- 14 Local councils in New South Wales have three main sources of revenue: fees, rates and grants.<sup>[19]</sup>
- 15 There are legislative constraints on a high proportion of the fees that local councils may charge for services. There are also restrictions on the manner in which some of those

- fees earned may be spent by councils.<sup>[20]</sup>
- 16 Increases in rates from one year to the next are constrained by the maximum percentage increase or “cap” determined by the Independent Pricing and Regulatory Tribunal (**IPART**). During the Relevant Period, New South Wales local council rate increases were capped at between 1.5% and 3.6% per annum. Whilst a council may apply to increase their rates by an amount greater than the cap, this is a time-consuming and expensive process that commences in about November of each year. Applications are assessed in accordance with strict criteria. A successful council will first be entitled to issue rate notices reflecting the increase on 1 August the following year. Thus, there is a time period of approximately ten months that will elapse between a council recognising a need for additional revenue and beginning to receive that revenue, assuming that its application to IPART is successful.<sup>[21]</sup>
- 17 Whilst New South Wales local councils have access to federal government financial assistance grants, the manner in which those grants are allocated is not responsive to local council expenditure budget increases compared to previous years. Special purpose grants are available to local councils from the State government, but such grants are typically tied to specific infrastructure or services and are rarely made for the purpose of a council mitigating expenditure budget increases.<sup>[22]</sup>
- 18 The limited ability to absorb unforeseen cost increases is a significant and challenging factor that affects local government budgeting. It is important to local councils to avoid recurring costs that fluctuate materially from one year to the next. Specifically, the ability to achieve certainty and stability of insurance costs is beneficial for the administration of a local council’s budget. Increases in those costs by a percentage greater than the rates increase cap for the corresponding year is likely to have an impact on a council’s capacity to deliver other services in its community.<sup>[23]</sup>

### III THE SCHEME

19 Section 382 of the *Local Government Act 1993* (NSW) provides that a local council must make arrangements for its adequate insurance against public liability and professional liability.

20 The Scheme was established in the context of increasing difficulties faced by local councils in the late 1980s and early 1990s in placing insurance with commercial insurers and underwriters in the local and overseas insurance markets.

21 As referred to above, the Scheme was established by Deed dated 22 March 1994 between JLT and each local council named in Schedule 1 to the Deed. Schedule 1 listed the Members in ten regional groups (the **Regions**). The membership of the Scheme has changed from time to time. RVC became a Member with effect from 30 June 2000.

22 As will be apparent from the provisions of the Deed referred to below, the Scheme is a discretionary mutual risk product, which is a managed investment scheme.<sup>[24]</sup>

23 The provisions of the Deed and the salient features of the operation of the Scheme during the Relevant Period may be summarised as follows.<sup>[25]</sup>

24 The Recitals to the Deed stated:

“A. Each of the Members is a body corporate constituted for an area within the meaning of the New South Wales Local Government Act 1993.

B. In order to meet their insurance obligations under the Act, the Members wish to establish a scheme for purposes of:

(a) purchasing insurance in respect of public liability (including personal injury, damage to property and products liability), professional indemnity, property and fidelity guarantee; and

(b) indemnity in respect of liability not covered by such public liability, professional indemnity, property and fidelity guarantee insurance.

C. The Members wish to engage JLT to assist in the management of the scheme and the most efficient way of organising their insurance requirements.”

25 Clause 2.1.1 of the Deed provided:

“Each Member agrees with JLT to enter into this deed for the purposes of:

(a) purchasing insurance in respect of public liability (including personal injury, damage to property and products liability), professional indemnity, property and fidelity guarantee;

(b) establishing a scheme to be known as the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme for their indemnity in respect of Liability not covered by such public liability, professional indemnity, property and fidelity guarantee insurance;

(c) having its Claims managed and resolved; and

(d) promoting good risk management practices to minimise the occurrence and effect of Claims.”

26 The Scheme was governed by the Board, of which eleven representatives were elected by Members and three representatives were elected by JLT.<sup>[26]</sup> The convention adopted by Board members during the Relevant Period was that the JLT representatives on the Board attended meetings and participated in discussions but did

not vote on decisions made by the Board.<sup>[27]</sup> RVC was a Member in the Northern Rivers Region. At all times during the Relevant Period, the Board included a representative appointed by the Members in that Region.

27 Members of the Scheme were members of one or more of the Funds established by the Board. As I have already mentioned, it is the Liability Fund (also referred to as the Liability Scheme) and the Property Fund (also referred to as the Property Scheme) that are relevant to these proceedings, although RVC was also a Member of certain other Funds during the Relevant Period.<sup>[28]</sup>

28 For each Fund, the Board established a separate **Annual Fund** in respect of each **Fund Year** (defined as each period of twelve months commencing at 4pm on 30 June).<sup>[29]</sup>

29 Clause 3.3 provided:

“3.3.1 The Board of Management is authorised to manage and administer the Scheme in accordance with this deed. The Board of Management's functions include:

- (a) determining, in accordance with clause 6, the Primary Insurance to be purchased by Members in respect of each Fund Year;
- (b) determining, in accordance with clause 7, the initial and further Contributions to an Annual Fund for a Fund Year;
- (c) determining in accordance with clause 8 the amount to be paid from an Annual Fund to a Claiming Member in respect of a Liability;
- (d) determining, in accordance with clause 9.9, the amount of any surplus in an Annual Fund available for distribution to Members; and
- (e) such other functions as are contemplated in this deed or are reasonably necessary to manage and administer the Scheme.

3.3.2 The Board of Management is vested with all the powers it considers necessary or desirable to carry out its functions.

3.3.3 A decision or resolution of the Board of Management on any matter which is within its authority shall bind all of the Members.”

30 Clause 3.4 provided:

“The Board of Management may by ordinary resolution appoint (and replace) a person or persons to carry out any of its management and administrative functions upon such terms as it determines.”

31 As referred to in clause 3.1(a), the Board determined levels, coverage and terms of insurance to be purchased jointly by the Members of each Annual Fund (**Primary Insurance**). As part of this process, a delegation of Board representatives visited London in about March or April each year where they made presentations to underwriters and discussed areas of emerging risk, any risk programs that the Board was considering offering to Members, and issues relating to the state of the insurance market. The delegation typically comprised the Chairman of the Board, the chairs of the Finance Committee and Claims and Risk Management Committee of the Board. Those

delegates then reported back to the Board. JLT was responsible for negotiating and placing the Primary Insurance as determined by and on the instructions of the Board.  
[30]

- 32 The Primary Insurance was often described in contemporaneous documents as “*reinsurance*”, but that description is not strictly accurate. As explained by Mr Eurell, the Primary Insurance was commercial insurance that was placed to cover the obligations under the Deed to make payments to claiming Members out of Annual Funds. The Primary Insurance covered the exposure to make such payments in excess of any risk retained by the Member (by way of an individual excess or deductible) or retained by the relevant Annual Fund in the form of a self-insured retention. During the Relevant Period, the Property Fund had a self-insured retention but the Liability Fund did not. The Property Fund’s self-insured retention was funded by Contributions paid by Members.<sup>[31]</sup>
- 33 The Board determined the total **Contributions** to be paid by Members in respect of each Annual Fund for each Fund Year. The Board delegated to JLT the task of determining each Member’s individual Contribution and a **Call** was issued to each Member to pay that Contribution.<sup>[32]</sup> In order to facilitate these determinations, each Member was required to notify JLT in writing at least one month prior to the beginning of the Fund Year of the deductible that the Member wished to apply to it for each Annual Fund.<sup>[33]</sup>
- 34 For the Liability Fund, the Board determined the percentage by which total Contributions were to be increased or decreased for the forthcoming year and JLT then typically increased or decreased each individual Member’s Liability Fund Contributions by that same percentage. This approach was subject to any further adjustments to reflect changes to a Member’s deductibles or other issues affecting a specific Member.  
[34]
- 35 Each Member’s Contributions to the Property Fund from one year to the next were determined by applying an Industrial Special Risks (**ISR**) rate to the Member’s total asset value. The ISR rate is a percentage rate calculated as the number of cents per \$100 charged for insurance for each asset. Each Member’s ISR rate when they first became a member of the Property Fund was calculated on the basis of their assets and their property insurance premiums immediately prior to becoming a member of the Property Fund. JLT reviewed the ISR rate for each Property Fund Member from time to time, having regard to factors such as increases in that Member’s total asset value. There was a degree of flexibility in the calculation of each individual Member’s ISR rate and Contribution to the Property Fund.<sup>[35]</sup>
- 36 From time to time, JLT undertook a “*benchmarking*” exercise in relation to the Liability Scheme and/or Property Scheme Contributions payable by a particular Member. This essentially involved JLT comparing the Contributions payable by the Member to Contributions payable by other Members of similar size, location and risk profile, with a view to “*doing equity*” between Members. This process was typically undertaken for a

particular Member if they indicated dissatisfaction with the Scheme or with their Contributions or were considering retiring from the Scheme. The object of “benchmarking” for dissatisfied Members was to “do equity” between all Members of the Scheme and thereby preserve the membership of the Scheme, including the dissatisfied Member. A “benchmarking” process across all Liability Scheme Members was undertaken by JLT at the request of the Board commencing in the 2013-2014 insurance year.<sup>[36]</sup>

37 It was open to the Board to determine that further Contributions were required in respect of an Annual Fund, including if there would otherwise be a deficit in the Annual Fund.<sup>[37]</sup>

38 The Board had regard to the advice and recommendations of JLT in relation to Primary Insurance and Contributions. Clause 5.1 of the Deed required JLT to advise the Board about those matters, as referred to below. For the purpose of the Board determining the level of Contributions required for each Annual Fund in each Fund Year, JLT included in the draft budget for each Annual Fund modelling of different scenarios of Contribution changes. In deciding whether to make any change to the level of Contributions, the Board considered those scenarios and also took advice from auditors and actuaries in relation to the financial position of the Funds and the value of anticipated claims.<sup>[38]</sup>

39 As referred to above, JLT was required to issue a Call to each Member for any Contribution payable by that Member. Members were required to pay Contributions within 20 business days after the issue of a Call. JLT was obliged to take such action as required by the Board to recover unpaid Contributions from Members.<sup>[39]</sup>

40 The Scheme had a **Claims Committee** comprising three representatives appointed by the Board and two representatives appointed by JLT.<sup>[40]</sup> Members were required to notify the Claims Committee of any claim, threatened claim or circumstance likely to give rise to a claim against them.<sup>[41]</sup> The Claims Committee was then required to investigate the claim, assess whether it was covered by an Annual Fund, make any appropriate claim under the relevant Primary Insurance and report to and advise the Board with respect to the claim.<sup>[42]</sup> A claim was covered if it would have been covered by the relevant Primary Insurance if the only retention under that Primary Insurance had been the deductible applicable to the individual claiming Member for the relevant cover.<sup>[43]</sup> The “Scheme wording” issued to Members replicated the wording of the policy issued by the lead insurer in the Primary Insurance arrangements for the relevant Annual Fund.<sup>[44]</sup>

41 If the Board determined that a claim was covered, the defence or settlement of the third party’s claim against the Member would be managed by the Claims Committee (or JLT on behalf of the Claims Committee) and the claim would be paid out of the relevant Annual Fund in the amount determined by the Board.<sup>[45]</sup>

42 Clause 5.1 of the Deed provided (emphasis added):

**“Each Member appoints JLT and JLT agrees to:**

- (a) provide representatives to the Board of Management and the Claims Committee in accordance with this deed;
- (b) advise Members in relation to loss prevention and risk minimisation techniques;
- (c) to organise a budget for each Annual Fund in respect of each Fund Year (setting out the current value, the anticipated claims for payment of Liabilities, the aggregate Contributions it recommends be paid and the recommended Contribution from each Member);**
- (d) advise in relation to the required Contributions for any Fund Year and the amount of Contributions to be required from each Member;**
- (e) advise on and effect Primary Insurance on the instructions of the Board of Management;**
- (f) manage the handling of Claims in conjunction with the Claims Committee in accordance with clause 8; and
- (g) provide budgets and reports to the Board of Management in such form and at such intervals as the Board of Management from time to time reasonably requires as to:
  - (i) the ability of the Annual Fund to meet actual and anticipated Liabilities for any Fund Year;
  - (ii) the desirability or need for further Contributions for any Fund Year;
  - (iii) the availability of money to distribute by way of surplus under clause 9.9; and
  - (iv) such other matters as the Board of Management reasonably requires.”

43 Clause 2.4.3 of the Deed provided:

“JLT will participate in the Scheme to provide advice and assistance in relation to all aspects of the Scheme, to manage Claims in conjunction with the Claims Committee and to arrange Primary Insurance.”

44 JLT was appointed as the **Fund Manager** to hold each Annual Fund as a separate and distinct fund in trust to be applied for the benefit of Members in accordance with the Deed and to administer and manage the Annual Funds on the terms of the Deed,<sup>[46]</sup> including paying claims out of Annual Funds in accordance with Board determinations on the advice of the Claims Committee and advising the Board of any need to make a Call on Members if an Annual Fund was insufficient to pay such claims.<sup>[47]</sup> Upon



payment of a claim out of an Annual Fund, the Fund Manager was subrogated to the rights of the claiming Member to recover amounts from any other person in relation to the matters that gave rise to the claim.<sup>[48]</sup>

45 In the event of any surplus in an Annual Fund, the Board could determine (with the agreement of the Fund Manager, which was not to be unreasonably withheld) to distribute the surplus to Members of that Fund or to retain the surplus within the Annual Fund for such purposes as determined by the Board, including to meet a potential deficiency in the Annual Fund for any subsequent year.<sup>[49]</sup>

46 Clause 9.6 of the Deed provided that a Member had no entitlement to be paid from an Annual Fund other than in accordance with the Board's determination of a claim by the Member or a determination of the Board concerning distribution of any surplus.

47 Clauses 9.7 and 9.8 of the Deed required accounts to be maintained in respect of each Annual Fund and for those accounts to be audited annually.

48 Pursuant to clause 11.1.1 of the Deed, each Member agreed to pay JLT and the Fund Manager the fees agreed with the Board from time to time in consideration for JLT's services to Statewide.

49 During the Relevant Period, JLT received management fees for its services as Scheme manager. For the Property Scheme, the management fee was 15% of total Contributions, invoiced on an annual basis subject to adjustments as they arose. For the Liability Scheme, the management fee was a fixed fee determined annually by the Board and invoiced on a monthly basis.<sup>[50]</sup>

50 In addition to the management fees, JLT earned brokerage on the placement of Primary Insurance for the Scheme.<sup>[51]</sup> Consultancy fees were paid to JLT or its wholly owned subsidiary Echelon Pty Limited for services that the Board engaged JLT or Echelon Pty Limited to provide from time to time, including risk management services, loss adjusting services and forensic services relating to specific events.<sup>[52]</sup>

51 Clause 10.3 of the Deed provided that a Member may retire from one or more Funds with effect from the end of a Fund Year by giving a specified period of notice in writing to the Board, JLT and the Fund Manager. The notice period was three months at all relevant times until 1 July 2013, when it was increased to 12 months. That is to say, a notice period of 12 months applied for all Fund Years ending on 30 June 2014 or later.

52 Clause 2.3 of the Deed relevantly provided:

"No partnership is created by this deed. Except as provided in this deed the parties' obligations under this deed are several and no party has authority to bind another. This deed constitutes separate agreements between each Member and JLT and does not constitute any agreement between any of the Members."

53 Clause 2.2 provided:

"Notwithstanding any other provision of this deed each Member undertakes for itself and its representatives on the Board of Management and Claims Committees, to act in relation to this Scheme fairly and in good faith."

54 Clause 2.6.1 provided:

“JLT shall take such actions with respect to enforcement or recovery against any Member as the Board of Management directs.”

55 As JLT submitted, the Scheme is not an insurer. It is a contractual arrangement binding on Members and JLT that provides cover to the Members of each Fund established by the Board, underwritten by the Primary Insurance and also, in the case of the Property Fund, the self-insured retention. As Mr Eurell deposed:-<sup>[53]</sup>

“The model of Statewide is to provide cover to its members as a whole. The aggregate deductible and reinsurance is worked out on a collective basis. Therefore, consideration of individual factors is less relevant to the calculation of an individual member’s contribution. For example, if a Statewide member suffers large losses in any particular year, this will not have any effect on the member’s contribution for the following year ... Rather, a member’s contribution will primarily be affected by the experience of the membership as a whole, or external market forces (which themselves are somewhat diminished by the collective bargaining power of the mutual). This is reflected in the collective increase or decrease to the overall contributions as determined by the Board ... because the amount the Board needs to fund Statewide is affected by the cost of reinsurance Statewide needs to purchase.

The Statewide model was established to enable councils to opt out of the insurance market by leveraging the benefits of being involved in a mutual scheme, which enabled a pooling of risks and offering those pooled risks to the insurance market, rather than councils having to approach the insurance market alone. In some instances this can mean that a council could be paying more than what might be available for that particular council from the open market in a very soft market. But in other instances (e.g. a harder insurance market), it means paying less than what might be available for a particular council in the open market, or indeed the ability to obtain cover that it otherwise would not be able to obtain on its own. If a council does not want to participate in the mutual model, and would prefer to re-enter the open market, the council can elect to retire from Statewide and enter the open market ...

Open Market insurance on the other hand, involves the provision of cover for the specified risks to an individual insured on a standalone basis by considering the risk profile of the council on an individual basis. Its availability, cost and scope, is subject to fluctuations in the market and factors peculiar to the individual council.”

56 RVC chose to become a Member of Statewide by acceding to the Deed on 30 June 2000. Contrary to RVC’s submission,<sup>[54]</sup> the evidence does not establish that RVC made that decision on the advice or recommendation of JLT.<sup>[55]</sup>

57 Upon becoming a Member of Statewide, RVC ceased to be an individual participant in the commercial insurance market in respect of the risks for which it was covered by the relevant Statewide Funds<sup>[56]</sup> and was bound by the Deed unless and until it retired from the Statewide Funds by giving notice in accordance with clause 10.3 of the Deed. As will be seen in Section V below, RVC gave notice of its retirement from all Funds on 6 June 2016. Until that notice took effect on 30 June 2017,<sup>[57]</sup> RVC was a Member of the Liability Fund, the Property Fund and certain other Funds within the Scheme that are not relevant to these proceedings.

58 RVC also had many other lines of insurance independently of the Scheme for risks that were not covered by its membership of any Fund within the Scheme.<sup>[58]</sup> It is convenient to refer to those insurances as the **non-Statewide lines of cover** to distinguish them from RVC’s **Statewide lines of cover**. As I have already mentioned, the relevant Statewide lines of cover for the purpose of these proceedings are property insurance

and public liability and professional indemnity insurance. I shall adopt the parties' convention of referring to public liability and professional indemnity insurance simply as **liability insurance**.

59 Mr Donlevy reviewed the Scheme's annual reports and analysed the performance of the Liability Fund and Property Fund during the period from 2009 to 2017.

60 In relation to the Liability Fund, Mr Donlevy's analysis revealed that:<sup>[59]</sup>

- (1) approximately 79% of Contributions were set to meet the costs of "*reinsurance*" (meaning the Primary Insurance);
- (2) approximately 15% of Contributions were set to meet Liability Fund expenses (such as administration fees, claims management fees, funds management fees and risk management fees);
- (3) approximately 5% of Contributions were set to meet general operating expenses of the Scheme; and
- (4) total surpluses of \$37 million had been generated over the period from 2009 to 2017, of which \$24 million had been paid to Members as at the date of Mr Donlevy's report as distributions of surplus (or "*rebates*"), meaning that 65% of the surpluses achieved had been returned to Members.

61 Mr Donlevy observed that Contributions to the Liability Fund had remained relatively stable in dollar terms for the 2009 to 2017 period. The surplus funds of the Liability Fund had increased over time until 2015 and had been reduced thereafter by distributions paid to Members. Mr Donlevy expressed the opinion that it is necessary for the Liability Fund to hold some "*buffers*" even though there is a nil self-retention for that

Fund. The reasons for holding “*buffers*” include the need to cover risks in relation to reinsurance recoverability, given the very substantial role of reinsurance in the Liability Fund.<sup>[60]</sup>

62 In relation to the Property Fund during the period from 2009 to 2017, Mr Donlevy’s analysis revealed that:<sup>[61]</sup>

- (1) approximately 49% of Contributions were set to meet the cost of “*reinsurance*” and a further 25% of Contributions were set to meet the net cost of claims up to the self-insured retention;
- (2) approximately 16% of Contributions were set to meet Property Fund expenses (such as administration fees, claims management fees, funds management fees and risk management fees);
- (3) approximately 3% of Contributions were set to meet general operating expenses of the Scheme; and
- (4) total surpluses of \$30 million had been generated by the Property Fund, of which \$24 million had been paid to Members as surplus distributions (or “*rebates*”), meaning that 81% of the surpluses achieved had been returned to Members.

63 In a subsequent report, Mr Donlevy analysed information for the period from 2009 to 2019 and concluded that 72% of all accounting surplus generated by the Liability Fund and 97% of all accounting surplus generated by the Property Fund across that period had been distributed to Members. Mr Donlevy opined that the accounting surpluses did not indicate that Contributions for the Liability Fund and the Property Fund were set at a level “*higher than they needed to be*”.<sup>[62]</sup>

64 Mr Donlevy compared the combined commission and general expense ratios of each of the Property Fund and the Liability Fund with the same ratios for the Australian commercial property and liability insurance sectors for the period based on industry sourced from the Australian Prudential Regulation Authority for the period from 2012-2013 to 2018-2019. Mr Donlevy found that the Property Fund ratio averaged 19% of Contributions across that period compared to an average of 24% of gross premiums for the Australian commercial property insurance sector. The Liability Fund ratio averaged 23% of Contributions compared to 24% of gross premiums for the Australian liability insurance sector.<sup>[63]</sup>

65 RVC did not challenge Mr Donlevy’s analysis referred to above in cross-examination. Nor did RVC adduce any expert evidence contrary to Mr Donlevy’s analysis.

66 During the Relevant Period until it ceased to be covered by the Liability Fund on 30 June 2017, RVC paid the following Contributions and received the following rebates from the Liability Fund:<sup>[64]</sup>

<b>Liability Scheme</b>
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Year	Deductible	Contribution	Rebate	Contribution less rebate
2008-2009	\$12,500	\$335,800	\$23,982	\$311,818
2009-2010	\$12,500	\$319,010	\$14,246	\$304,764
2010-2011	\$12,500	\$319,010	\$15,675	\$303,335
2011-2012	\$12,500	\$319,010	\$17,962	\$301,048
2012-2013	\$12,500	\$330,175	\$18,949	\$311,226
2013-2014	\$12,500	\$341,400	\$15,060	\$326,340
			\$17,092	
2014-2015	\$12,500	\$349,252	\$25,983*	\$306,177
2015-2016	\$12,500	\$357,634	\$16,358	\$341,276
2016-2017	\$12,500	\$364,072	-	\$364,072

67 The Contributions paid by RVC to the Property Fund (adjusted at the end of each Fund Year according to any movements in RVC's total asset value or "TAV" during the year) and the rebates paid to RVC from the Property Fund were:<sup>[65]</sup>

Property Scheme						
Year	Deductible	TAV	Contribution	Property-adj	Rebate	Contribution less rebate
2008-2009	\$5,000	\$123,953,629	\$325,998	-\$31,181	\$106,729	\$188,088
2009-2010	\$5,000	\$112,111,729	\$317,001	-\$11,561	\$8,240	\$297,200
2010-2011	\$5,000	\$103,943,843	\$293,880	\$42,650	\$34,795	\$301,735

2011-2012	\$5,000	\$131,985,215	\$352,703	\$5,717	\$26,137	\$332,283
2012-2013	\$5,000	\$140,252,567	\$364,137	-\$24,490	\$10,892	\$328,755
2013-2014	\$5,000	\$121,214,034	\$315,156	\$1,153	\$-	\$316,309
2014-2015	\$5,000	\$122,100,666	\$317,462	\$3,578	\$23,306	\$297,734
2015-2016	\$20,000	\$124,853,185	\$262,192	\$3,524	\$36,207*	\$229,409
2016-2017	\$20,000	\$129,490,068	\$196,825	\$-	\$-	\$196,825

68 On 17 March 2000, the Board adopted a Code of Ethics.<sup>[66]</sup>

69 The Introduction to the Code states:

“The Board of Management, at its June 1999 meeting, considered the issue of ethical procedures to be followed when conflicts of interest are perceived to exist with Jardines Lloyd Thompson, and/or members of the Board. Three examples of potential conflict were raised:

- Jardine Lloyd Thompson representing two councils that may be in conflict with each other,
- Jardine Lloyd Thompson representing a council when the Board has denied indemnity, and
- A Board member coming from a council on which indemnity has been denied.

It was considered appropriate that a Code of Ethics should be prepared to assist the Board and members of staff from Jardine Lloyd Thompson in exercising their duties and obligations. The Code should provide guidance for Board and staff members to act honestly and exercise a reasonable degree of care and diligence in carrying out their functions.”

70 As will be referred to later in these reasons, RVC relied on the Board’s recognition of the potential for the first two conflicts described above as evidence relevant to the proper characterisation of JLT’s role vis-à-vis local councils who were Members of Statewide.

71 As I have already mentioned, Mr Demer was the Chief Executive Officer of JLT Australia & New Zealand during the Relevant Period. Mr Demer’s description of the steps involved in the annual renewal of the Primary Insurances for the Statewide Funds was incorporated into RVC’s particulars of the insurance broking services that it claims JLT provided to it and to each group member with respect to their annual insurance programs, the particulars of the broking services contracts that RVC claims JLT entered into with it and with each group member annually, and the recommendations that RVC

claims JLT made to it and to each group member annually to “*obtain or renew*” its liability and property cover “*through Statewide Mutual*”.<sup>[67]</sup> As will be seen in Section IV below, those alleged broking services, contracts and recommendations are the key premises underlying each of the causes of action against JLT. Mr Demer described the annual renewal process as involving the following steps:<sup>[68]</sup>

- (1) in about January or February, JLT prepared budgets for each Annual Fund for consideration by the Finance Committee;
- (2) in about March, JLT issued declarations to each Member detailing their risk and insurance covers due for renewal, or available to the Member, in the forthcoming year (the **Insurance Declarations**). The information provided by Members in the completed Insurance Declarations was provided to insurers for the purpose of placing Primary Insurance for each Annual Fund and was also used for the Scheme’s assessment of the risks to which Annual Funds were exposed, the cover required, and the costing for that cover in the forthcoming year;
- (3) in late May or early June, JLT issued a renewal report to each Member which detailed the proposed risk cover program for that Member (the **Renewal Reports**). Members generally had 21 days within which to accept the proposal, ask questions or take other action;
- (4) in about mid-June, Members provided renewal instructions to JLT in relation to the cover that the Member wished to be placed; and
- (5) in about July, JLT issued a summary of cover to each Member summarising the risks for which that Member was covered (the **Summary of Cover**).

72 The annual renewal process insofar as it related to RVC is described in much greater detail in Section V of these reasons. As will be seen, the Insurance Declarations that JLT issued to RVC set out details of RVC’s Statewide lines of cover and non-Statewide lines of cover that were falling due for renewal. As indicated by Mr Demer’s description of steps 3 and 4 of the process above, RVC had choices to make in respect of its Statewide lines of cover concerning matters such as excess or deductible amounts and sub-limits of liability for various components of the property cover.

73 It is common ground between the parties that the form and contents of the documents that JLT issued to RVC during annual renewal processes in the Relevant Period were the same as the documents that JLT issued to group members, save for matters that were specific to each local council (such as deductibles, property values and sub-limits for certain components of the property cover).<sup>[69]</sup>

## IV THE PLEADED CASE

### Commercial List Statement allegations and JLT's responses

#### *Alleged representations*

- 74 RVC alleges that, by certain statements made in Renewal Reports issued to RVC and group members as part of each annual renewal process during the Relevant Period, JLT held itself out to RVC and group members as:-<sup>[70]</sup>
- (1) one of the largest insurance brokers in Australia and the world;
  - (2) possessed of the expertise to deliver the most comprehensive range of insurance and risk solution products and services available to local government authorities across Australia; and
  - (3) capable of ensuring that councils receive a well designed insurance programme at a competitive premium cost.
- 75 JLT does not admit making the representations above to RVC or group members during the Relevant Period.<sup>[71]</sup>

#### *The alleged Broking Services and Recommendations*

- 76 RVC alleges that, by engaging in the annual renewal practice described by Mr Demer,<sup>[72]</sup> JLT provided insurance broking services to RVC and to each group member individually during the Relevant Period *“by designing and providing advice with respect to its annual insurance programme and by placing or arranging its Property and/or Public Liability and Professional Indemnity insurance with Statewide Mutual”*. The *“annual insurance programme”* refers to the suite of insurance cover (including liability cover and property cover) to be placed for RVC and each group member for the insurance year that was to commence on 30 June immediately following the relevant annual process. RVC relies on the Insurance Declarations, Renewal Reports, Financial Services Guides, Summary of Cover documents and the invoices for Statewide Liability and Property Scheme Contributions as evidencing and describing those alleged Broking Services. RVC's Third Further Amended Commercial List Statement defines these services allegedly provided annually to RVC and each individual group member as the ***“Broking Services”*** and I will use the same term.<sup>[73]</sup>
- 77 RVC further alleges that, by preparing and providing an Insurance Declaration and Renewal Report to RVC and each group member in the course of providing the alleged annual Broking Services, omitting at the same time to recommend or identify any liability insurance and/or property insurance policy, arrangement or underwriter *“besides Statewide Mutual”*, JLT advised or recommended to RVC and each group member that it should obtain or renew its liability insurance and/or property insurance *“through Statewide Mutual”*. RVC's Third Further Amended Commercial List Statement



defines this alleged annual advice or recommendation as the “**Recommendations**” and I will use the same term.<sup>[74]</sup>The Recommendation allegedly made during each annual renewal process was directed to the immediately forthcoming year.<sup>[75]</sup>

78 RVC alleges that, as a result of the alleged Recommendations, RVC and each group member “*instructed or authorised*” JLT during the Relevant Period to place or arrange its property and liability insurance cover with Statewide for the immediately forthcoming year by signing and returning to JLT an authorisation form and/or by paying the invoices sent by JLT in respect of liability cover and property cover for that year.<sup>[76]</sup>

79 For reasons that will become apparent, it is relevant to note that those are the only things that RVC and each group member is alleged to have done as a result of the alleged Recommendations. For example, there is no allegation that RVC and each group member made any decision concerning their insurance program for any subsequent year.

80 Throughout the hearing, the parties adopted the term “*individual broking relationship*” to refer to the relationship that RVC alleges was created by the provision of the Broking Services and “*individual broker*” to refer to the alleged role of JLT within that individual broking relationship. I will adopt the terminology of **individual broking relationship** and **individual broker** to refer to the alleged role of JLT in allegedly providing the Broking Services and making the Recommendations.

81 JLT denies that it provided the alleged Broking Services or made the alleged Recommendations to RVC or any group member and refers to the Statewide membership of RVC and each group member during the Relevant Period and the provisions of the Deed. In particular, JLT refers to the provisions of the Deed pursuant to which the Board was responsible for governing and managing the Scheme and the majority of the Board was appointed by Members. JLT also relies on the Board’s functions under the Deed, which included determining the amount and terms of the Primary Insurance to be purchased by the Members jointly and determining the Contributions for each Annual Fund. In paragraph 9 of its Second Further Amended Commercial List Response, JLT:

“(b) says that the Plaintiff and each Group Member was a Member under the Statewide Deed at certain times during the Relevant Period;

(c) says that the Plaintiff and each Group Member was a Member under the Statewide Deed until such time as it elected to retire from the Statewide Scheme and gave notice in accordance with clause 10.3 of the Statewide Deed;

#### Particulars

Prior to 1 July 2013, the required period of notice for retirement was at least 3 months

From 1 July 2013, the required period of notice for retirement was at least 12 months

(d) says that the Statewide Deed recorded, and it was the fact that, each Member entered into the Statewide Scheme for the purpose of:

(i) purchasing insurance in respect of public liability (including personal injury, damage to property and products liability), professional indemnity, property and fidelity guarantee;

(ii) their indemnity in respect of Liability (as that term is defined in the Statewide Deed) not covered by such public liability, professional indemnity, property and fidelity guarantee insurance;

(iii) having their Claims Liability (as that term is defined in the Statewide Deed) managed and resolved; and promoting good risk management practices to minimise the occurrence and effect of Claims”

82 JLT says that each Member of the Scheme appointed JLT to advise on and effect Primary Insurance from time to time on the instructions of the Board. The insurance so effected was placed on behalf of RVC and group members (collectively with other Members of each relevant Fund) on the instructions of the Board in accordance with the Deed. The insurance was not arranged or placed “*with Statewide*”, which was neither an insurer nor a legal entity.<sup>[77]</sup>

83 In paragraph 10 of the Second Further Amended Commercial List Response, JLT denies that it made the alleged Recommendations to RVC and group members. JLT repeats the matters referred to at [81]-[82] above and:<sup>[78]</sup>

“(b) says that, pursuant to the Statewide Deed, the Plaintiff and other Members appointed the Board of Management to receive advice and issue instructions to JLT for the purchase of Primary Insurance, being the insurance purchased by Members or any of them for the relevant class of risk as contemplated by the Statewide Deed from time to time;

Particulars

Statewide Deed, clauses 1.1 (“Primary Insurance”), 3.3.1 (a), 5.1 (e) and 6.1

(c) says that, pursuant to the Statewide Deed, any advice given during the Relevant Period by JLT in respect of obtaining or renewing Primary Insurance covering the Members of the Statewide Scheme was given to the Board of Management, as required by the Statewide Deed;

(d) says that JLT was not appointed, whether under the Statewide Deed or otherwise, to give advice or recommendations to the Plaintiff or any Group Member as to whether to exercise the right to retire from the Statewide Scheme”

84 JLT says that it did act as individual broker to RVC from time to time during the Relevant Period, but only in respect of non-Statewide lines of cover.<sup>[79]</sup>

***Alleged general law duty of care***

85 It is alleged that RVC and the group members lacked knowledge of the liability and property insurance market during the Relevant Period, including knowledge of terms and premium rates reasonably available from underwriters and insurers in that market. RVC alleges that JLT had that knowledge and, further, that JLT knew and intended that RVC and each group member would or was likely to act on the alleged Recommendations by authorising JLT to place or arrange their liability and/or property insurance with Statewide.<sup>[80]</sup> RVC alleges that, in those circumstances, JLT owed RVC and each group member a duty to exercise reasonable care and skill in providing the alleged Broking Services and making the alleged Recommendations.<sup>[81]</sup>

86 JLT does not admit that RVC and group members lacked knowledge of the market during the Relevant Period and otherwise denies these allegations. JLT repeats its denial that it provided the alleged Broking Services or made the alleged

Recommendations and says that the Members of Statewide appointed the Board to receive advice and issue instructions for the purchase of Primary Insurance in accordance with the Deed.<sup>[82]</sup>

87 In submissions, RVC contended that the alleged duty to exercise reasonable care and skill was an overarching duty that applied continuously throughout the whole of the Relevant Period.<sup>[83]</sup> That contention departs from RVC's pleaded case of duties owed "*in providing the Broking Services and making the Recommendations*", which were allegedly provided and made during each annual renewal process and were directed on each occasion to the immediately forthcoming insurance year. It is no part of RVC's pleaded case that JLT owed a duty at any given time during the Relevant Period to exercise reasonable care and skill pertaining to RVC and each group member's insurance programs in future years. JLT objected to any departure from RVC's pleaded case. The matters to be determined are therefore limited to those that have been pleaded.

***Alleged broking services contracts and implied obligation to exercise reasonable care and skill***

88 RVC alleges that JLT provided the alleged Broking Services and made the alleged Recommendations pursuant to "*separate contracts for services*" made by offer and acceptance during each annual renewal process. RVC alleged that, by issuing an Insurance Declaration and Renewal Report to RVC and to each group member, JLT made an offer to obtain or renew insurance contracts on behalf of the recipient council. RVC alleged that the offer was accepted by the recipient council signing the renewal authorisation form and paying the invoices that JLT forwarded to the council in respect of that year's insurances.<sup>[84]</sup> RVC refers to these alleged annual contracts as the **Broking Services Contracts** and I will use the same term.

89 RVC claims that the alleged Broking Services Contracts included a term implied as a matter of law that JLT would exercise reasonable care and skill in providing the Broking Services and making the Recommendations.<sup>[85]</sup>

90 JLT denies the alleged Broking Services Contracts, and repeats its earlier denial that it provided the alleged Broking Services and made the alleged Recommendations. JLT contends that its contractual relationship with RVC and group members concerning the provision of insurance broking services relating to liability insurance and property insurance was governed by the Deed and that there is no scope for any separate contract to be implied from conduct.<sup>[86]</sup>

## ***Alleged excessive Contributions***

- 91 RVC alleges that the Contributions that it and each group member was required to pay during the Relevant Period in order to obtain or renew liability insurance and property insurance *“through Statewide Mutual”*.<sup>[87]</sup>
- (1) exceeded premium rates that were reasonably available from alternative underwriters or providers in the market; or
  - (2) *“exceeded the contribution rates that were reasonably available from or could be negotiated by JLT with Statewide Mutual”*.
- 92 In support of the first allegation, RVC relies on:
- (1) a comparison between Contributions that it paid to the Liability Fund and the Property Fund during the 2010 to 2017 years with the premium that it paid for liability insurance and property insurance procured independently of the Scheme in the 2018 and 2019 years;
  - (2) the amounts that RVC contends would have been payable during the 2010 to 2017 years for liability insurance and property insurance that it could have obtained through a different mutual pool, Civic Risk Mutual, with terms of coverage that RVC contends were comparable to the terms of the coverage that it obtained through the Scheme in those years; and
  - (3) certain internal JLT correspondence that RVC contends demonstrates the availability of competitive rates or premiums from other providers in the market during the Relevant Period.
- 93 In support of the second allegation referred to at [91] above, RVC relies on JLT’s offer of more favourable Contribution rates to RVC and certain other Members of Statewide once those Members raised concerns about the competitiveness of the Statewide offering in late 2016 and 2017, and premiums quoted by JLT in response to a tender issued by RVC and nine other Members in late 2016 for insurance broking services and insurance coverage.
- 94 JLT denies the allegations referred to at [91] above. JLT says that the Contributions were determined by the Board on a collective basis. JLT contends that it is not possible to compare those Contributions with premiums that may have been charged by insurers for policies taken out by RVC or an individual group member, or with amounts that may have been payable by RVC or any individual group member under the Civic Risk Mutual scheme. JLT contends that there are differences between Statewide, commercial insurance products and the Civic Risk Mutual scheme that must be taken in account, including differences in principle and differences in their respective specific features. In addition, JLT says that it is not possible to compare insurance premiums charged in a particular year with Contributions charged to Statewide Members in different years without taking into account differences in commercial conditions over time.<sup>[88]</sup>

***Alleged breaches of general law or contractual duty of care***

95 In paragraph 17 of the Third Further Amended Commercial List Statement, RVC alleges that JLT breached the alleged duty of care and/or the implied obligation under the alleged Broking Services Contracts. It is convenient to set out paragraph 17 in full:  
[89]

“17 In breach of the duty pleaded in paragraph 13 and/or the Implied Term pleaded in paragraph 15 above, JLT:

(a) failed to make any, or (if any) reasonable, efforts to obtain on behalf of:

- (i) Richmond Valley; and
- (ii) each of the Group Members,

suitable Property and/or Public Liability and Professional Indemnity insurance at the best premium rates that were reasonably available to each of them in the market, including from Statewide Mutual;

(b) made the Recommendations to:

- (i) Richmond Valley; and
- (ii) each of the Group Members,

and placed or renewed their Property and/or Public Liability and Professional Indemnity insurance with Statewide Mutual:

- (iii) in the circumstances pleaded in paragraph 16 above; and
- (iv) in circumstances where JLT had no reasonable grounds to believe that the contributions payable to Statewide Mutual were lower than or reasonably competitive with the premium rates that were available to Richmond Valley and each of the Group Members in the market; and/or
- (v) in circumstances where JLT had no reasonable grounds to believe that the contributions paid to Statewide Mutual were lower than the contribution rates reasonably available to Richmond Valley and each of the Group Members from Statewide Mutual in respect of Property and/or Public Liability and Professional Indemnity insurance;

(c) failed to recommend or identify to:

- (i) Richmond Valley; and
- (ii) each of the Group Members,

any alternative underwriter or provider of suitable Property and/or Public Liability and Professional Indemnity insurance besides Statewide Mutual;

(d) did not make any, or (if any) reasonable, efforts on behalf of:

- (i) Richmond Valley; and
- (ii) each of the Group Members,

to:

- (iii) request, solicit, negotiate or obtain from any alternative underwriter or provider of suitable Property and/or Public Liability and Professional Indemnity insurance besides Statewide Mutual a quotation, offer or terms for such insurance at lower premium rates than those payable to Statewide Mutual;
- (iv) request, negotiate or obtain a reasonably available contribution from Statewide Mutual that was lower than the contribution paid by Richmond Valley and each Group Member in respect of Property and/or Public Liability and Professional Indemnity insurance;

(e) failed to request, solicit or procure, on behalf of:

- (i) Richmond Valley; and
- (ii) any of the Group Members,

a competitive quotation for, or offer of, suitable Property and/or Public Liability and Professional Indemnity insurance from an underwriter or provider besides Statewide Mutual; and

(f) failed to advise:

- (i) Richmond Valley; and
- (ii) each of the Group Members,

of:

- (iii) the circumstances pleaded in paragraph 16 above; and
- (iv) the fact that JLT had not requested or solicited a quotation, offer or terms for suitable Property and/or Public Liability and Professional Indemnity insurance from any alternative underwriter or provider besides Statewide Mutual;
- (v) the fact that JLT had not requested or negotiated, on Richmond Valley and each Group Member's behalf, lower contributions from Statewide Mutual for their respective Property and/or Public Liability and Professional Indemnity insurance."

96 JLT denies these allegations and repeats its responses to the earlier allegations referred to above, including its denial that it provided the alleged Broking Services, entered into the alleged Broking Services Contracts and made the alleged Recommendations.<sup>[90]</sup>

97 In submissions, RVC relied on paragraph 17(f) of its Third Further Amended Commercial List Statement as encapsulating the "*bare minimum*" that was required of JLT to discharge the pleaded contractual and general law duties of care. RVC submitted that the pleaded duties required JLT to at least inform it and each group member that JLT had not sought offers or terms for its liability and insurance and property insurance independently of Statewide.<sup>[91]</sup> However, the pleaded duties were to exercise reasonable care and skill in providing the alleged Broking Services and making the alleged Recommendations. As JLT submitted, those duties (if owed) could not have been discharged by JLT advising RVC that it had not performed the Broking Services in respect of liability and property insurance because it had not looked beyond Statewide for the renewal of those lines of cover. Paragraph 17(f) of the Third Further Amended Commercial List Statement is not, in truth, an allegation of breach of any pleaded duty.<sup>[92]</sup>

### **Causation and loss**

98 RVC's contentions as to the loss that it claims was caused by JLT's alleged breaches of the pleaded duties of care are stated in paragraph 18 of the Third Further Amended Commercial List Statement. It is convenient to set out paragraph 18 in full:

"18 By reason of the breaches of duty and/or contract pleaded in paragraph 17 above:

- (a) Richmond Valley; and
- (b) each of the Group Members,

has suffered loss or damage.

#### **Particulars**

- (i) The particulars to paragraphs 16(c) and 16(d) above are repeated.

(ii) The loss or damage suffered is equivalent to the value of the opportunity to obtain suitable Property and/or Public Liability and Professional Indemnity insurance from alternative underwriters or providers besides Statewide Mutual, at the best premium rates that were reasonably available to Richmond Valley and each of the Group Members in the market.

(iii) The value of that opportunity is equal to the difference between:

(A) the amounts paid by Richmond Valley and each Group Member to Statewide Mutual during the Relevant Period, for their Property and/or Public Liability and Professional Indemnity insurance; and;

(1) the amount that would have been paid by Richmond Valley and each Group Member to alternative underwriters or providers during the Relevant Period, but for JLT's breach of duty and/or contract; or

(2) the amount that would have been paid by Richmond Valley and each Group Member to Statewide Mutual during the Relevant Period, but for JLT's breach of duty and/or contract,

subject to any adjustment the Court finds necessary.

(iv) Further particulars to be provided prior to trial."

99 The substance of the particulars to paragraphs 16(c) and 16(d) of the Third Further Amended Commercial List Statement that are referred to in paragraph 18(i) is set out at [91]-[93] above.

100 JLT repeats its denials of the earlier allegations referred to above and denies that RVC or group members have suffered the alleged loss. JLT also contends that the claims of RVC and group members in relation to the whole or part of the Relevant Period are statute barred by s 14 of the *Limitation Act 1969* (NSW). In relation to RVC, this defence is pleaded in relation to the causes of action in tort and contract arising prior to 3 December 2012.<sup>[93]</sup>

### ***Alleged breach of fiduciary duties***

101 RVC alleges that, as an insurance broker providing the alleged Broking Services and making the alleged Recommendations, JLT owed the following fiduciary duties to RVC and each of the group members:<sup>[94]</sup>

(1) a duty to refrain from pursuing or advancing JLT's own interests, in circumstances where there was a conflict or significant possibility of conflict between JLT's interests and the interests of RVC or the group member (as the case may be); and

(2) a duty to refrain from using JLT's position or knowledge resulting from its position as insurance broker to obtain a benefit for itself or a third party or to cause detriment to RVC or a group member.

102 RVC alleges that, by reason of the functions and services that JLT was appointed to perform under the Deed, its performance of those functions and services, the fees that JLT received in consideration for performing those functions and services, and other fees and commissions that JLT and its related entities earned in respect of insurance placed on the instructions of the Board, there was a conflict between the interests of

JLT and its related entities in earning and continuing to earn those fees and commissions and the interests of RVC and group members in obtaining “suitable” property insurance and/or liability insurance “at the best premium rates that were reasonably available to each of them in the market”.<sup>[95]</sup>

103 It is convenient to set out in full the alleged breaches of fiduciary duty in paragraphs 23 and 24 of the Third Further Amended Commercial List Statement:

“23. In making the Recommendations and in placing or renewing:

(a) Richmond Valley’s; and

(b) each Group Member’s,

Property and/or Public Liability and Professional Indemnity insurance with Statewide Mutual, JLT:

(c) pursued or advanced its own interests in earning and continuing to earn fees and commissions for itself and its related entities; and

(d) used its position or knowledge resulting from its position as their insurance broker for its own financial benefit (or its related entities’) and to the detriment of Richmond Valley and each Group Member

24. The conduct of JLT pleaded in paragraph 23 above breached the fiduciary duties pleaded in paragraph 19 above.”

104 JLT denies that it owed the alleged fiduciary duties to RVC and group members. JLT says that its relationship with RVC and group members was governed and regulated by the terms of the Deed, and that those terms are inconsistent with the fiduciary duties alleged.<sup>[96]</sup>

105 In further support of its contention that it did not owe the alleged fiduciary duties to RVC and each group member, JLT says that neither RVC nor any group member had an expectation that JLT would act, or reposed trust and confidence in JLT to act, in its interests.<sup>[97]</sup> JLT also relies on additional matters listed in Annexure A to the Second Further Amended Commercial List Response that relate specifically to RVC or a named individual group member. It is convenient to set out in full those additional matters relating to RVC:<sup>[98]</sup>

“In respect of Richmond Valley Council (Richmond Valley):

A. during the Relevant Period, Richmond Valley was aware of alternative cover for property and liability exposures other than Statewide, including that offered through Aon, Arthur J Gallagher, Marsh and Willis;

B. during the Relevant Period, Richmond Valley did not have any expectation or understanding that JLT would seek to procure risk cover for its property and liability exposures other than through Statewide;

C. in or about 2010, Richmond Valley gave consideration to conducting a tender in respect of all lines of insurance or risk cover, including in respect of its cover with Statewide;

D. in or about September 2013, independently of JLT, Richmond Valley was aware of the availability of alternative cover in respect of cover for its property and liability exposures from Willis;

E. on or about 23 June 2015, Richmond Valley received indicative pricing from Aon in respect of cover for its property and liability exposures;

F. in or around 2016, Richmond Valley conducted a tender independently of JLT to identify available property and liability risk cover;

G. further or alternatively to (A), from the events and circumstances referred to in (C)-(F) above, Richmond Valley was aware of the existence of such alternatives to risk cover through Statewide as existed;



H. at all times during the Relevant Period up to 30 June 2017, Richmond Valley remained as a member of the Statewide scheme and continued to deal with JLT despite knowing that JLT identified to it only risk cover through that scheme in respect of property and liability exposures;

I. at no stage during the Relevant Period did Richmond Valley express the understanding that JLT was required to source for it cover in respect of property and liability exposures other than through Statewide;

J. with effect from 30 June 2017, without seeking any advice from or otherwise involving JLT, Richmond Valley gave notice of an intention to withdraw from the Statewide scheme and thereafter itself approached and obtained cover for its property and liability exposures through Aon.”

- 106 JLT denies that the fees to which it was entitled under the Deed, fees and commissions that it earned from placing insurance for Statewide Members collectively on the instructions of the Board and fees earned by its related entity for services provided to Members gave rise to the alleged conflict of interest referred to at [102] above. JLT also says that the fees were disclosed in the Scheme’s annual reports, in JLT’s Financial Services Guide, and also in Insurance Declarations, Renewal Reports and invoices issued to RVC and group members during the Relevant Period. If JLT owed the alleged fiduciary duties (which is denied), RVC and group members who instructed JLT to place insurance on their behalf did so with knowledge of the fees and commissions received by JLT and related entities and gave informed consent to their receipt of those fees and commissions.<sup>[99]</sup>
- 107 JLT denies that it pursued its own interests, or used its position under the Deed for its own benefit or acted to the detriment of Members, when placing or renewing property insurance and/or liability insurance for Members collectively on the instructions of the Board. JLT says that, subject to receiving RVC’s or a group member’s notice of retirement from an Annual Fund, JLT was contractually obliged by the Deed to arrange Primary Insurance to be purchased jointly by the Members of each Annual Fund, including RVC and the group members. JLT therefore denies the alleged breaches of fiduciary duty.<sup>[100]</sup>

### **Claims for relief in respect of alleged breaches of fiduciary duty**

- 108 RVC claims that it has suffered, and each group member has suffered, loss and damage by reason of the alleged breaches of fiduciary duty. That alleged loss is pleaded in precisely the same terms as the causation and loss pleading in respect of the causes of action in tort and contract, which has been set out in full at [98] above. [101]
- 109 RVC claims for equitable compensation for the alleged losses of opportunity or, alternatively, an account of the profits that RVC contends JLT and/or its related entities have earned as a result of the alleged breaches of fiduciary duty. [102]
- 110 JLT denies that RVC or group members have suffered the alleged losses of opportunity and denies that it is liable to account to RVC or group members for any profits. [103]
- 111 Further, JLT says that the claims are time barred by s 23 of the *Limitation Act 1969* (NSW) and/or by analogy with s 14 and s 15 of that Act or are precluded by the doctrine of laches in relation to part or the whole of the Relevant Period. In relation to RVC, this defence is pleaded in relation to causes of action arising prior to 3 December 2012. [104]

### **Disputes about the scope of the pleaded case**

- 112 During opening addresses, JLT made it clear that it was defending the case pleaded against it and that it did not acquiesce in any departure from that pleaded case. [105] The hearing was marked by several hard-fought disputes about the scope of RVC's pleaded case during the course of the evidence and closing addresses. I have referred to some of those disputes in passing above. One of those disputes was determined during the hearing on the basis that my reasons for that determination would be included in these reasons for judgment. An application for leave to amend made by RVC shortly before the commencement of the final hearing was dismissed on the same basis.
- 113 I have considered all of the parties' extensive written and oral submissions in relation to the amendment application and other pleading disputes. I use the terms "*pleadings*" and the "*pleaded case*" as convenient shorthand expressions to refer to the Third Further Amended Commercial List Statement and the Second Further Amended Commercial List Response notwithstanding that, strictly speaking, they are not

- pleadings. They are, of course, intended to serve the same essential function as pleadings: *Stewart v Australia and New Zealand Banking Group Ltd* [2020] NSWSC 1787, especially at [18]-[20] (Hammerschlag J, as the Chief Judge in Equity then was).
- 114 Before recording my reasons for dismissing the amendment application and addressing the other pleading disputes that arose during the final hearing, it is convenient to note four matters that were not the subject of any dispute.
- 115 First, RVC and group members were aware of the terms of the Deed and were represented on the Board in accordance with the provisions of clause 3.1 of the Deed. [106]
- 116 Second, there is no allegation in these proceedings that JLT breached its express or implied contractual obligations under the Deed or breached any contractual or other duty in providing advice and services to the Board in relation to the Primary Insurance purchased in respect of each Statewide Fund in each Fund Year during the Relevant Period. The members of the Board are not parties to these proceedings, and there is no allegation that they breached any duty to Members in determining the Primary Insurances to be placed for the collective benefit of Members of the Liability Fund and Members of the Property Fund, in determining the fees to be paid to JLT for its services under the Deed or in determining the fees to be paid to JLT or its related entities for other consultancy services provided from time to time.
- 117 Third, JLT accepts that, in performing its obligations under the Deed, JLT owed common law and fiduciary duties to RVC and each other Member of the Scheme, including a common law duty to exercise reasonable care and skill in giving advice to the Board about the Primary Insurance that should be placed in respect of each Fund and in effecting that Primary Insurance in the market on the instructions of the Board, and fiduciary duties to each Member in the performance of those Primary Insurance broking obligations under the Deed. [107]. However, there is no allegation in these proceedings that JLT breached any common law duty or fiduciary duty owed to RVC or group members arising from JLT's performance of its functions under the Deed. As referred to above, the duties pleaded by RVC in these proceedings are alleged to have arisen from JLT's alleged conduct in providing the alleged Broking Services and making the alleged Recommendations to RVC and each group member individually during annual renewal processes in the Relevant Period.
- 118 Fourth, there is no allegation that the fees paid to JLT or any related entity of JLT exceeded the fees that were approved by the Board from time to time as provided for in the Deed.

***The annual cycle of the alleged Broking Services, Broking Services Contracts and Recommendations and the alleged breaches and losses of opportunity***

- 119 As JLT submitted, and as I have said above, each of the three pleaded causes of action depends on RVC establishing that JLT provided the alleged Broking Services and made the alleged Recommendations to RVC and (separately) to each group member during

each annual renewal process. The cause of action in contract also depends on RVC establishing that JLT entered into the alleged annual Broking Services Contracts separately with RVC and each group member.

- 120 The source of the pleaded contractual duty of care is an implied term in each of the alleged annual Broking Services Contracts. That is to say, it is a separate duty alleged to have been owed by JLT to RVC and each group member during each annual renewal process in the Relevant Period.
- 121 The pleaded general law duty of care and fiduciary duties are also separate duties said to have been owed during each annual renewal process. Those duties are alleged to have arisen from the provision of the alleged annual Broking Services and the making of the alleged Recommendations in circumstances where JLT allegedly had superior knowledge of “*the market*”, including terms and premium rates reasonably available from insurers and underwriters in “*the market*”.<sup>[108]</sup> Having regard to the annual cycle of insurance renewals and the undisputed fact that conditions in “*the market*” changed over time,<sup>[109]</sup> the market knowledge allegation is plainly directed to “*the market*” at the time of the provision of the alleged Broking Services and the making of the alleged Recommendations during each annual renewal process.
- 122 Subject to one exception, that is entirely consistent with RVC’s opening submissions, which referred to the alleged Broking Services having been provided by JLT designing and advising RVC “*with respect to its annual insurance program*”.<sup>[110]</sup> and to JLT’s practices in dealing with RVC and group members during the renewal process each year.<sup>[111]</sup> RVC submitted that, by those annual renewal practices, JLT provided the alleged Broking Services and made the alleged Recommendations.<sup>[112]</sup> RVC submitted that “*in each year of the Relevant Period, JLT entered into separate broking contracts with RVC and group members to design and provide advice with respect to each council’s annual insurance program, to provide advice and recommendations as to the placement of each council’s Property Insurance and Liability Insurance, and to arrange and place that insurance*”.<sup>[113]</sup> RVC submitted that the alleged common law and contractual duties of care and the alleged fiduciary duties arose from JLT’s alleged provision of the annual Broking Services to RVC and each group member.<sup>[114]</sup>
- 123 The exception referred to above is that senior counsel for RVC said in oral opening submissions that: “*There is a contractual arrangement to provide broking services across the whole time period and that includes, we say, the obligation to identify any other alternative insurer*”.<sup>[115]</sup>
- 124 That submission departs from RVC’s pleaded case for all of the reasons explained above. JLT did not acquiesce in this departure, or any other departure, from the case pleaded against it. The case to be determined is the case that has been pleaded. I

have already rejected a similar submission made by RVC in closing that to the effect that there was one general law duty of care applying continuously during the whole of the Relevant Period.<sup>[116]</sup>

125 The pleaded breaches of each alleged annual Broking Services Contract and the general law and fiduciary duties allegedly owed during each annual renewal process are set out in paragraphs 17 and 22-24 of the Third Further Amended Commercial List Statement.<sup>[117]</sup> and are directed to:

- (1) JLT's alleged failure in the course of providing the alleged Broking Services during each annual renewal process to make efforts or reasonable efforts to request, solicit, negotiate or obtain quotations, offers or terms for "suitable" property and/or liability insurance at the best premium rates that were allegedly reasonably available to RVC and each group member in the insurance market at that time (the **relevant market**) and its alleged failure to recommend or identify any provider of property and liability cover other than Statewide;<sup>[118]</sup>
- (2) the Recommendations allegedly made by JLT in the course of providing the alleged Broking Services during each annual renewal process by providing the Insurance Declarations and Renewal Reports to RVC and each group member and the renewal of RVC's and each group member's Statewide property and liability cover at the conclusion of that annual renewal process, notwithstanding the conditions that RVC claims existed in the relevant market and in circumstances where JLT allegedly lacked reasonable grounds to believe that the Statewide Liability Fund and Property Fund Contributions payable for the immediately forthcoming year were competitive with premium rates allegedly available to RVC and each group member in the relevant market or, alternatively, contribution rates that were allegedly reasonably available to RVC and each group members in the Statewide Liability and Property Funds at that time;<sup>[119]</sup>
- (3) JLT's conduct in allegedly making the Recommendations and in renewing Statewide property and liability cover for RVC and each group member at the conclusion of each annual renewal process, notwithstanding the alleged conflict between its financial interests in earning fees and commissions for services provided in respect of Statewide and the interests of RVC and each group member in obtaining "suitable" liability insurance and property insurance at the best premium rates reasonably available to them in the relevant market;<sup>[120]</sup> and
- (4) JLT's alleged failure in the course of providing the alleged Broking Services during each annual renewal process to request, negotiate or obtain lower Statewide Contributions on behalf of RVC and each group member.<sup>[121]</sup>

126 Paragraphs 18 and 25 of the Third Further Amended Commercial List Statement are sparsely pleaded, rolled up allegations of causation and loss.<sup>[122]</sup> The causation pleading is limited to the words "[b]y reason of the breaches ...". However, as I have observed earlier in these reasons, the only thing that RVC and each group member is

alleged to have done as a result of the alleged Recommendations is to have “*instructed or authorised*” JLT to place or arrange its property and liability insurance cover “*with Statewide*” for the immediately forthcoming year.<sup>[123]</sup>

127 As JLT submitted, the alleged loss of opportunity particularised in paragraphs 18 and 25 as having been suffered “[*b*]y reason of” the alleged breaches in paragraphs 17 and 22 to 24 is a loss of opportunity to obtain lower Contributions or non-Statewide cover at the best premium rates that were available in “*the market*”. That reference to “*the market*” in the particulars in paragraph 18(ii) (which are repeated in paragraph 25) is plainly a reference to the same “*market*” referred to the breach allegations in paragraphs 17 and 22 to 24, being the relevant market. There is nothing in the language or context of the particulars in paragraph 18(ii) (repeated in paragraph 25) to indicate that “*the market*” there refers to some future market conditions during one or more unspecified annual renewal processes after the date of the alleged breach.

128 RVC submitted that the particulars to paragraphs 18 and 25 of the Third Further Amended Commercial List Statement identify the value of the lost opportunity by reference to what RVC and each group member would have paid “*during the Relevant Period*”. RVC submitted that the value of the alleged opportunity is therefore not limited to the difference between the Contributions paid and what RVC claims would have been paid for non-Statewide cover in the same insurance year in respect of which the alleged breach occurred. RVC submitted that, given the notice requirement under clause 10.3 of the Deed, “*it would simply be nonsensical*” for paragraphs 18 and 25 to be read in that way. RVC submitted that its causation pleading in those paragraphs must therefore be read as encompassing the giving of notice of retirement and that a breach of duty may therefore have flow on effects in multiple years, depending on when it first occurred.<sup>[124]</sup>

129 I reject RVC’s submissions that paragraphs 18 and 25 of the Third Further Amended Commercial List Statement must be read in that way. As JLT submitted, RVC has not pleaded or even particularised the links in the chain by which RVC now seeks to contend that JLT’s alleged breaches (all of which are referable to JLT’s alleged acts or omissions in or in relation to the relevant market) resulted a loss of opportunity for RVC in different market conditions at a later time. This unpleaded causation theory bears no resemblance to the annual cyclical nature of all other elements of RVC’s pleaded causes of action referred to at [119]-[124] above and bears no resemblance to the pleaded breaches of duty referred to at [125] above. For the reasons explained below, those alleged breaches do not include a failure on the part of JLT to advise RVC to give notice of retirement under clause 10.3 of the Deed. The unpleaded causation theory is also inconsistent with paragraph 11 of the Third Further Amended Commercial List Statement in which RVC pleads that, as a result of the alleged Recommendations, RVC and each group member “*instructed or authorised*” JLT during the Relevant Period to place or arrange its property and liability insurance cover with the Scheme by signing and returning to JLT an authorisation form “*for the relevant year*” and/or by paying the invoices sent by JLT in respect of the property and liability lines of insurance for that

- year. As I have already observed, there is no pleaded allegation that RVC or any group member made any decision as a result of the alleged Recommendations whether or not to give notice of retirement under clause 10.3 of the Deed with a view to arranging its property and/or liability insurance independently of Statewide in future years.<sup>[125]</sup>
- 130 There is no rule of law that requires a plaintiff in every case to plead the material facts constituting each and every variation of the counterfactual scenarios that might be relied on to establish causation. However, a defendant is “*entitled to a direct and unambiguous identification of the material facts relied on to establish the causal link between the conduct which plaintiffs impugn and the loss they allegedly suffered*”, except in cases where the causal link between the impugned conduct and the alleged loss is obvious: *DSHE Holdings Ltd (receivers and managers appointed) (in liq) v Potts; HSBC Bank Ltd v Abboud; Potts v National Australia Bank Ltd* [2022] NSWCA 165 at [312]-[313] (Leeming and Kirk JJA and Basten AJA), referring to *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151; (2020) 381 ALR 427; [2020] HCA 27 at [72] (Gageler and Edelman JJ); *English v Vantage Holdings Group Pty Ltd* [2021] WASCA 47 at [102]-[104] at (Murphy and Vaughan JJ), citing *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No. 7)* [2019] QSC 241 at [17]-[21]. That entitlement is an incident of the essential function of pleadings, which is to ensure the basic requirement of procedural fairness that a defendant should have the opportunity to meet the case put against it: *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11 at 169 CLR 286-287 (Mason CJ and Gaudron J).
- 131 I accept JLT’s submission that, if RVC wished to allege as part of its causation case that it would have given notice of retirement but for JLT’s alleged breaches of duty and contract, RVC was required to plead that as a material fact. In my opinion, this causal link that RVC sought to rely on during the final hearing was not obvious and needed to be pleaded in order to avoid JLT being taken by surprise in the circumstances of this case where (a) it is common ground that RVC was aware of the provisions of the Deed at all material times; (b) RVC therefore knew that it would be futile to explore the possibility of non-Statewide property or liability cover in any given year unless it had first given the requisite period of notice under clause 10.3; (c) it was not pleaded that JLT owed or breached a duty to advise RVC to give notice of retirement at any time during the Relevant Period; and (d) the only action that RVC and group members were pleaded to have taken as a result of the alleged Recommendations was to sign and return the authorisation form “*for the relevant year*” and/or to pay the property and liability insurance invoices for that year.
- 132 I reject RVC’s submission that the words “*during the Relevant Period*” in paragraph (iii) of the particulars to paragraph 18 of the Third Further Amended Commercial List Statement (repeated in paragraph 25) put JLT on notice of the causation theory referred to immediately above. Those words are merely directed to the particularisation of the total amount of the value of the alleged lost opportunities described in paragraph (ii) of the particulars in respect of each alleged breach. As I have said above, the loss particularised in paragraph (ii) as having flowed from each alleged breach is a loss of

opportunity to obtain lower Contributions or alternative insurance at the best rates that were available in “*the market*”, being the market conditions existing at the time of each alleged breach.

133 Contrary to RVC’s submissions, the “*sparse*”<sup>[126]</sup>-pleading of causation and loss in paragraphs 18 and 25 of the Third Further Amended Commercial List Statement is not a virtue that entitles RVC to run a causation theory at trial of which no proper notice was given to JLT through pleadings or particulars. RVC’s submissions to the effect that it is entitled to do just that because JLT failed to request additional particulars of paragraphs 18 and 25 to investigate whether RVC might have any additional, unpleaded and unparticularised causation case, are entirely without merit.

134 I reject the assertion implicit in RVC’s submissions that JLT was on notice that RVC was advancing the unpleaded causation theory because “*there would simply be no other causation pathway with respect to alternative insurance outside Statewide (as distinct from cheaper contributions to Statewide) other than via the giving of notice.*”<sup>[127]</sup> A party who sees a fundamental difficulty in a the causation pathway pleaded as part of the case against it is not obliged to assume that the opposing party is in fact relying on an entirely different causation pathway said to arise from facts that have not been pleaded or particularised. For the reasons identified at [131] above, the giving of notice under clause 10.3 so as to take up opportunities to obtain non-Statewide cover in subsequent years was not an obvious causal link between the alleged breaches and the particularised loss of opportunity. That is confirmed by paragraph 11 of the Third Further Amended Commercial List Statement<sup>[128]</sup> and by the fact the evidence served by RVC prior to trial gave no indication that it may seek to rely on the unpleaded causation theory now advanced. As referred to in Section V of these reasons, RVC relied on affidavits of its three General Managers during the Relevant Period. Each of those witnesses deposed that, if JLT had informed him during the renewal process for a particular year that alternative cheaper liability insurance and property insurance was available for that year, he would have directed JLT to obtain that cheaper insurance in that year rather than placing RVC’s insurance through the Scheme in that year. Those witnesses did not give evidence that, if JLT had informed him during the renewal process for a particular year that alternative cheaper liability insurance and property insurance was available for that year, he would have caused RVC to give notice of retirement from the Liability Scheme and Property Scheme so as to facilitate RVC seeking cheaper alternative insurance in a subsequent year or years.<sup>[129]</sup>



***Alleged breaches of duty of care in contract and tort: No retirement advice breach pleaded***

- 135 Unless and until it gave the requisite period of notice of its retirement from the Statewide Liability Fund and Property Fund under clause 10.3 of the Deed, RVC and each group member was bound by the Deed to pay the annual Contributions determined by the Board for each Fund.
- 136 The alleged breaches of the contractual and tortious duties of care are pleaded in paragraph 17 of the Third Further Amended Commercial List Statement, which has been set out in full at [95] above.
- 137 During the third week of the hearing, in the context of pressing a question put to an expert witness to which JLT had objected,<sup>[130]</sup> RVC submitted that the breaches alleged in paragraphs 17(a) and 17(d)(iii) of the Third Further Amended Commercial List Statement necessarily include an allegation that JLT breached the alleged duty of care by failing to advise RVC and individual group members to give notice of retirement from the Scheme under clause 10.3 of the Deed. I will refer to this as the alleged **retirement advice breach**. RVC acknowledged that the alleged retirement advice breach was not expressly pleaded, but submitted that it was necessarily implied in paragraphs 17(a) and 17(d)(iii) of the Third Further Amended Commercial List Statement because JLT's alleged failure to make reasonable efforts to "*obtain*" suitable liability insurance and property insurance included an alleged failure to do all things necessary in order to obtain such insurance, and that "*reasonable efforts must include the giving of notice*" or at least an obligation to advise RVC and the group members that they needed to give such notice if they wanted JLT to obtain alternative insurance.
- 138 I reject RVC's submission for the following reasons.
- 139 As JLT submitted and as I have discussed above, paragraphs 17(a) and 17(d)(iii) of the Third Further Amended Commercial List Statement are directed to steps that JLT allegedly failed to take in the relevant market. Those paragraphs are directed to a failure by JLT to obtain insurance terms or quotes from third party insurers and underwriters operating in the relevant market at the best premium rates reasonably available in that market. Those paragraphs are not directed to an alleged failure by JLT in different market conditions at an earlier time to advise RVC and each individual group member to give notice of retirement from the Statewide Liability Fund and Property Fund. Nor are they directed to an alleged failure by JLT to give such advice during each annual renewal process with which paragraphs 17(a) and 17(d)(iii) are concerned, so as to facilitate JLT obtaining alternative insurance for RVC and group members in future, unknown market conditions during subsequent annual renewal processes.
- 140 Contrary to RVC's submission, it was not necessary for RVC or any group member wishing to seek insurance cover or quotations for insurance cover outside of Statewide to receive advice from JLT to give the requisite period of notice of retirement from Statewide. As senior counsel for RVC acknowledged in opening, there is no suggestion

that RVC and group members were not aware of the terms of the Deed. The requirement to give notice of retirement and the period of notice was clearly stated in clause 10.3. Senior counsel for RVC submitted that there could be no downside to giving notice, by which I understood senior counsel to mean that there would be no impediment to RVC changing its mind and applying to remain in the Funds in the following year. That is confirmed by correspondence between JLT and RVC after RVC gave notice in 2016.<sup>[131]</sup> Those are further reasons why it cannot be said that JLT's alleged failure to make "*reasonable efforts*" to "*obtain*" alternative insurance or to "*request, solicit, negotiate or obtain*" quotations, offers or terms for alternative insurance in paragraphs 17(a) and (d)(iii) of the Third Further Amended Commercial List Statement includes, by necessary implication, a failure to advise RVC and group members to give notice of retirement.

141 RVC submitted that the "*reasonable efforts*" referred to in paragraphs 17(a) and 17(d)(iii) must be understood as including advising RVC and each group member to give notice of retirement from the Scheme because "[a] *pleading of this kind has to be interpreted in a way that makes coherent sense*". Senior counsel for RVC submitted that it would not make sense for RVC to plead an allegation that JLT failed to make reasonable efforts to obtain alternative insurance or quotations without also pleading an obligation to do that which is necessary to obtain such alternative insurance or offers.

142 I do not consider that paragraphs 17(a) and 17(d)(iii) must be read in the manner that RVC now contends in order for the Third Further Amended Commercial List Statement to "*make coherent sense*". For the reasons explained at [119]-[124] and [139] above, the reading of paragraphs 17(a) and 17(d)(iii) that RVC now seeks to advance would strain against the ordinary meaning of the language of those paragraphs and is contrary to the pleaded case considered as a whole, including the manner in which the alleged loss of opportunity has been particularised in paragraph 18 of the Third Further Amended Commercial List Statement.

143 It is true that, absent any alleged retirement advice breach and absent any evidence that RVC and group members had given notice of retirement expiring in any given year during the Relevant Period, RVC's pleaded loss of opportunity case suffers from a fundamental difficulty insofar as it concerns an alleged loss of opportunity to obtain alternative liability and property insurance independently of Statewide. Any such alternative insurance would have been surplus to RVC's requirements because RVC was bound to pay Contributions which provided Statewide cover for the same risks that would be covered by any alternative insurance. That fundamental difficulty does not affect the case pleaded in paragraphs 17(a), 17(d)(iv) and 18 of the Third Further

Amended Commercial List Statement concerning the alleged loss of opportunity for RVC and group members to pay lower Contributions to the Statewide Liability Fund and Property Fund.

144 The fundamental difficulty identified above adds no weight to the implausible interpretation of paragraphs 17(a) and 17(d)(iii) of the Third Further Amended Commercial List Statement that RVC propounded for the first time during the third week of the final hearing. A defendant is entitled to respond to the case expressly pleaded against it and is not required to interrogate whether a differently pleaded case may make better “sense” or have better prospects of success from the plaintiff’s perspective and, if so, to defend that different case. For the reasons explained above and the further reasons below, I reject RVC’s submissions that JLT in fact understood paragraphs 17(a) and 17(d)(iii) as including an alleged retirement advice breach. I accept JLT’s submissions that it did not understand those paragraphs in that way and that it would be taken by surprise and denied procedural fairness if RVC were permitted to advance its case as including an alleged retirement advice breach.

145 In support of its submission that JLT must be taken to have understood RVC’s paragraphs 17(a) and 17(d)(iii) as including an alleged retirement advice breach, RVC referred to paragraph 10(d) of the Second Further Amended Commercial List Response which is set out in full at [83] above, and which is repeated in JLT’s response to paragraph 17 (and many other paragraphs) of the Third Further Amended Commercial List Statement.

146 Paragraph 10 of the Second Further Amended Commercial List Response sets out JLT’s response to the allegation that, in the course of allegedly providing the annual Broking Services to RVC and each group member, it advised or recommended to each of them that they obtain liability insurance and/or property insurance through Statewide. JLT denies making those alleged Recommendations on the basis that:

- (1) JLT denies in paragraph 10(a) providing the alleged Broking Services to RVC and individual group members, each of whom:
  - (a) was a Member of the Scheme;
  - (b) had entered into the Scheme for the purpose of (*inter alia*) purchasing liability insurance and property insurance collectively with other Members of the Scheme as determined by the Board; and
  - (c) would remain a Member of the Scheme unless and until it gave notice of retirement under clause 10.3 of the Deed;
- (2) JLT contends in paragraphs 10(b) and (c) that any advice given in respect of Primary Insurance was given to the Board in accordance with the Deed; and
- (3) JLT says in paragraph 10(d) that it was not appointed, whether under the Deed or otherwise, to give advice or make recommendations to RVC or any group member as to whether to exercise its right to retire from the Scheme.

147 As JLT submitted, paragraph 10(d) is one part of its response to the allegation that it

made the alleged Recommendations in providing the alleged Broking Services to RVC and each individual group member. Read in the context of paragraphs 9 and 10 of the Third Further Amended Commercial List Statement and the whole of paragraphs 9 and 10 of the Second Further Amended Commercial List Response, it is plain that paragraph 10(d) of the Second Further Amended Commercial List Response is directed to denying that JLT's advice to the Board in respect of Primary Insurance, in the absence of advice to RVC and each individual group member about whether it should remain in the Scheme, constituted an implied recommendation to RVC and each individual group member that it should remain in the Scheme.<sup>[132]</sup>

148 JLT's repetition of paragraphs 9 and 10 of its Second Further Amended Commercial List Response in denying the breaches alleged in paragraph 17 and in denying the sparsely pleaded causation and loss allegations in paragraph 18 of the Third Further Amended Commercial List Statement is a repetition of its denial that it provided the alleged Broking Services or made the alleged Recommendations at all, which forms part of the basis of its denial of the alleged general law, contractual and fiduciary duties and the alleged breaches of those duties. Central to JLT's defence of the pleaded case is its contention that the alleged individual broking relationship did not exist in respect of liability and property insurance, the alleged Recommendations were not made and the alleged duties did not arise in the context of the relationship between JLT and each Member established by the Deed, which was a continuing relationship in respect of each Member unless and until that Member gave notice of retirement under clause 10.3. The giving of such notice was a matter for each Member. The obvious consequence of continued membership of the Scheme was that RVC and each group member was obliged to pay the annual Contributions determined by the Board which included the cost of the Primary Insurance placed on the instructions of the Board. Contrary to RVC's submissions, JLT put its *"cards on the table"*. There is no question of JLT adopting a *"footprints in the sand approach"*. RVC's claim to be surprised by JLT's reliance on continuing membership of Statewide and a lack of any obligation of JLT to advise RVC or any group member to retire from Statewide, in circumstances where RVC did not allege that JLT owed any such obligation, lacks credibility.

149 For those reasons, JLT's repetition of its paragraph 10, including paragraph 10(d), in its response to RVC's paragraph 17 does not support an interpretation of RVC's paragraphs 17(a) and 17(d)(iii) as including an alleged retirement advice breach and does not support RVC's submission that JLT must have understood paragraphs 17(a) and 17(d)(iii) as including an alleged retirement advice breach.

150 RVC submitted that, because JLT *"relies on the notice requirement"* as part of its defence to paragraph 17 of the Third Further Amended Commercial List Statement, *"it must be an issue in the case whether the existence of the notice requirement makes any – and if so what – difference to the performance of the broker's obligations"*.<sup>[133]</sup> I accept that the parties have joined issue about whether the rights and obligations of JLT and Members under the Deed, including clause 10.3 of the Deed, mean that JLT did not provide the alleged Broking Services, did not make the alleged

Recommendations, did not owe the alleged duties and did not commit the pleaded breaches of duty and/or RVC did not suffer the loss of opportunity alleged to flow from any breach that may be established. However, I reject RVC's submission that the pleadings give rise to a general issue about "*whether the existence of the notice requirement makes any...difference to the performance of the broker's obligations*", untethered to any pleaded allegation of breach of those obligations. As JLT submitted, a joinder of issue about whether JLT committed an unpleaded breach of the alleged duty of care simply cannot be extrapolated from one element of JLT's central defensive contention referred to at [148] above: see, for example, *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Market Ltd* (2008) 73 NSWLR 653; [2008] NSWCA 206 at [352]-[358] (Ipp JA, Giles and Hodgson JJA agreeing).

151 As I have noted earlier in these reasons, it is trite law that the requirement for a plaintiff to articulate the elements on which it relies as making up its cause of action is fundamental to the essential function of pleadings, which is to ensure the basic requirement of procedural fairness that a party should have the opportunity to meet the case put against it: *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11 at 169 CLR 286-287 (Mason CJ and Gaudron J). I accept JLT's submission that, if RVC had pleaded the alleged retirement advice breach, this would have changed the manner in which JLT conducted its defence of the proceedings in that (*inter alia*) JLT would have considered calling expert evidence about what a competent and prudent insurance broker would have done in the circumstances having regard to clause 10.3 of the Deed and that JLT would also have cross-examined RVC's witnesses differently, including by testing how they would have acted if JLT had advised that RVC should give notice of retirement from the Scheme. Reading the unpleaded retirement advice breach into the Third Further Amended Commercial List Statement in the manner that RVC sought to do during the third week of the hearing, after the cross-examination of lay witnesses had concluded and all of the written expert evidence (including joint reports) had been tendered, would deny procedural fairness to JLT.

152 I feel compelled to observe that RVC's submission that JLT must have always understood paragraphs 17(a) and 17(d)(iii) of the Third Further Amended Commercial List Statement as including an alleged retirement advice breach by necessary implication is very difficult to reconcile with the fact that this suggested interpretation of paragraphs 17(a) and 17(d)(iii) did not emerge until the third iteration of RVC's submissions about this pleading dispute, two days after the dispute arose during the cross-examination of expert witnesses and after RVC been afforded time to prepare written submissions about the issue (which did not mention that suggested interpretation).

153 RVC pressed the question to which JLT objected on the further basis that the question whether retirement advice would have been given by a reasonable insurance broker in JLT's alleged position (that is, allegedly as individual broker) is relevant to the issue of causation in a way that permits RVC to advance the following counterfactual scenario:

If the alleged breaches of duty had not occurred, then “*the issue of the notice period would have arisen*” in “*discussions*” between JLT and RVC and it is “*inevitable*” that RVC would then have given notice of retirement under clause 10.3 of the Deed. RVC submitted that, in that hypothetical counterfactual, RVC submitted, “*any opportunity that RVC lost was necessarily an opportunity ... to obtain cheaper insurance in the following year*”.<sup>[134]</sup> RVC submitted that nothing in the wording of paragraph 18 of the Third Further Amended Commercial List Statement limits the loss there particularised to loss of opportunity to obtain alternative insurance in the same year as the year in respect of which the alleged breach of duty occurred. RVC submitted that it was able to run a case, for example, that breach of duty in June 2013 caused a loss of opportunity in 2014-2015 and 2015-2016.

154 I reject those submissions for all of the reasons explained at [119]-[134] above and for the further reason that the submission is somewhat circular. For the purpose of determining causation, the relevant counterfactual inquiry must be framed by reference to any pleaded breach that has been established. As JLT submitted, the pleaded case does not call for a general inquiry into what “*discussions*” might have occurred between JLT and RVC. What is required is a specific inquiry into what would have occurred if JLT had not committed of the pleaded alleged breaches (if and to the extent that those breaches are proved). For the reasons explained above, the pleaded alleged breaches do not include an alleged retirement advice breach. Contrary to RVC’s submissions, the Court does not ignore the notice requirement under the Deed by declining to embark on such a general inquiry. The notice requirement will feature in the causation analysis in a manner that reflects both parties’ pleadings.

155 RVC’s submissions raised a “*broader point*” that, if it is not permitted to raise the alleged retirement advice breach and/or to raise retirement advice as part of its causation theory, then its loss of opportunity case will be exposed as misconceived, at least insofar as it concerns an alleged loss of opportunity to obtain alternative insurance independently of the Scheme. RVC submitted that JLT was not entitled to take the pleading points addressed above in circumstances where, according to RVC, JLT had not previously put RVC on notice of the difficulty inherent in RVC’s case by moving for summary dismissal or applying to strike out RVC’s pleading.

156 I reject RVC’s “*broader point*”.

157 First, JLT does not contend that the Third Further Amended Statement of Claim discloses no cause of action or is liable to be struck out. Rather, JLT submits that the case disclosed is a weak case that should fail for reasons that include the fundamental difficulty referred to at [143] above that affects part of its loss of opportunity case. That

is quintessentially a contest for final hearing. As I have already observed, the fundamental difficulty does not affect RVC's pleaded case that it lost the opportunity to pay lower Contributions to the Liability Fund and Property Fund.

158 Second, I repeat my observations at [144] above.

159 Third, as I have observed at [148] above, the Second Further Amended Commercial List Response clearly articulated JLT's central contention that RVC's pleaded case was fundamentally inconsistent with the relationship established by the Deed, which continued in respect of RVC and each group member unless and until it gave notice of retirement under clause 10.3 of the Deed. The Third Further Amended Commercial List Statement did not call for anything further from JLT to put RVC on notice of that contention.

160 Fourth, I accept JLT's submission that:<sup>[135]</sup>

"The fact that a plaintiff encounters difficulties with the pleaded case it seeks to advance does not mean that it should be permitted to advance an unpleaded case in an effort to avoid those difficulties. To hold otherwise would be to allow a plaintiff continually to shift its case throughout the course of a trial until it identifies some permutation of facts that provides it with success, regardless of the effect it has on a defendant's ability fairly to meet the case advanced. That is neither consonant with the conduct of modern litigation nor consistent with notions of procedural fairness."

161 The reasons set out at [135]-[160] above are the reasons for my ruling rejecting the question referred to at [137] above.<sup>[136]</sup>

### ***Dispute about the scope of the pleaded basis of the alleged fiduciary duties***

162 As referred to at [101] above, the pleaded basis of the allegation that JLT owed fiduciary duties to RVC and each group member is that JLT was an insurance broker providing the alleged Broking Services to RVC and each group member and making the alleged Recommendations to RVC and each group member.

163 In closing submissions, RVC submitted that:<sup>[137]</sup>

"... even if JLT was not formally the insurance broker to RVC and group members, by holding itself out as an adviser to the RVC and group members and assuming an advisory role, it constituted itself as a fiduciary by creating an expectation on the part of RVC and Group Members that it would act in their interests advising them..."

164 As JLT submitted, that contention is beyond the scope of RVC's pleaded case in relation to the alleged fiduciary duties. JLT did not acquiesce in the expansion of RVC's case, which falls to be determined in accordance with its pleading.

### ***No pleaded issues concerning JLT's state of mind at the time of the alleged breaches of fiduciary duty***

165 I have summarised RVC's pleaded case in relation to alleged breaches of fiduciary duty at [101]-[103] above. RVC contends that it has put in issue JLT's state of mind at the time of the alleged breaches of fiduciary duty. Specifically, RVC contends that it is part

of its case that JLT acted with “*steadfast determination not to let anything occur that would jeopardise its ongoing receipt of fees at the level that it was receiving*” under the Deed.<sup>[138]</sup>RVC pointed to:

- (1) the word “*pursued*” in paragraph 23(c) of the Third Further Amended Commercial List Statement,<sup>[139]</sup>which RVC submitted incorporates a mental element because the word is defined in the Oxford English dictionary as meaning to seek to obtain;<sup>[140]</sup>and
- (2) the word “*further*” in paragraph 19 (at the commencement of the section of the Third Further Amended Commercial List Statement relating to the fiduciary duty claim), which RVC submitted picks up paragraph 12 (in the section relating to the tort and contract claims)<sup>[141]</sup>which pleads that JLT knew and intended that RVC and group members would act on the alleged Recommendations.<sup>[142]</sup>

166 I reject those submissions for the following reasons.

167 The proscriptive duties on which the plaintiff relies in paragraph 19 of the Third Further Amended Commercial List Statement are duties that recognise that a fiduciary has undertaken to act on behalf of another person, and reflect the principle of equity:<sup>[143]</sup>

“... that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it.”

168 The objective of the first element of this principle (commonly referred to as the conflict rule) is to preclude the fiduciary from being swayed by considerations of personal interest, whilst the objective of the second element (commonly referred to as the profit rule) is to preclude the fiduciary from misusing their position for personal advantage.<sup>[144]</sup>

169 As Gageler J said in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifepan Australia Friendly Society Ltd* (2018) 265 CLR 1; [2018] HCA 43 at [70] (citations omitted):

“Consistently with the objective of imposing each obligation, in neither case does the benefit or gain to the fiduciary need to be at the expense of the principal, though it may be. And in neither case does the fiduciary need to act dishonestly or fraudulently, or otherwise than in good faith, though again the fiduciary may do so.”

170 Similarly, the learned authors of Meagher, Gummow & Lehane’s *Equity Doctrines and Remedies* say:<sup>[145]</sup>

“The authorities are unanimous in holding that whether or not there is actual fraud, dishonesty or bad faith on the part of a fiduciary is irrelevant to liability. Fiduciaries may be liable although their integrity emerges from the proceedings unscathed. ... On no view was intention required where the conflict is between duty and interest and a profit is made.”

171 As JLT submitted, the two duties alleged in paragraph 19 of the Third Further Amended Commercial List Statement are stated in terms that reflect the well-known conflict rule and profit rule. In the context of the applicable legal principles that I have referred to immediately above, the terms of paragraph 23 cannot reasonably be read as conveying



any allegation that JLT had a particular state of mind when it allegedly engaged in the conduct that is said to have breached those duties. I accept JLT's submission that, in that legal context, the word "*pursued*" describes the alleged actions of JLT and the alleged outcome or effect of those actions and does not incorporate any allegation about JLT's state of mind.

- 172 Any allegation that JLT acted with a state of mind intending to advance its own interests or intending to use its position or knowledge derived from its position for its own benefit to the detriment of RVC is, in substance, an allegation of fraud in the common law sense, or at least an allegation of dishonesty and bad faith: *Derry v Peek* (1889) 14 App Cas 337 at 374; *Forrest v Australian Securities and Investment Commission* (2012) 247 CLR 486; [2012] HCA 39 at [22] (French CJ, Gummow, Hayne, and Kiefel JJ); *Nadinic v Drinkwater* (2017) 94 NSWLR 518; [2017] NSWCA 114 at [22] (Leeming JA, Beazley P and Sackville AJA agreeing).
- 173 RVC disavowed any allegation of fraud, emphasising that it does not allege that JLT acted with the intention to defraud or cause harm to RVC and group members.<sup>[146]</sup> However, an allegation that JLT made the alleged Recommendations acting as individual broker to RVC and with the intention of maintaining its fees necessarily imports an allegation that it intentionally sacrificed the interests of RVC and group members, or acted with reckless disregard for those interests, by recommending Statewide cover rather than less costly alternatives.
- 174 As a matter of procedural fairness, any such allegation was required to be pleaded distinctly and with particularity in the Third Further Amended Commercial List Statement so that JLT was not taken by surprise and had a proper opportunity to meet it: *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11 at 169 CLR 285 and 286-287 (Mason CJ and Gaudron J); *Forrest v Australian Securities and Investment Commission* (2012) 247 CLR 486; [2012] HCA 39 at [26] (French CJ, Gummow, Hayne, and Kiefel JJ); *Nadinic v Drinkwater* (2017) 94 NSWLR 518; [2017] NSWCA 114 at [45]-[46] (Leeming JA, Beazley P and Sackville AJA agreeing). The requirement for specific pleading with particularity applies to Commercial List Statements, although they are not strictly pleadings: *YTO Construction Pty Ltd v Innovative Civil Pty Ltd* [2019] NSWCA 110 at [50] (White JA, Macfarlan JA and Emmett AJA agreeing); *Stewart v Australia and New Zealand Banking Group Ltd* [2020] NSWSC 1787 at [17]-[26] (Hammerschlag J). Paragraph 23 of the Third Further Amended Commercial List Statement does not provide JLT with the requisite notice for the reasons at [171] above.
- 175 Contrary to RVC's submissions, paragraph 12 of the Third Further Amended Commercial List Statement does not put JLT on notice of any allegation that it breached its alleged fiduciary duties with a state of mind of "*steadfast determination*" to "*maintain its fees at almost all costs*" or otherwise with the intention of advancing its own interests or using its alleged position or knowledge derived from that position for its own benefit to the detriment of RVC and group members. Read in the context of the pleading as a

whole (and particularly paragraph 13), it is abundantly clear that paragraph 12 is directed to the question whether the alleged Recommendations were capable of giving rise to a general law duty to exercise reasonable care and skill in accordance with well established principles: see *Mutual Life & Citizens Assurance Company Limited v Evatt* (1968) 122 CLR 556 at 571 (Barwick CJ). Contrary to RVC's submissions, the word "further" in paragraph 19 of the Third Further Amended Commercial List Statement does not transform the substance of paragraph 12 into a state of mind allegation which is then imported into RVC's pleading of its cause of action for alleged breaches of fiduciary duty.

### **Reasons for dismissal of RVC's application for leave to amend**

176 By notice of motion filed on 6 September 2021, RVC sought leave to amend by expanding its claims for alleged breach of fiduciary duties and introducing new claims for alleged misleading or deceptive conduct. Leave was refused on 20 September 2021 on the basis that my reasons for that decision would be included in my reasons for judgment following the substantive hearing.

177 The proposed amendments would have expanded the scope of the pleaded fiduciary duty by amending paragraph 19 of RVC's pleading as follows (amendments underlined):

"19. ... as an insurance broker providing the Broking Services and making the Recommendations, JLT owed:

(a) Richmond Valley; and

(b) each of the Group Members,

the following fiduciary duties:

(c) a duty to refrain from pursuing or advancing JLT's own interests in circumstances where, or allowing itself to be in a position where, there existed a conflict or a significant possibility of conflict between its own interests and obligations and the interests ~~those~~ of Richmond Valley or the Group Member (as the case may be);

..."

178 The proposed amendments would have introduced the following new allegation of conflict in paragraph 22 of RVC's pleading (amendments underlined):

"22. By reason of the matters pleaded in paragraphs 20 and 21 above, a conflict existed between JLT's (and its related entities') own financial interests in earning and continuing to earn fees and commissions for, or in connection with, services it provided to Statewide Mutual, and/or between JLT's interest and obligations in respect of its role with Statewide Mutual, on the one hand and the interests of:

(a) Richmond Valley; and

(b) each Group Member,

on the other hand, in obtaining suitable Property and/or Public Liability and Professional Indemnity insurance at the best premium rates that were reasonable available to each of them in the market."

179 Paragraph 20 of RVC's pleading (which was not the subject of any proposed amendment) stated that:

“20. At all material times during the Relevant Period, JLT was appointed to perform and performed various functions and services for Statewide Mutual.”

180 The particulars for paragraph 20 were the whole of the provisions of the Deed.

181 The matters pleaded in paragraph 21 of RVC’s existing pleading were JLT’s entitlement under the Deed to receive certain fees and commissions (paragraph 21(a)) and the receipt of fees and commissions by related entities of JLT (paragraph 21(b)).

182 The proposed amendments would have added the following additional paragraph 21(c):

“(c) by reason of JLT’s role in Statewide Mutual as pleaded at paragraph 20 above, JLT:

(i) considered that it was obliged to act in the best interests of Statewide Mutual as a whole, by, amongst other things, not taking actions that may have the effect of diluting Statewide Mutual’s membership and concentrating risk;

(ii) identified to Richmond Valley and each Group Member only risk cover available through Statewide Mutual in respect of their Property and/or Public Liability and Professional Indemnity exposure;

(iii) did not approach insurers, including those providing insurance via Statewide Mutual, to provide, or give quotations to provide, Property and/or Public Liability and Professional Indemnity insurance to Richmond valley and each Group Member; and

(iv) was less likely than an independent broker to be able to obtain such quotations, if it had sought to do so, for Property and/or Public Liability and Professional Indemnity Insurance in respect of Richmond Valley and each Group Member from insurance providers beyond those involved in Statewide Mutual.”

183 The proposed amendments would have introduced a new claim in paragraphs 23(e) and 24 that JLT breached the expanded fiduciary duties pleaded in paragraph 19 by making the alleged Recommendations to RVC and each group member “*while in a position of conflict*”.

184 As JLT submitted, the proposed amended paragraph 22 did not identify the alleged “*interest and obligations*” of JLT “*in respect of its role with Statewide Mutual*” that were said to be in conflict with the pleaded interests of RVC and each group member.

185 The statement in paragraph 22 that the alleged conflict existed “[b]y reason of the matters pleaded in paragraphs 20 and 21” did not identify the relevant alleged “*interest and obligations*” of JLT. Paragraph 20 was expressed in the most general terms, as referred to above. Paragraphs 21(a) and (b) might be understood as referring to an “*interest*” of JLT “*in respect of its role with Statewide Mutual*” but they shed no light on the substance or source of the “*obligations*” of JLT on which the proposed new allegation of conflict was based. The proposed new paragraph 21(c) provided no assistance in identifying the “*interest and obligations*” of JLT. It merely referred to an alleged state of mind of JLT (in paragraph 21(c)(i)) and alleged conduct of JLT (in paragraphs 21(c)(ii) to 21(c)(iv)).

186 RVC submitted that the “*interest*” of JLT referred to in the proposed new conflict allegation means the financial interests described in the existing paragraphs 21(a) and (b). I accept that this reading of “*interest*” in the proposed amended paragraph 22 is

available when that paragraph is read in the context of paragraph 21. However, it is the alleged "*interest and obligations*" of JLT that is said to be the foundation of the alleged conflict in paragraph 22.

187 RVC's submissions suggested that "*obligations*" in the proposed amended paragraph 22 refers to the obligation that JLT allegedly "*considered*" that it owed to "*act in the best interests of Statewide Mutual as a whole*", as referred to in the proposed new paragraph 21(c)(i). However, RVC submitted that it does not allege that JLT in fact owed an obligation of the kind described in the proposed paragraph 21(c)(i).

188 According to the language of proposed amended paragraphs 19, 22 and 23, the amended claim that RVC wished to pursue is that:

- (1) JLT had a duty to refrain from acting where there was a conflict or significant possibility of conflict between "*its own interests and obligations*" (being alleged actual obligations, as opposed to obligations that RVC alleges JLT believed it had but did not in truth have);
- (2) a conflict did exist between "*JLT's interest and obligations in respect of its role with Statewide Mutual*" (being alleged actual obligations of JLT in respect of that role); and
- (3) JLT made the alleged Recommendations "*while in a position of conflict*".

189 I accept JLT's submission that the proposed new allegation of conflict was incoherent by reason of RVC's failure to identify the alleged actual "*obligations*" of JLT "*in respect of its role with Statewide Mutual*" that formed the basis of the proposed allegation. The incoherence is illustrated by RVC's inability to identify those alleged "*obligations*", as referred to above.

190 A further problem with the proposed amendments was that the allegation in paragraph 21(c)(i) that JLT "*considered that it was obliged to act in the best interests of Statewide Mutual as a whole*" is itself incoherent. "*Statewide Mutual*" is not a legal entity. It is merely a convenient term to refer to a contractual relationship between JLT, RVC, the group members and many other local councils. In my opinion, the notion that "*Statewide Mutual*" has "*interests*" or "*best interests*" is misconceived. In any event, the proposed amendments shed no light on how the alleged "*best interests of Statewide Mutual as a whole*" were said to be distinguishable from the several interests of the Members at any given time, each of whose interests included an interest in the performance of the Deed by all parties to the Deed in accordance with its terms.

191 An incoherent pleading does not provide sufficient notice to the opposing party of the case put against it and provide that party with a fair opportunity to meet that case. The importance of RVC clearly articulating JLT's "*interest and obligations in respect of its role with Statewide Mutual*" which the proposed amendments alleged were in conflict with the interests of RVC and each group member may be illustrated by asking the

question: How does the alleged fiduciary duty to avoid that alleged conflict accommodate itself to the contractual relationship between JLT and RVC and each group member under the Deed that created JLT's "*role with Statewide Mutual*"?<sup>[147]</sup>  
192 For those reasons, I determined that requiring JLT to defend the incoherently pleaded amended fiduciary claims would not facilitate the just resolution of the real issues in the proceedings. Nor would it facilitate the quick and cheap resolution of those real issues. It was therefore not consistent with the overriding purpose or the dictates of justice to grant leave to RVC to amend its fiduciary claims in the terms of the proposed Fourth Further Amended Commercial List Statement.<sup>[148]</sup> Having determined to refuse leave on that basis, I do not find it necessary to address the parties' submissions in relation to the other grounds on which JLT opposed RVC's application for leave to make those amendments.

193 I now turn to the claims for alleged misleading or deceptive conduct that would have been introduced by paragraphs 26A to 26G of the proposed Fourth Further Amended Commercial List Statement if leave to amend had been granted.

194 Those amendments involved allegations in proposed paragraph 26A that JLT expressly or impliedly made six "*Broking Services Representations*" in Insurance Declarations, Renewal Reports, Summaries of Cover, Financial Services Guides and invoices issued during annual renewal processes in the Relevant Period. The alleged "*Broking Services Representations*" included that JLT was "*providing broking services*" to and for RVC and each group member in relation to the placement of their insurance programme, including for property insurance and/or liability insurance for the forthcoming insurance year. Proposed paragraph 26B alleged that the six "*Broking Services Representations*" were misleading or deceptive for reasons that included that JLT "*did not regard itself as being under any obligation to try to obtain and/or recommend options for Property insurance and/or Public Liability and Professional Indemnity Insurance for Richmond Valley or Group Members outside of Statewide Mutual but did not disclose that fact to Richmond Valley or Group Members*".

195 Paragraph 26G of the proposed amendments pleaded that RVC and each of the group members had suffered loss "*by*" the allegedly misleading or deceptive conduct of JLT. The proposed pleading was devoid of any material facts relied on in support of that causation allegation. The particulars of loss set out in paragraph 26G of the proposed Fourth Further Amended Commercial List Statement were the loss of an allegedly valuable opportunity to obtain "*suitable*" property insurance and/or liability insurance from "*alternative underwriters or providers besides Statewide Mutual, at the best premium rates that were reasonably available to Richmond Valley and each of the group members in the market.*" The particulars stated:

"(ii) The value of that opportunity is equal to the difference between the amounts paid by Richmond Valley and each Group Member to Statewide Mutual during the Relevant Period, for their Property insurance and/or Public Liability and Professional Indemnity insurance; and

(A) the amount that would have been paid by Richmond Valley and each Group Member to alternative underwriters or providers of insurance during the Relevant Period, but for JLT's statutory contraventions; or

(B) the amount that would have been paid by Richmond Valley and each Group Member to Statewide Mutual during the Relevant Period, but for JLT's statutory contraventions.

subject to any adjustment the Court finds necessary."

- 196 I note that the particulars in proposed paragraph 26G were in the same terms as the particulars of loss in paragraphs 18 and 25 of the Third Further Commercial List Statement (relating to breach of duty of care/breach of contract and breach of fiduciary duty, respectively), save for the references to "*but for JLT's statutory contraventions*" in paragraphs (ii)(A) and (B) above (rather than "*but for JLT's breach of duty and/or contract*" in the equivalent particulars in paragraphs 18 and 25).
- 197 I accept RVC's submission that some elements of the proposed misleading or deceptive conduct claims relating to the alleged "*Broking Services Representations*" sought to place a new legal framework over the substance of the existing dispute in the proceedings. For example, the existing dispute included the allegation in paragraph 9 of the Third Further Amended Commercial List Statement that JLT had provided individual insurance broking services to RVC and each group member by placing its property insurance and/or liability insurance "*with Statewide Mutual*". The provision of those broking services was said to be evidenced by the contents of the Insurance Declarations and Renewal Reports. Paragraphs 26A and 26B of the proposed amendments would have raised questions about whether JLT had made representations to that effect to RVC and each group member, including in those Insurance Declarations and Renewal Reports, and whether any such representations were misleading or deceptive because JLT did not do all of the things that RVC contends were required to deliver such broking services with reasonable care and skill and JLT did not regard itself as being obliged to do those things. To that extent, the proposed amendments can fairly be said to fall within the scope of the "*real questions raised by ... the proceedings*" in the reasonably broad sense described in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [71]-[83] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 198 However, as JLT submitted, the proposed amendments also went further than the real questions already raised by the proceedings. For example, the matters pleaded in proposed paragraph 26B in support of the allegation that the "*Broking Services Representations*" were misleading or deceptive included that:
- “(a) ... during the Relevant Period, JLT:
- ...
- (iv) where the interests of Richmond Valley or any Group Member conflicted with the interests of Statewide Mutual, it preferred the interests of Statewide Mutual over those of the individual council;

(v) did not disclose that if the interests of Richmond Valley or any Group Member conflicted with the interests of Statewide Mutual, it intended to prefer the interests of Statewide Mutual over those of the individual council"

- 199 The existing pleadings raised no allegation of conflict between the interests of RVC or any group member and *"the interests of Statewide Mutual"*. The allegations in proposed paragraphs 26B(a)(iv) and (v) are incoherent for the reasons identified at [190] above.
- 200 The new issues sought to be raised in paragraphs 26B(a)(iv) and (v) were integral to the pleading of misleading or deceptive conduct claims in paragraphs 26A to 26G of the proposed Fourth Further Amended Commercial List Statement. It follows that I do not accept RVC's submission that the suite of amendments are necessary amendments for the purpose of determining the real questions raised by the proceedings.<sup>[149]</sup>
- 201 Even if the proposed amendments were properly characterised as necessary in that sense, the requirement in s 64 of the *Civil Procedure Act 2005* (NSW) that *"all necessary amendments are to be made for the purpose of determining the real questions raised by ... the proceedings"* is expressed to be subject to s 58 of that Act. Section 58 requires the Court to seek to act in accordance with the dictates of justice, which are to be determined by having regard to the provision of ss 56 and 57. To the extent relevant, the Court may also have regard to the matters in s 58(2). I determined that it was not consistent with the overriding purpose or the dictates of justice to grant leave in respect of the paragraphs 26A to 26G of the proposed Fourth Further Amended Commercial List Statement due to the incoherence of the allegations central to those proposed misleading or deceptive conduct claims (as referred to at [198]-[199] above) and to the deficient pleading of the causation element of those claims to which I now turn.
- 202 The proposed paragraph 26G failed to articulate how the alleged loss of opportunity particularised was said to have been caused by the alleged misleading or deceptive conduct.
- 203 I have referred to the relevant principles at [130] above.
- 204 As JLT submitted, the pleading of causation in proposed paragraph 26G is limited to the words *"[b]y the conduct of JLT that constituted the statutory contraventions"*. The particulars to paragraph 26G go to the nature and quantum of the alleged loss of opportunity and provide no indication of the causal link between the impugned conduct and the claimed loss. It is not pleaded that RVC relied on the allegedly misleading Broking Services Representations and there is no indication of what RVC (or group members) contend they would have done differently if the alleged misleading conduct had not occurred. As JLT submitted, various theoretical possibilities arise. At the hearing of the amendment application, senior counsel for RVC said that RVC would have gone out to tender earlier than it did in 2016.<sup>[150]</sup> That contention is neither pleaded nor particularised. Even if it had been articulated in the proposed paragraph 26G, this would have simply raised further questions including questions about when RVC it would have gone out to tender, whether it would have done so alone or collectively with other councils (as it did in 2016) and what would have been the scope

of the tender. I accept JLT's submissions that, because the insurance market conditions changed over time, JLT would need to know those elements of the alleged counterfactual in order to have a proper opportunity to defend that causation and loss case. Those matters would be likely to influence the pleading of the response to the causation allegation and would inform the factual matters to be investigated in order for JLT to prepare evidence responsive to the causation allegation and addressing the alleged value of the opportunity said to have been lost. Matters for investigation would include which (if any) brokers and insurers might have responded to the counterfactual tender and on what terms they might have responded having regard to the tender scope and the state of the insurance market at the relevant time. Contrary to RVC's submissions, those matters go beyond the issues that had been addressed in the "*alternative market*" evidence that had been served by the parties prior to the amendment application.

205 RVC submitted that the causation pleading in proposed paragraph 26G is in the same terms as in the existing paragraph 18. That is so, but it is the pleading of causation and loss in proposed paragraph 26G that gives rise to the issues referred to above. Those issues are not raised by paragraph 18. As JLT submitted, the causation question raised by the contract and tort claims in paragraph 18 concerns the position that RVC and group members would be in if JLT had performed the alleged contractual and general law duties of care by procuring alternative insurance or cheaper Contributions. The causation question that would be raised by the proposed paragraph 26G, if it were amended to plead the material facts concerning the "*earlier tender*" counterfactual articulated in very general terms in RVC's submissions, would introduce the issues referred to above into the proceedings for the first time. As I have explained, those issues include the likely response of brokers other than JLT to the counterfactual tender of unknown scope being issued at an unknown time. I accept JLT's submission that, even if causation were properly pleaded, it would not have had sufficient time to address those issues prior to the hearing. I note that RVC's amendment application was pressed on the basis that the Court should grant leave to amend without adjourning the hearing.

206 RVC submitted that, even if JLT did not have sufficient time to prepare to defend the proposed misleading or deceptive conduct claims prior to the hearing, the amendments should be allowed in respect of group members lest such claims be statute barred by the time their individual cases are heard and determined. I was not persuaded that the group members should be granted leave in respect of proposed amendments that have not been properly pleaded for the reasons explained above. After the amendment application was dismissed, no further application was made on behalf of or for the benefit of group members for leave to introduce a properly pleaded claim of misleading or deceptive conduct.

207 Having determined to refuse leave for the reasons explained above, I do not find it necessary to address the parties' submissions in relation to the other grounds on which JLT opposed RVC's amendment application in respect of the misleading or deceptive



conduct claims.

## Common questions

- 208 The group members are Albury City Council, Bland Shire Council, Burwood Council, Central Coast Council, Gunnedah Shire Council, Inner West Council, Kiama Municipal Council, Kyogle Council, Lismore City Council, Orange City Council, Mid-Western Regional Council, Narromine Shire Council, Parkes Shire Council, Port Macquarie-Hastings Council, Shellharbour City Council, Snowy Monaro Council, Willoughby City Council, Woollahra Municipal Council and Yass Valley Council. Northern Beaches Council was a group member at the time of the hearing but withdrew while judgment was reserved.
- 209 The common questions, as determined in *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383 and subsequently amended by consent are:
- “(1) During the Relevant Period, did JLT hold itself out in the Renewal Reports that it issued to Richmond and group members as:
- (a) being one of the largest insurance brokers in Australia and the world;
  - (b) possessed of the expertise to deliver the most comprehensive range of insurance and risk solution products and services available to local government authorities across Australia; and/or
  - (c) capable of ensuring that local councils receive a well-designed insurance programme at a competitive premium cost?
- (2) Did JLT hold itself out in the Renewal Reports and Financial Services Guides that it issued to Richmond and each group member as being a subscriber to the Code of Practice of the National Insurance Brokers Association at all material times during the Relevant Period?
- (3) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, during the Relevant Period, did JLT’s conduct by:
- (a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for Property and/or Public Liability and Professional Indemnity insurance to Richmond and each group member; and
  - (b) accepting authorisation forms and payment of those invoices from Richmond and each group member;
- give rise in each case to a contract between JLT on the one hand, and the relevant local council on the other, an implied term of which was that JLT would exercise reasonable care and skill in:
- (c) designing and providing advice with respect to its annual insurance programme and placing or arranging its property and/or public liability and professional indemnity insurance through Statewide; and
  - (d) advising or recommending that it obtain or renew their property and/or public liability and professional indemnity insurance through Statewide?
- (4) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, during the Relevant Period, did JLT by reason of the course of conduct in doing one or more or all of:
- (a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for Property and/or Public Liability and Professional Indemnity insurance to Richmond and each group member;

(b) accepting authorisation forms and payment of those invoices from Richmond and each group member;

(c) providing such assistance as it did, to Richmond and each group member to obtain protection for their property and/or public liability and professional indemnity exposure,

owe Richmond and each group member a fiduciary duty:

(d) to refrain from pursuing or advancing its own interests in circumstances where there existed a conflict, or significant possibility of conflict, between its own interests and those of Richmond or each group member;

(e) to refrain from using its position or knowledge resulting from its position as an insurance broker so as to obtain a benefit for itself or a third party or to cause detriment to Richmond or a group member (as the case may be)?

(5) Did a conflict exist between JLT's own financial interests in earning and continuing to earn fees and commissions, for or in connection with, services it provided to Statewide Mutual and the interests of Richmond and each group member in obtaining suitable property cover and/or liability and professional indemnity cover at the best premium rates that were reasonably available to each of them in the market?

(6) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, in doing one or more or all of:

(a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for property and/or public liability and professional indemnity cover to Richmond and each group member;

(b) accepting authorisation forms and payment of those invoices from Richmond and each group member;

(c) providing such assistance as it did, to Richmond and each group member to obtain protection for their property and/or public liability and professional indemnity exposure,

did JLT breach any fiduciary duties by:

(d) pursuing or advancing its own interests in earning or continuing to earn fees or commissions; or

(e) using its position or knowledge resulting from its position for its own financial benefit and to the detriment of Richmond and each group member?"

## **V ANNUAL RENEWALS AND RELEVANT CONTEMPORANEOUS EVENTS**

### **RVC's annual renewal process generally**

210 RVC's insurance program, encompassing its Statewide lines of cover and non-Statewide lines of cover, was renewed with effect from 4pm on 30 June each year.<sup>[151]</sup>

211 As I have already mentioned, the position of General Manager of RVC was held by Mr Brian Wilkinson until March 2012,<sup>[152]</sup> Mr John Walker from March 2012 until February 2016,<sup>[153]</sup> and Mr Vaughan Macdonald from February 2016. Mr Macdonald held the

position of Chief Operating Officer of RVC for one year prior to being appointed as General Manager in February 2016. At the time of the final hearing, Mr Macdonald continued to hold the office of General Manager.<sup>[154]</sup>

212 During their respective tenures as General Manager of RVC, Mr Wilkinson, Mr Walker and Mr Macdonald were responsible for authorising the placement of RVC's insurance cover annually. The renewal process commenced in about March or April each year and the work of dealing with JLT in relation to the renewals fell to RVC's Governance Officer or Risk Coordinator and Manager of Governance and Risk, who then liaised with and reported to the General Manager. During the Relevant Period, those positions at RVC were held by Ms Jacqui Parry until about early 2011, and Ms Deborah McLean and Ms Sue Parle thereafter.<sup>[155]</sup>

213 Mr Wilkinson gave evidence that, to the best of his knowledge, neither Ms Parry, Ms McLean nor any other RVC staff involved in the placement and renewal of RVC's insurance policies in the Relevant Period up to March 2012 had specific expertise in insurance. Mr Wilkinson had held various finance, administrative and governance positions in local government since 1990, including the positions of Director Corporate Services at Casino Council from January 1991 to January 2000 and General Manager of Crookwell Shire Council from January 2000 to January 2003 before he commenced as General Manager of RVC in January 2003.<sup>[156]</sup>

214 Each of Mr Walker and Mr Macdonald also gave evidence that neither they nor Ms McLean nor Ms Parle had any experience or expertise in the insurance industry. Prior to being appointed as the General Manager of RVC in March 2012, Mr Walker had accumulated some 30 years' experience in executive roles across a number of large organisations. Before joining RVC as its Chief Operating Officer in February 2015, Mr Macdonald had held a number of senior roles in Local Government.<sup>[157]</sup>

215 RVC did not adduce any evidence from Ms Parry, Ms McLean or Ms Parle.

216 During at least part of the Relevant Period, RVC was a member of the Northern Rivers Regional Organisation of Councils (**NOROC**), which included a Risk Managers Group and a General Managers Group. During Mr Wilkinson's time as General Manager of RVC, he was a member of the General Managers Group of NOROC and RVC's Governance Officer participated in the Risk Managers Group of NOROC.<sup>[158]</sup>

217 As will be apparent from the evidence of RVC's annual renewal processes referred to in detail below, the process was essentially the same in each year during the Relevant Period. The documentary evidence and the evidence of Messrs Wilkinson, Walker and Macdonald concerning the steps involved in the renewal process is consistent with Mr Demer's evidence referred at [71] above.<sup>[159]</sup>

218 RVC's submissions placed significant emphasis on the description of JLT as a "broker" or "insurance broker" and references to RVC as a "client" of JLT in the annual renewal documents issued to RVC during the Relevant Period. RVC submitted that insurance brokers perform an established, recognised and familiar role in commerce. Whilst RVC acknowledged that the term "broker" is not one of precision, it submitted that an

insurance broker is “*in essence*” a person who “*carries on an independent business of placing insurances upon the instructions of clients and whose basic relationship of agency is with their client*”. In support of that submission, RVC cited cases in which one insured had dealt with an insurance broker or consultant. Two of those cases concerned the role of the broker or consultant as the agent of the insurer.<sup>[160]</sup> None of the cases cited by RVC concern a mutual risk product such as the Scheme or an engagement to effect insurance cover in respect of the collective or pooled risks of more than one insured.

219 As JLT submitted, it is appropriate in many contexts to refer to JLT as a broker to RVC. JLT did provide individual broking services to RVC in relation to RVC’s many non-Statewide lines of cover and RVC was a client of JLT in relation to those lines of cover. Under the Deed, JLT was responsible for placing or “*broking*” the Primary Insurance on the instructions of the Board for the collective benefit of the Members of the Property Fund and Liability Fund, including RVC. JLT refers to this aspect of its role under the Deed as “*scheme broker*”. These are important contextual matters when considering the meaning or significance of the terms “*broker*”, “*insurance broker*” and “*client*” in the annual renewal documents. Those terms must also be considered in the context of those documents themselves, which covered the renewal of RVC’s non-Statewide lines of cover in addition to its Statewide lines of cover. As JLT submitted, it is not helpful to pick out the word “*broker*” or “*client*” wherever it appears and purport to ascribe to it some meaning that characterises the whole of the relationship between JLT and RVC.

220 RVC also relied on JLT’s subscription to the Code of Practice of the National Insurance Brokers Association (the **NIBA Code**) at all times during the Relevant Period. JLT admits that it held itself out as a subscriber to the NIBA Code in the Renewal Reports and Financial Services Guides that it issued to RVC and each group member in the context of performing the role of scheme manager and appointed scheme broker to Statewide.<sup>[161]</sup>

221 The submissions made on behalf of RVC identified two versions of the NIBA Code that applied at different times throughout the Relevant Period. The first version commenced in about 2006 and so applied from the beginning of the Relevant Period in 2009<sup>[162]</sup> and the second version applied from 1 January 2014.<sup>[163]</sup>

222 Contrary to the submissions made by senior counsel for RVC,<sup>[164]</sup> neither version of the NIBA Code formed part of any contract between JLT and RVC or created any other legal rights or obligations between JLT and RVC. Clause 4.6 of the 2006 version of the NIBA Code provided:

“The Code does not create any legal or other right as between the member and any person other than NIBA. The member makes no representation to you or any person other than NIBA that it will abide by the Code. You are able to make a complaint under the Code for any breach of the relevant standards or provisions and seek to have it resolved in accordance with the Code terms.”

223 The 2014 version of the NIBA Code contained a statement to the same effect under “*How to Navigate the Code – Step 3*”.

224 Both versions of the NIBA Code provided for alleged breaches of the Code to be reported to the Code Administrator, who may impose binding orders or sanctions for breach of the Code (excluding monetary penalties). There is no evidence that RVC reported any alleged breach of the NIBA Code by JLT during the Relevant Period.

### **The period from 1 January 2009 to 30 June 2009**

225 The Relevant Period commenced on 1 January 2009, mid-way through the 2008-2009 insurance year. RVC did not adduce any specific evidence concerning RVC’s insurance arrangements and Scheme membership during this period.

### **Renewal process for the 2009-2010 year**

226 Mr Brian Wilkinson was the General Manager of RVC with responsibility for authorising the placement of RVC’s insurance cover for the 2009-2010 year.

227 It will be recalled that JLT prepared budgets in about January or February of each year for each of the Scheme’s Annual Funds, including the Liability Fund and the Property Fund.

228 Mr Wilkinson gave evidence that, in about March each year, JLT forwarded to RVC a Statewide letter that outlined the renewal terms for the coming Fund Year (the **Statewide Renewal Letter**).<sup>[165]</sup> However, Mr Wilkinson was unable to locate the Statewide Renewal Letter sent to RVC in respect of the 2009-2010 year.<sup>[166]</sup>

229 Mr Wilkinson, Mr Walker and Mr Macdonald gave evidence that, in about March or April each year, JLT sent RVC a suite of documents including the Insurance Declaration which set out the details of RVC’s insurance policies that were due for renewal and declarations and questionnaires that RVC was required to complete for the purpose of those renewals. The questionnaires included a “*Property Protection Questionnaire*” and a “*Public Liability – Professional Indemnity Questionnaire*” that was referred to as the “*Statewide Declaration*”. Up to and including the 2013-2014 year, JLT sent the

- Statewide Declaration with the Statewide Renewal Letter. From the 2014-2015 insurance year, the Statewide Declaration was incorporated within the Insurance Declaration suite of documents.<sup>[167]</sup>
- 230 During the renewal process for the 2009-2010 year, JLT sent the Insurance Declaration suite of documents to RVC on 9 April 2009.<sup>[168]</sup>
- 231 The Insurance Declaration contained a “*Client Profile*” which named RVC as the named insured and described its business activity as “*Local Government Authority*”.
- 232 The Client Profile section of the Insurance Declaration stated: “*We will give the following information to insurers when negotiating terms for your renewal programme.*” The Client Profile section also stated that, if there were any changes to the entities to be insured or the insured’s business activities or products, the insured must “[t]ell your advisor” or “[t]ell your JLT advisor”.<sup>[169]</sup>
- 233 The Insurance Declaration contained a separate section summarising the scope of cover, policy limits and sub-limits, deductible (also referred to as an excess) and various other details for each insurance cover that was due for renewal: being contract works, councillors and officers’ liability, motor vehicle, marine cargo, personal accident, workers compensation top-up, casual hirers liability, fidelity guarantee, property insurance and liability insurance.
- 234 The summaries for contract works, councillors and officers liability, motor vehicle, marine cargo, personal accident and workers compensation top-up described RVC as the “*Insured*”, specified the “*Period of Insurance*” and identified the “*Policy Wording*” by reference to policy terms issued by an insurer. The questionnaire at the end of each of those summaries included a question about whether there were any known incidents likely to lead to a claim that had not been disclosed to “*your Insurer*”.
- 235 By contrast, the summaries for property insurance, liability insurance, casual hirers liability, and fidelity guarantee described RVC as the “*Member*”, specified the “*Period of Protection*” and identified the “*Protection Wording and Conditions*” by reference to “*Mutual Protection Wording*” or “*Statewide Mutual Protection Wording*” or “*Statewide Wording*”. The questionnaire at the end of each of those summaries included a question about whether there were any known incidents likely to lead to a claim not reported “*to your protection provider*” or “*to Statewide*”. The questionnaire at the end of the liability insurance summary required RVC to complete and return the Statewide Declaration.
- 236 There are numerous other clear indications within the summaries for property insurance and liability insurance that the information was sought and the declarations were required for Scheme renewal purposes.
- 237 For example, in the “*Property*” section of the Insurance Declaration:<sup>[170]</sup>
- (1) the “*Interest Protected*” was described as real and personal property “belonging to **the Members** or for which **the Members** are responsible or have assumed

- responsibility” (emphasis added);
- (2) the “Mutual Fund Self Retention” was specified as \$7,500,000 “**in the aggregate over all claims from Member Councils**” (emphasis added);
- (3) the limits of liability were described as follows:

**“LIMIT(S) OF LIABILITY**

The amount(s) set out hereunder represent the maximum Limit(s) of Liability for **any one loss or series of losses arising out of the one event in the Aggregate over all Member Councils** subject to any lesser Limit(s) of Liability specified elsewhere in the protection wording, but the Limit(s) or any Lesser Limit(s) of Liability shall only be applied in excess of the relevant deductible

Sections 1 and 2 Combined Limit      \$1,000,000,000

Section 3                      \$100,000,000”

- (4) the declared values were described as follows:

**“DECLARED VALUES**

**The declared values listed below have been used for the calculation of the Member’s Contribution to the Property Mutual and will apply to the basis of claims settlement from the commencement of the ensuing protection period.**

Section 1: Declared Values Only \$112,073,629”

- (5) the basis of settlement was described as being “*as per the Protection Wording*”, which was in turn described as “*the Mutual Protection Wording*”; and
- (6) the questionnaire<sup>[171]</sup> sought information concerning RVC’s assets and their value and the sub-limits of liability required by RVC for particular categories of loss, and instructed RVC to complete the schedule of assets in JLT’s standard form to facilitate JLT combining “*all Members’ Schedule of Assets into a single ‘Master’ Schedule of Assets*” so as to be able to “*filter and sort the Master Schedule of Assets items in a variety of ways that assist in underwriting analysis*” as this was a “*very useful and important presentation element to existing and prospective insurers and does assist lowering premium costs when negotiating the Property Mutual placement*”.

238 In the “*Public liability - Professional Indemnity*” section of the Insurance Declaration:  
[172]

- (1) the “*Scope of Cover*” for the professional indemnity component of the cover was described as (emphasis added):

“Any Claim or Claims first made **against The Member** and **notified to Statewide** during the Period of Protection arising out of any negligent act, error or omission whenever or wherever the same was or may have been **committed**

or alleged to have been committed by The Member in the conduct of The Member's Business (other than indemnity provided by this policy under (a) Public Liability and (b) Products Liability)."

- (2) the "Protection Wording and Conditions" was identified as a specific version of the "Statewide Mutual Protection Wording"; and
- (3) RVC was instructed to complete and return the Statewide Declaration that had been sent to it separately.<sup>[173]</sup>

239 The Statewide Declaration was printed on "Statewide" letterhead with the following headings: "NSW Local Government (Jardines) Mutual Liability Scheme" and "Declaration Form for Fund Year Commencing 30 June 2009". The Statewide Declaration required a yes or no answer to each of the following questions (emphasis added):<sup>[174]</sup>

"i) is Council aware after enquiry of any allegations or incidents which may give rise to a claim which has not to date been **advised to the Scheme Manager**? If so, please give details. (The provision of information does not limit Council's right to seek **indemnity under the Mutual Protection Scheme**)

ii) Are there any variations to Council's activities or additional activities or functions undertaken since Council last reviewed its public liability and professional indemnity policy? If so, please give details."

240 The document then set out a declaration that the information was true and that (emphasis added):<sup>[175]</sup>

"Council agrees that **the information contained in this declaration may be used by Statewide when negotiating with primary and excess insurance underwriters.**"

241 Immediately before the "Important Information" referred to below, the Insurance Declaration set out a "Collection Statement under Privacy Act 1988", which included the following statement:<sup>[176]</sup>

"We are collecting the information principally for the purpose of approaching the (re)insurance market, placing insurance, assessing and advising you on your insurance needs, claims handling or risk management (depending on your requirements)."

242 The following information was set out at the end of the Insurance Declaration under the heading "Important Information" (emphasis added):<sup>[177]</sup>

#### **"MUTUAL SCHEMES**

**The NSW Local Government Liability Scheme (Statewide) is a Mutual Risk Product** as defined by ASIC that is neither authorised under, nor subject to, the provisions of the Insurance Act 1973.

Statewide is not a product regulated by APRA.

Statewide estimates its future liabilities based upon procedures which are supported by both independent legal and actuarial experts. Statewide also maintains specific financial provisions for late reported claims (IBNR) and future claim developments plus a prudential risk margin. These provisions are amounts in addition to specific claim estimates.

**Statewide and Jardine Lloyd Thompson Pty Ltd (JLT) as the Scheme Manager have established financial targets to ensure that adequate financial resources are available to discharge future liabilities and make future payments.** This is achieved via a combination of financial management strategies which may include purchasing reinsurance, developing risk margins and retaining surplus funds. The Scheme Board and/or committees review the operating financial statements at regular intervals and an independent audit occurs annually with its findings reported to Members.



**The Deed is the primary document which governs the operation of the Mutual Schemes.** Wordings on each Scheme are issued as a guide as to the terms under which a claim will be considered and settled. A copy of the Deed is available on the website at [www.statewide.nsw.gov.au](http://www.statewide.nsw.gov.au).

#### **DUTY OF DISCLOSURE**

Before you enter into a contract of general insurance with an insurer, you have a duty under the Insurance Contracts Act 1984, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of the insurance and, if so, on what terms. ...

**You have a duty to disclose to the relevant Statewide Scheme every matter that you know, or could reasonably be expected to know, is relevant to that Scheme's decision whether to accept the risk of cover, and if so, on what terms. The same duty arises on renewal, extension, reinstatement, or variation of Council's membership of any of the Schemes.** The disclosure required is especially important in matters relating to the physical risk, new undertakings or past claims. If you breach the duty, even innocently, the Scheme, (or its reinsurers) may be able to reduce its liability in respect of a claim.

...

#### **REMUNERATION AND OTHER INCOME**

JLT's principal remuneration for arranging insurance on your behalf is either by way of;

- a) commission paid by the insurer; OR
- or
- b) a Fee; OR
- c) a combination of Commission paid by the insurer and a Fee.

In addition to the above the Jardine Lloyd Thompson Group may receive income from insurers as follows;

- Interest earned on insurance monies passing through our bank accounts;
- Profit commissions or profit shares paid by insurers on specific classes of business;
- Administrative service fees or expense reimbursements for limited specific services we provide to insurers as part of the placing or claims process.

**Where we act as managers of a Mutual Scheme or Discretionary Trust, our fee is negotiated according to the services to be provided for that Scheme.**

We will disclose any potential conflict of interest not included above which may occur and affect our relationship."

- 243 On 19 May 2009, Statewide issued an invoice to RVC for its Liability Scheme Contribution for the 2009-2010 year. The Contribution amount for public liability was \$319,010.00, to which GST was added. The invoice stated: *"Insurance has been arranged subject to payment and to the policy terms and conditions. Please read the important information included with this invoice and ensure that you review your sums insured at least annually."* The enclosed *"Important Information"* included the information set out at [239] above under the headings *"Mutual Schemes"* and *"Duty of Disclosure"*.<sup>[178]</sup>
- 244 RVC's Governance Officer (Ms Parry) coordinated the completion of the Insurance Declaration and the Statewide Declaration and Mr Wilkinson reviewed and signed the completed documents, which were then returned to JLT.<sup>[179]</sup> The signed Insurance Declaration and the completed questionnaires, schedules and declarations (with the

exception of the Statewide Declaration) were returned to JLT on 28 May 2009.<sup>[180]</sup> For reasons that are not explained by the evidence, the Statewide Declaration was not signed and returned to JLT until 13 July 2009.<sup>[181]</sup>

245 Mr Wilkinson, Mr Walker and Mr Macdonald gave evidence that, in about June each year, JLT sent RVC a Renewal Report, together with a letter to be signed by RVC authorising JLT to place RVC's insurance cover in accordance with the Renewal Report. RVC's General Manager then reviewed the Renewal Report and signed the authorisation, which was returned to JLT.<sup>[182]</sup>

246 During the renewal process for the 2009-2010 year, JLT sent the Renewal Report to RVC on 26 June 2009 "*detailing your renewal terms for the period 30 June 2009 to 30 June 2010*".<sup>[183]</sup>

247 The Renewal Report stated:<sup>[184]</sup>

"Jardine Lloyd Thompson Australia (JLT) is a leading provider of insurance related risk solutions and corporate services in Australia employing over 750 staff around the country who work to ensure quality risk management outcomes for Council.

JLT is a wholly owned subsidiary of the largest European-headquartered insurance broking group, which is also one of the largest firms of its type in the world.

This combination of International experience and Australian expertise allows JLT to deliver the most comprehensive range of insurance and risk solution products and services available and this report provides you with the details of the proposed insurance program negotiated on your behalf.

In this report we:

- summarise the current market conditions;
- provide renewal terms based on the updated information you have provided us;
- state credit terms and provide premium payment options;
- detail the various insurance policies where we have obtained quotations on your behalf."

248 The Renewal Report then set out JLT's assessment of the insurance market conditions and continued:<sup>[185]</sup>

"Despite these challenging market conditions, as a result of our substantial involvement with Local Authorities, JLT has developed several exclusive and specialist markets and products both locally and overseas. JLT has accumulated substantial purchasing power on behalf of Local Authorities, by virtue of the substantial premium volume placed through these markets.

This strategic approach has enabled JLT to obtain premium terms, which are extremely competitive.

We believe the results of our marketing activity demonstrate the ability of JLT to negotiate a competitive insurance programme in the current market conditions whilst retaining continuity of underwriter and without compromising Insurer security.

The personnel within JLT - Risk Services Division, are engaged exclusively in the marketing, placement, management and servicing of the insurance programs for Local Government and Semi Government Authorities, and we are constantly seeking and developing new specialist insurance markets for the benefit of our clients.

It is not our size that makes us the partner of choice for our clients, who include some of the world's largest corporations, it is rather the quality, availability and professionalism of our people and services. Key factors in our success are focus and teamwork - we only operate in areas where we are, or can become, a market leader and we positively encourage teamwork across the whole Group.

We are driven by our clients' needs and strive to exceed expectations at all times.

We aim to provide quality insurance and risk management services to you and look

forward to working with you throughout the year.”

249 The Renewal Report then set out JLT’s “*Comments and Recommendations*”:<sup>[186]</sup>

“Below are our comments and recommendations on:

- changes to your current program (where appropriate);
- changes in rates or premiums;
- holding insurer's quoted terms and best alternative terms (where obtained).

Your policies are subject to terms, conditions, endorsement and exclusions which impact on the extent of cover provided. Full details appear in the policy documents.

Once renewal of your program is finalised with the insurers we will send you a Summary of Insurances confirming cover details.”

250 Under the heading “*Summary of Costs*”, the Renewal Report stated:<sup>[187]</sup>

“These are your costs for 2009 - 2010 and include government charges:-

<b>Class of Insurance</b>	<b>Premium including statutory charges</b>	<b>Recommended Insurer</b>
Councillors & Officers Liability	\$ 12,047.73	Zurich Australian Insurance Limited
Motor Vehicle	\$ 35,552.00	Zurich Australian Insurance Limited
Motor Vehicle	\$ 56,216.60	Zurich Australian Insurance Limited
Marine Cargo	\$ 6,414.56	Zurich Australian Insurance Limited through Associated Marine Insurers Agents Pty Ltd
Personal Accident	\$ 2,887.50	ACE Insurance Limited
Workers' Compensation Top Up	\$ 3,913.70	ACE Insurance Limited
Property	\$348,701.63	Statewide Property Mutual
Total Cost	\$465,733.72	

251 The next section of the Renewal Report was entitled “*Important Commentary*”:<sup>[188]</sup>

After stating that “*Statewide Mutual and Insurers reserve the right to amend the quoted terms if the claims experience or underwriting information changes significantly prior to renewal*”, the commentary was divided into sections for each of the lines of insurance set out in the “*Summary of Costs*” table, including “*Property Mutual*”. The commentary in relation to “*Property Mutual*” stated (emphasis added):<sup>[189]</sup>

“Statewide Property will be commencing Fund Year 12 from 30 June 2009, and the Scheme continues to operate successfully for the benefit of all Member Councils.

For the third consecutive protection period, the cost of incurred claims will exceed the aggregate fund (Fund Years 9, 10 and 11). Claims costs incurred by the Property Mutual over the self retention limit are to be met by Reinsurers and payment of claims from Member Councils is not affected. Due to the continual increase in claims costs, the aggregate fund will increase to \$8,200,000.

Due to prevailing market conditions, the lead reinsurer has changed for the ensuing fund year. However, the method of operation of the Property Scheme is working effectively and this method will be continue for 2009 - 2010. In accordance with the renewal provisions of the Statewide Mutual Deed, cover has been effected as per the details contained in this report.

All tax invoices will be dispatched to Council shortly.

There have been some alterations to the limits of cover available and deductibles applicable and these are all detailed in the Property section of this report. A full and revised protection wording will be provided to Council shortly.

Actual claim numbers received in the previous five protection periods have reduced slightly, however the severity of the property damage incurred has increased. Over the corresponding period, the 1<sup>st</sup> average cost per claim has doubled from \$13,800 to \$29,500 (as at 1st March 2009). Storm related claims have had a significant impact in this regard.

**Taking the above factors into consideration and the previously mentioned market situation, our negotiation discussions with Reinsurers have proved better than originally expected for Members.**

**Despite the initial gloomy outlook, total contributions for Fund Year 12 will result in an average scheme rate adjustment of 7.5%. This incorporates the increase in the self retention limit and the recent increase in the Fire Services Levy to incorporate the Emergency Services Levy. For standard property insurance, this now equates to 40% of the premium contribution.**

**Members will be aware that a new Fund is established each year from which claims are paid, and reinsurance is purchased by the Scheme for losses which exceed the Fund amount. If claims do not reach the amount of the Fund, then a surplus remains. This surplus may be supplemented by higher than budgeted investment earnings. When all claims are settled (or the quantum of claims can be accurately estimated), the surplus is distributed to Member Councils.**

Since inception of the Property Scheme, a total of \$10,338,000 has been distributed in rebates to Member Councils.

Overall the Scheme continues to operate successfully and a rebate amount of \$1,675,000 will be distributed to Members at 30 June 2009.

This rebate is the first instalment of, and applies to, Fund Year 8 (2005 - 2006 period).

The rebate calculation takes into account Council's claims history for each Fund Year, and the rebate amount decreases as the cost of claims increases. Members with a good claims experience are therefore rewarded.

Surplus distributions are dependent upon renewal with the Property Scheme for 2009-2010.

Your Council's portion of the rebate will be as follows:

Fund Year 8:    \$24,455.01    Plus GST \$2,445.50    \$26,900.51

A cheque will be provided to Council once the renewal process has been completed and all renewal Contributions have been paid to Statewide.”

- 252 The emphasised passages immediately above highlight that JLT has negotiated the “*Property Mutual*” cover on behalf of all Members, consistently with the Deed.
- 253 The Renewal Report then summarised the terms of cover for each line of insurance referred to in the “*Summary of Costs*” table, including the insured, insurer, period of insurance, policy number, geographical limits, monetary limits and sub-limits and

deductibles.<sup>[190]</sup>The summary of terms for “*Property*” differed from the summary for other lines of insurance cover in the following relevant respects:<sup>[191]</sup>

- (1) RVC was referred to as the “*Member*” rather than the “*Insured*”;
- (2) the period was described as the “*Period of Protection*” rather than the “*Period of Insurance*”;
- (3) the summary did not identify an “*Insurer*” and referred instead to the “*Protection Provider*” being “*Statewide Property Mutual*”;
- (4) a “Certificate Number” was provided rather than a “Policy Number”;
- (5) the “*Limit(s) of Liability*” were described in the following terms (emphasis added):

“All risks of direct physical loss or damage, as defined and limited in the wording, on Real Property, Personal Property, Business Interruption, including the Extensions of Coverage applying at the following described locations:

**As per schedule advised to and on file with Statewide Property Mutual.**

The maximum limit of liability will not exceed the respective Sub-Limits of Liability shown elsewhere for the coverages involved.

However, in no event will the total Limit of Liability exceed \$1,200,000.000 as a result of any one occurrence, regardless of the number of perils, coverages or locations involved, **in the Aggregate over all Member Councils.**”

- (6) the summary contained the following statement in relation to “*Declared Values*” (emphasis added):

“The declared values listed below have been **used for the calculation of the Member’s Contribution to the Property Mutual** and will apply to the basis of valuation from the commencement of the ensuing protection period.

Section 1: Declared Values Only     \$112,121,629”

- (7) the summary identified a “Mutual Fund Self Retention”, being \$8,200,000 “[i]n the aggregate over all claims from Member Councils”; and
- (8) the summary contained the following “*Remarks*” (emphasis added):

“Please **refer to your Statewide Wording** for details of Terms, Conditions and Exclusions. The wording, by its application to Primary insurance, applies to cover under the Scheme.

**In determining the cover afforded by the Scheme, the provisions of the Deed are paramount.**”

254 The Renewal Report attached a list of “*Important Information*”, including information in the same or substantially the same terms set out at [239] above under the heading “*Mutual Schemes*”.<sup>[192]</sup>

255 JLT’s letter to RVC enclosing the Renewal Report requested RVC to sign and return a written form stating whether RVC authorised JLT to place insurances in accordance with the Renewal Report.<sup>[193]</sup>Mr Wilkinson gave evidence that, in each year during his tenure as General Manager of RVC, he reviewed the Renewal Report and signed the authorisation form.<sup>[194]</sup>Mr Wilkinson deposed that his signing of the authorisation form authorised the placement of RVC’s property insurance and his approval for the payment of the Statewide Liability Scheme Contribution invoice authorised the placement of RVC’s liability insurance.<sup>[195]</sup>The authorisation form for the 2009-2010

year was signed by Mr Wilkinson on 29 June 2009.<sup>[196]</sup> Mr Wilkinson gave evidence that he approved payment of the Statewide invoice for RVC's Liability Scheme Contribution, but there is no evidence about when the payment was approved or made.<sup>[197]</sup>

256 I infer that Mr Wilkinson distinguished between the authorisation processes for property insurance and liability insurance because the Renewal Report did not refer to liability insurance. The Statewide invoice for RVC's Liability Scheme Contribution for the 2009-2010 year had been issued before RVC returned the completed Insurance Declaration to JLT and before JLT issued the Renewal Report.<sup>[198]</sup> I infer that, as in subsequent years,<sup>[199]</sup> the Statewide Board determined the Liability Scheme Contributions and the Property Scheme Contribution rates before gathering information from RVC and other Members through the Insurance Declaration process. The property information provided through that process was relevant to the calculation of the amount of each Member's Contribution to the Property Scheme for the forthcoming year, applying the rates already determined by the Board to the Member's declared asset values and other information. The Property Scheme Contribution amount was advised in the Renewal Report, followed by the Property Scheme Contribution invoice. The Board's determination of the Liability Scheme Contributions and the Property Scheme Contribution rates before gathering information through the Insurance Declaration process appears to have been driven by the requirement for stability of Contributions explained in Section II above. Contributions collected in excess of the costs of the Primary Insurance (and, in the case of the Property Scheme, the Mutual Fund Self Retention) were available for distribution to Members in accordance with clause 9.9 of the Deed, and/or accumulated as surplus funds.<sup>[200]</sup>

257 On 1 July 2009, JLT sent RVC a Statewide invoice for RVC's Contribution to the Property Scheme for the period 30 June 2009 to 30 June 2010. The invoice was on Statewide letterhead and the amount of the "Contribution" was \$317,001.48 (plus GST). Immediately below the "Contribution" and "GST" amounts, the invoice stated: *"Insurance has been arranged subject to payment and to the policy terms and conditions. Please read the important information included with this invoice and ensure that you review your sums insured at least annually."* The enclosed "Important

*Information*” included information in the same or substantially the same terms set out at [239] above under the headings “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*”.<sup>[201]</sup>

258 Mr Wilkinson, Mr Walker and Mr Macdonald gave evidence that, in about July each year JLT issued a “*Summary of Insurances*” document to RVC which outlined all of the insurance that had been arranged for RVC, including property and liability insurance cover.<sup>[202]</sup>

259 JLT issued the Summary of Insurances to RVC for the 2009-2010 year on about 30 July 2009.<sup>[203]</sup>

260 The introductory pages of the Summary of Insurances contained the following statement:<sup>[204]</sup>

“Distinctive. Choice.

JLT is an international group of Risk Specialists and Employee Benefits Consultants and one of the largest companies of its type in the world. We offer a distinctive choice to our clients and partners through our combination of independence, scale and specialism.

As an independent business, we are able to operate with autonomy and flexibility. We have the scale to provide solutions to the complex demands of the world’s leading companies and to deliver global servicing whilst recognizing that the needs of each of our clients are unique. By developing highly specialised services, we provide our clients with a depth of expertise and experience.”

261 The Summary of Insurances stated that it provided “*an outline of all insurance policies we have arranged on your behalf*”.<sup>[205]</sup>The outline for each insurance policy issued to RVC independently of the Scheme (councillors & officers liability, motor vehicle, marine cargo, personal accident and workers compensation top up) specified the “*Insured*” or “*Policy Holder*”, “*Period of Insurance*”, “*Insurance Coverage*” or “*Scope of Cover*”, “*Insurer*” and “*Policy Number*” together with other information including limits, sub-limits and deductibles.<sup>[206]</sup>The outline for each of the Scheme lines of protection (casual hirer’s liability, and fidelity guarantee, property insurance and liability insurance) referred to RVC as the “*Member*” (not the “*Insured*”), identified the “*Period of Protection*” (not the “*Period of Insurance*”), identified the Scheme as the “*Protection Provider*”.<sup>[207]</sup>and specified RVC’s certificate number (not an insurance policy number).<sup>[208]</sup>The outline for property insurance also described the “*Limit(s) of Liability*” in the terms referred to at [253] above and identified the “*Mutual Fund Self Retention*”. The outlines for liability insurance and property insurance concluded with “*Remarks*” directing RVC to the relevant “*Statewide Mutual Liability Wording*” or “*Statewide Wording*” and stated (emphasis added):<sup>[209]</sup>

“The wording, by its application to Primary insurance, applies to cover under the Scheme.

**In determining the cover afforded by the Scheme, the provisions of the Deed are paramount.”**

262 Mr Wilkinson gave evidence that he approved payment of the invoices received from JLT for RVC’s insurances, including property insurance and liability insurance.<sup>[210]</sup>

263 In his affidavit, Mr Wilkinson deposed that he “*understood that JLT was Richmond Valley’s insurance broker*”<sup>[211]</sup> and that it was his objective during each annual renewal process to obtain “*cost effective and suitable options*” for insurance.<sup>[212]</sup> Mr Wilkinson deposed:<sup>[213]</sup>

“29. When authorising JLT to place Richmond Valley’s Liability Insurance and Property Insurance with Statewide Mutual in each of the Relevant Insurance Years, based on my understanding that JLT was Richmond Valley’s broker, I expected that JLT:

(a) had sourced the best available insurance for Richmond Valley, both in terms of cost and suitability to Richmond Valley’s needs; and

(b) would have informed Richmond Valley if it could obtain appropriate Liability Insurance or Property Insurance at a more competitive price than the Liability Insurance or Property Insurance that Richmond Valley obtained from Statewide Mutual.

30. In respect of each of the Relevant Insurance Years, JLT never informed me, that appropriate Liability Insurance or Property Insurance was available to Richmond Valley at a more competitive price than the Property Insurance or Liability Insurance that Richmond Valley obtained from Statewide Mutual. Nor am I aware of JLT informing anyone else employed by Richmond Valley of that matter.

31. During the relevant Insurance Years, I was not aware of any insurance provider other than Statewide Mutual from whom Richmond Valley could obtain Liability Insurance or Property Insurance, nor did I turn my mind to whether any such provider existed in the insurance marked.

32. Based on the matters set out at paragraphs 29 to 31 above, in each Relevant Insurance Year, when I authorised JLT to place Richmond Valley’s Liability Insurance and Property Insurance with Statewide Mutual, I understood that the insurance available through Statewide Mutual represented the best insurance that Richmond Valley could obtain in respect of Liability Insurance and Property Insurance.”

264 In cross-examination, Mr Wilkinson departed from his evidence in paragraph 29 of his affidavit when he accepted that all of the services that JLT provided to RVC in respect of its Statewide lines of cover were provided under the Deed, including the services that JLT provided to RVC in respect of the annual renewal of RVC’s Statewide cover. Mr Wilkinson also accepted that, in acting under the Deed, JLT was acting as manager of the Scheme. He did not expect JLT, as manager of the Scheme, to propose alternatives to the Scheme.<sup>[214]</sup>

265 RVC submitted that Mr Wilkinson’s evidence in cross-examination was ambiguous because it was not clear whether he understood the cross-examiner’s phrase “*Statewide lines of cover*” to refer to the lines of cover *per se* (that is, to liability insurance and property insurance) or to RVC’s liability and property cover that was in fact renewed under the Statewide Liability and Property Schemes each year. Having observed the cross-examination and reviewed the transcript, I consider that Mr Wilkinson understood that the cross-examiner was referring to liability and property insurance *per se*. No relevant ambiguity arises in any event because Mr Wilkinson also gave evidence that, by the time he authorised the renewal of RVC’s Statewide liability cover and property cover in June each year, he knew that it was too late for RVC to



retire from the Liability Scheme or the Property Scheme for the forthcoming year and so there would have been no point in RVC looking for alternatives to Statewide for those lines of cover. Mr Wilkinson also gave evidence that he knew that minimisation of premiums wherever possible was a role that RVC had entrusted to the Statewide Board under the Deed and that JLT advised the Board about such matters.<sup>[215]</sup>

266 For the purpose of his affidavit, Mr Wilkinson was asked to assume that liability insurance was “*available from reputable insurance providers other than Statewide Mutual*” for the 2009-2010 insurance year, that such insurance “*would have been identified by JLT as suitable to Richmond Valley’s insurance needs*” in that insurance year and that the premium payable for such insurance would have been \$246,000.<sup>[216]</sup> It will be recalled that the Contribution payable by RVC to the Liability Scheme for the 2009-2010 year was \$319,010 (plus GST),<sup>[217]</sup> which was subsequently reduced to \$304,764 after rebates.<sup>[218]</sup> The Liability Scheme accumulated surplus funds at the same time as paying rebates to Members.<sup>[219]</sup>

267 Mr Wilkinson deposed that, if JLT had informed him that such alternative liability insurance was available, “*I would have directed JLT to obtain the Alternative Liability Insurance, instead of the Liability Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.*” Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost of the alternative insurance relative to other liability insurance available to RVC and “*the fact that it was identified as suitable to Richmond Valley’s needs*” by JLT.<sup>[220]</sup> Mr Wilkinson did not identify what RVC’s liability insurance “needs” were as at the commencement of the 2009-2010 insurance year. In cross-examination, Mr Wilkinson accepted that, in addition to the cost of what he referred to as the alternative insurance, he would have had regard to non-price factors that were relevant to achieving value for public money, including the benefits that RVC obtained through membership of the Liability Scheme.<sup>[221]</sup>

268 Mr Wilkinson was also asked to assume that property insurance was “*available from reputable insurance providers other than Statewide Mutual*” for the 2009-2010 insurance year, that such insurance “*would have been identified by JLT as suitable to Richmond Valley’s insurance needs*” in that insurance year and that the premium payable for such insurance would have been \$135,000.<sup>[222]</sup> It will be recalled that the Contribution payable by RVC to the Property Scheme for the 2009-2010 year was \$317,001.48 (plus GST), which was subsequently reduced to \$297,200 after adjustments and rebates or “bonus distributions”.<sup>[223]</sup> The Property Scheme generated a surplus even after paying rebates to members.<sup>[224]</sup>

269 Mr Wilkinson deposed that, if JLT had informed him that such alternative insurance was available, “*I would have directed JLT to obtain the Alternative Property Insurance, instead of the Property Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.*” Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost

of the alternative property insurance relative to other property insurance available to RVC and “*the fact that it was identified as suitable to Richmond Valley’s needs*” by JLT. [225] Mr Wilkinson did not identify what RVC’s property insurance “*needs*” were as at the commencement of the 2009-2010 insurance year. In cross-examination, Mr Wilkinson accepted that, in addition to the cost of what he referred to as the alternative insurance, he would have had regard to non-price factors that were relevant to achieving value for public money, including the benefits that RVC obtained through membership of the Property Scheme. [226]

270 The assumptions that Mr Wilkinson was asked to make were unrealistic for two reasons.

271 First, they implicitly included an assumption that, at the time that insurance was being negotiated for the year commencing on 30 June, it would have been open to RVC to accept a quotation from an insurer and enter into a policy of insurance independently of the Liability Scheme and/or the Property Scheme as an alternative to paying its membership Contribution for those Schemes for the forthcoming year. By 1 April 2009, RVC was contractually obliged to pay the Property Scheme Contribution and Liability Scheme Contribution for the year commencing on 30 June 2009. Any other insurance arrangement that RVC might have entered into after 1 April 2009 for the forthcoming year would have been in addition to, and not in the alternative to, the protection that it obtained through membership of those Schemes.

272 Second, the assumptions invoke a scenario in which JLT informs Mr Wilkinson about the availability of “*alternative*” insurance during the annual renewal process. That scenario is irreconcilable with Mr Wilkinson’s evidence referred to at [264]-[265] above about JLT’s role and his own knowledge that, during the annual renewal process, it was too late for RVC to retire from the Liability Scheme and/or the Property Scheme and take up alternative insurance for the forthcoming year and there was no point in RVC looking for such alternatives.

273 There is no evidence that RVC told JLT prior to 1 April 2009 that it was considering retiring from the Property Scheme and/or the Liability Scheme or that it required quotations for insurance for those risks as an alternative to its continuing membership of the Schemes. Although Mr Wilkinson deposed that he simply did not turn his mind to whether such alternative insurance was available in the market, [227] it is clear from Mr Wilkinson’s participation in a discussion about alternative insurance arrangements prior to and during the 2010-2011 renewal process referred to below that he had been told that such alternatives may be available and that he knew that potential alternatives could be explored by putting RVC’s insurance requirements out to tender. [228]

274 I reject Mr Wilkinson’s affidavit evidence referred to at [263] in light of his contrary evidence in cross-examination referred to at [264]-[265] above. I attribute no weight to Mr Wilkinson’s evidence referred to at [267] and [269] above because it is based on assumptions that are unproven and unrealistic for the reasons explained at [270]-[273] above.

## Renewal process for the 2010-2011 year

275 Mr Wilkinson was the General Manager of RVC with responsibility for authorising the placement of RVC's insurance cover for the 2010-2011 year.

276 Prior to the commencement of the annual renewal process, the General Managers Group of NOROC had made a decision in February 2010 endorsing the preparation of a discussion paper on "*General Insurance options*" for Councils within the Northern Rivers Region. According to the Discussion Paper that was subsequently produced in late May 2010: <sup>[229]</sup>

"The catalyst for discussion about potential opportunities for tendering this service was the identification of resource sharing opportunities for the NOROC membership of Councils and the potential for financial or non financial benefits through a combined approach."

277 JLT forwarded the Statewide Renewal Letter together with the Statewide Declaration to RVC on 23 March 2010. <sup>[230]</sup>

278 The Statewide Renewal Letter stated: <sup>[231]</sup>

"Each of the Statewide Mutual Schemes is due for renewal on 30 June 2010 - Liability, Property, Fidelity Guarantee, and Casual Hirers.

At its meeting on 12 March 2010, the Board of Management resolved that renewal on each Scheme will be offered at the same terms as applied for the 2009 - 2010 Fund Year. This follows on from the 5% reduction applied to the Liability Scheme renewal terms last year.

For the Property Mutual, while the contribution rate remains unchanged, any increase in Council's Total Declared Asset Value will result in a commensurate increase in the contribution applicable. Calculation of terms is dependent upon the provision of an updated Asset Schedule and your Account Manager will contact Council in the near future in that regard."

279 The letter then set out the renewal terms offered to RVC for (relevantly) the Liability Scheme and the Property Scheme.

280 The renewal terms for the Liability Scheme were a premium of \$319,010 with an excess of \$12,500 for protection up to \$400,000,000 for public liability and product liability and up to \$300,000,000 for professional indemnity.

281 In relation to the Property Scheme, the letter stated: <sup>[232]</sup>

"On receipt of Council's updated Asset Schedule, the renewal contribution, and any adjustment on the 2009-2010 contribution, will be calculated.

Because of concern that some Member Councils may be exposed to underinsurance, it resolved to assist with the provision of Valuation Services. To that end, Tenders were called and the tender submitted by Scott Fullarton Valuations Pty Ltd have been accepted. It is envisaged that this Company will undertake valuations of the assets of ALL Member Councils over the next 5 years and, when the schedule has been completed, we will advise of the anticipated dates over which a representative of the valuers will visit each Member Council."

282 The Statewide Declaration was in the same terms as the previous year, <sup>[233]</sup> save that it referred to the Fund Year commencing 30 June 2010. <sup>[234]</sup>

283 On 13 April 2010, JLT sent the Insurance Declaration suite of documents to RVC for the 2010-2011 year. <sup>[235]</sup>

284 The Insurance Declaration <sup>[236]</sup> contained the following introductory statement:

"Distinctive. Choice.

JLT is an international group of Risk Specialists and Employee Benefits Consultants and one of the largest companies of its type in the world. We offer a distinctive choice to our clients and partners through our combination of independence, scale and specialism.

As an independent business, we are able to operate with autonomy and flexibility. We have the scale to provide solutions to the complex demands of the world's leading companies and to deliver global servicing whilst recognizing that the needs of each of our clients are unique. By developing highly specialised services, we provide our clients with a depth of expertise and experience."

285 The contents of the "*Client Profile*" section of the Insurance Declaration were the same in all material respects as the previous year.<sup>[237]</sup>

286 As in the previous year, the Insurance Declaration contained a separate section summarising the details for each insurance cover that was due for renewal: councillors and officers liability, motor vehicle, marine cargo, personal accident, workers compensation top up, casual hirers liability, fidelity guarantee, property insurance and liability insurance.

287 The summaries for councillors and officers liability, motor vehicle, marine cargo, personal accident and workers compensation top up described RVC as the "*Insured*", specified the "*Period of Insurance*" and identified the "*Policy Wording*" by reference to policy terms issued by an insurer. The questionnaire at the end of each of those summaries included a question about whether there were any known incidents likely to lead to a claim that had not been disclosed to "*your Insurer*".

288 By contrast, the summaries for property insurance, liability insurance, casual hirers liability and fidelity guarantee described RVC as the "*Member*", specified the "*Period of Protection*" and identified the "*Protection Wording and Conditions*" by reference to "*Mutual Protection Wording*" or "*Statewide Mutual Protection Wording*" or "*Statewide Wording*". The questionnaire at the end of each of those summaries included a question about whether there were any known incidents likely to lead to a claim not reported "*to your protection provider*" or "*to Statewide*". The questionnaire at the end of the public liability and professional indemnity summary required RVC to complete and return the Statewide Declaration.

289 As in the previous year, there are numerous other clear indications within the summaries for property, insurance and liability insurance that the information was sought and the declarations were required for Scheme purposes.

290 In particular, the "*Property*" section of the Insurance Declaration:<sup>[238]</sup>

(1) described the "*Limits of Liability*" in the following terms (emphasis added):

"All risks of direct physical loss or damage, as defined and limited in the wording, on Real Property, Personal Property, Business Interruption, including the Extensions of Coverage applying at the following described locations:

**As per schedule advised to and on file with Statewide Property Mutual.**

The maximum limit of liability will not exceed the respective Sub-Limits of Liability shown elsewhere for the coverage's involved.

However, in no event will the **total Limit of Liability** exceed \$2,000,000,000 as a result of any one occurrence, regardless of the number of perils, coverage's or locations involved, **in the Aggregate over all Member Councils.**"

(2) specified the "Mutual Fund Self Retention" as \$8,200,000 "[i]n the aggregate over all claims from Member Councils";

(3) described the "*Declared Values*" in the following terms (emphasis added):

"The declared values listed below have **been used for the calculation of the Member's Contribution to the Property Mutual** and will apply to the basis of valuation **from the commencement of the ensuing protection period.**

Section 1: Declared Values Only \$103,943,843"

(4) stated that:

"Basis of Valuation is as per the Protection Wording"

(5) identified the "*Protection Wording*" as "*Protection wording reference/version number 2009-2010 Statewide Wording.doc*" save to the extent modified by endorsements that were listed in the summary;

(6) included a questionnaire which sought information about RVC's assets and their value and stated:

"Because your protection may be subject to Co-insurance (Average) we recommend that the insurable assets protected under the Property Scheme be subject to regular valuations by professional valuers with the declared value representing the cost of replacement at the time reinstatement actually takes place.

The Statewide Board of Management has appointed an independent valuation company to provide an insurance valuation service to all Members of the Property Mutual over a five year period. The Scheme will meet the cost of such insurance valuations. Full details will be provided to each participating Member separately, however in the interim please contact our office for further details."

(7) included in the questionnaire an instruction to RVC to adhere to JLT's standard layout of the schedule of assets because this enabled JLT to "*combine all Members' Schedule of Assets into a single 'Master' Schedule of Assets*" and to "*filter and sort the Master Schedule of Assets items in a variety of ways that assist in underwriting analysis*". The questionnaire stated that: "*This is a very useful and important presentation element to existing and prospective insurers and does assist lowering premium costs when negotiating the Property Mutual placement*".

291 In the "*Public Liability - Professional Indemnity*" section of the Insurance Declaration:

(1) the "*Scope of Cover*" was described in the following terms (emphasis added):

"1) **Statewide will pay to or on behalf of The Member** all sums for which The Member shall become legally liable to pay by way of compensation in respect of:

- Death or Personal Injury
- Loss or Damage to Property

happening during the Period of Protection and caused by an occurrence in connection with the Business from:

- a) Public Liability
- b) Products Liability

All as defined in the Protection Wording.

2) Professional Indemnity (this is a Claims Made Coverage)

**Any Claim or Claims first made against The Member and notified to Statewide during the Period of Protection** arising out of any negligent act, error or omission whenever or wherever the same was or may have been committed or alleged to have been committed by The Member in the conduct of The Member's Business (other than any indemnity provided by this protection under 1)(a) Public Liability and (b) Products Liability."

(2) the "*Protection Wording and Conditions*" were identified as a specific version of the "*Statewide Mutual Protection Wording*"; and

(3) the questionnaire stated:

"To enable us to finalise arrangements for the placement of this protection, Council will need to complete and return the Statewide Mutual Declaration, which has been forwarded under separate cover.

#### UNREPORTED CLAIMS

Are there any incidents known to the officer responsible for insurance, likely to lead to a claim not reported to Statewide Mutual?"

292 The Insurance Declaration included the same "*Collection Statement under Privacy Act 1988*" as in the previous year.<sup>[239]</sup>

293 The "*Important Information*" set out at the end of the Insurance Declaration included the following (emphasis added):

#### "MUTUAL SCHEMES

**The NSW Local Government Liability Scheme (Statewide) is a Mutual Risk Product** as defined by ASIC that is neither authorised under, nor subject to, the provisions of the Insurance Act 1973.

Statewide is not a product regulated by APRA.

Statewide estimates its future liabilities based upon procedures which are supported by both independent legal and actuarial experts. Statewide also maintains specific financial provisions for late reported claims (IBNR) and future claim developments plus a prudential risk margin. These provisions are amounts in addition to specific claim estimates.

Statewide and Jardine Lloyd Thompson Pty Ltd (JLT) as the Scheme Manager have established financial targets to ensure that adequate financial resources are available to discharge future liabilities and make future payments. This is achieved via a combination of financial management strategies which may include purchasing reinsurance, developing risk margins and retaining surplus funds. The Scheme Board and/or committees review the operating financial statements at regular intervals and an independent audit occurs annually with its findings reported to Members.

**The Deed is the primary document which governs the operation of the Mutual Schemes.** Wordings on each Scheme are issued as a guide as to the terms under which a claim will be considered and settled. A copy of the Deed is available on the website at [www.statewide.nsw.gov.au](http://www.statewide.nsw.gov.au).

#### DUTY OF DISCLOSURE

Before you enter into a contract of general insurance with an insurer, you have a duty under the Insurance Contracts Act 1984, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of the insurance and, if so, on what terms. ...

**You have a duty to disclose to the relevant Statewide Scheme every matter that you know, or could reasonably be expected to know, is relevant to that Scheme's decision whether to accept the risk of cover, and if so, on what terms. The same duty arises on renewal, extension, reinstatement, or variation of Council's membership of any of the Schemes.** The disclosure required is especially important in matters relating to the physical risk, new undertakings or past claims. If you breach the duty, even innocently, the Scheme, (or its reinsurers) may be able to reduce its liability in respect of a claim.

...

## REMUNERATION AND OTHER INCOME

JLT's principal remuneration for arranging insurance on your behalf is either by way of;

- a) commission paid by the insurer; OR
- or
- b) a Fee; OR
- c) a combination of Commission paid by the insurer and a Fee.

In addition to the above the Jardine Lloyd Thompson Group may receive income from insurers as follows;

- Interest earned on insurance monies passing through our bank accounts;
- Profit commissions or profit shares paid by insurers on specific classes of business;
- Administrative service fees or expense reimbursements for limited specific services we provide to insurers as part of the placing or claims process.

Where we act as managers of a Mutual Scheme or Discretionary Trust, our fee is negotiated according to the services to be provided for that Scheme.

We will disclose any potential conflict of interest not included above which may occur and affect our relationship."

- 294 On 19 May 2010, JLT forwarded to RVC a Statewide invoice dated 11 May 2010 for RVC's Liability Scheme Contribution for the 2010-2011 year in the amount of \$319,010 (excluding GST). Included with the invoice was a summary of the protection provided by RVC's membership of the Liability Scheme. The summary was in the same terms as the "*Public Liability-Professional Indemnity*" summary in the Insurance Declaration. The invoice also enclosed the same "*Important Information*" that had been included in the Insurance Declaration as set out immediately above.<sup>[240]</sup>
- 295 On 28 May 2010, the Insurance Declaration, signed by Mr Wilkinson indicating that he had read and approved its contents, was returned to JLT together with all supporting documentation and information with the exception of the Statewide Declaration.<sup>[241]</sup> For reasons that are not explained by the evidence, Mr Wilkinson did not sign the Statewide Declaration until 19 October 2010.<sup>[242]</sup>
- 296 An internal memorandum from Ms Parry to Mr Wilkinson dated 18 June 2010 recommended payment of Statewide invoices, including the invoice for RVC's 2010-2011 Liability Scheme Contribution referred to at [294] above.<sup>[243]</sup>
- 297 JLT sent the Renewal Report for the 2010-2011 year to RVC on or about 22 June 2010.<sup>[244]</sup>
- 298 The Renewal Report included an introductory statement in the same terms as the introductory statement in the Insurance Declaration set out at [284] above.
- 299 The Executive Summary section of the Renewal Report stated:

"Jardine Lloyd Thompson Australia (JLT) is a leading provider of insurance related risk solutions and corporate services in Australia employing over 750 staff around the country who work to ensure quality risk management outcomes for Council.

JLT is a wholly owned subsidiary of the largest European-headquartered insurance broking group, which is also one of the largest firms of its type in the world.

This combination of International experience and Australian expertise allows JLT to deliver the most comprehensive range of insurance and risk solution products and services available and this report provides you with the details of the proposed

insurance program negotiated on your behalf.

In this report we:

- summarise the current market conditions;
- provide renewal terms based on the updated information you have provided us;
- state credit terms and provide premium payment options;
- detail the various insurance policies where we have obtained quotations on your behalf;
- profile other products and services which may be of interest to you.”

300 The Executive Summary in the Renewal Report then set out JLT’s assessment of the insurance market conditions, and continued:

“Despite these challenging market conditions, as a result of our substantial involvement with Local Authorities, JLT has developed several exclusive and specialist markets and products both locally and overseas. JLT has accumulated substantial purchasing power on behalf of Local Authorities, by virtue of the substantial premium volume placed through these markets.

This strategic approach has enabled JLT to obtain premium terms, which are extremely competitive.

We believe the results of our marketing activity demonstrate the ability of JLT to negotiate a competitive insurance programme in the current market conditions whilst retaining continuity of underwriter and without compromising Insurer security.

The personnel within JLT - Risk Services Division, are engaged exclusively in the marketing, placement, management and servicing of the insurance programs for Local Government and Semi Government Authorities, and we are constantly seeking and developing new specialist insurance markets for the benefit of our clients.

It is not our size that makes us the partner of choice for our clients, who include some of the world's largest corporations, it is rather the quality, availability and professionalism of our people and services. Key factors in our success are focus and teamwork - we only operate in areas where we are, or can become, a market leader and we positively encourage teamwork across the whole Group.

We are driven by our clients' needs and strive to exceed expectations at all times.

We aim to provide quality insurance and risk management services to you and look forward to working with you throughout the year.”

301 The Renewal Report then set out JLT’s “*Comments and Recommendations*”:

“Below are our comments and recommendations on:

- changes to your current program (where appropriate);
- changes in rates or premiums;
- holding insurer's quoted terms and best alternative terms (where obtained).

Your policies are subject to terms, conditions, endorsement and exclusions which impact on the extent of cover provided. Full details appear in the policy documents.

Once renewal of your program is finalised with the insurers we will send you a Summary of Insurances confirming cover details.”

302 Under the heading “*Summary of Costs*”, the Renewal Report stated: <sup>[245]</sup>

<b>Class of Insurance</b>	<b>Premium including statutory charges</b>	<b>Recommended Insurer</b>
Councillors & Officers Liability	\$ 23,103.32	Zurich Australian Insurance Ltd



Motor Vehicle– Bushfire Vehicles	\$ 33, 330.00	Zurich Australian Insurance Ltd
Motor Vehicle	\$ 57,994.20	Zurich Australian Insurance Ltd
Marine Cargo	\$ 5,225.00	Associated Marine Insurers Agents Pty Ltd
Personal Accident	\$ 3,025.00	ACE Insurance Ltd
Workers’ Compensation Top Up	\$ 2,881.01	ACE Insurance Ltd
Property	\$323,268.47	Statewide Property Mutual
Total Cost	\$448,827.00	

303 The next section of the Renewal Report was entitled “*Important Commentary*”.[246] After stating that “*Statewide Mutual and Insurers reserve the right to amend the quoted terms if the claims experience or underwriting information changes significantly prior to renewal*”, the commentary was divided into sections for some of the lines of insurance set out in the table at [297] above, including “*Property Mutual*”. The commentary in relation to “*Property Mutual*” stated:[247]

**“Property Mutual**

The contribution for the Property Protection is adjustable at the end of each protection period and is calculated at 50% of the difference in asset values (Section 1 only) at the beginning and end of the Protection Period:

Declared Values at 30 June 2009: \$112,121,629

Declared Values at 30 June 2010: \$103,943,843

Difference: \$8,177,786

Resulting in an adjustment Rebate of:

-\$11,560.53 Plus GST -\$1,156.05 -\$12,716.58

A separate tax invoice will be issued for this adjustment.”

304 The Renewal Report then summarised the terms of cover for each line of insurance referred to in the “*Summary of Costs*” table. As in the previous year’s Renewal Report, the summary in relation to “*Property*” differs from the other summaries in the following respects:

- (1) RVC was referred to as the “*Member*” rather than the “*Insured*”;
- (2) the period was described as the “*Period of Protection*” rather than the “*Period of Insurance*”;
- (3) the summary did not identify an “Insurer” and referred instead to the “Protection Provider” being “Statewide Property Mutual and Others through Statewide Property Mutual”;
- (4) a “Certificate Number” was provided rather than a “Policy Number”;
- (5) the “*Limit(s) of Liability*” were described in the following terms (emphasis added):

“All risks of direct physical loss or damage, as defined and limited in the wording, on Real Property, Personal Property, Business Interruption, including the Extensions of Coverage applying at the following described locations:

**As per schedule advised to and on file with Statewide Property Mutual.**

The maximum limit of liability will not exceed the respective Sub-Limits of Liability shown elsewhere for the coverages involved.

However, in no event will the total Limit of Liability exceed \$2,000,000,000 as a result of any one occurrence, regardless of the number of perils, coverages or locations involved, **in the Aggregate over all Member Councils.**”

- (6) the summary contained the following statement in relation to “*Declared Values*” (emphasis added):

“The declared values listed below have been **used for the calculation of the Member’s Contribution to the Property Mutual** and will apply to the basis of valuation from the commencement of the ensuing protection period.

Section 1: Declared Values Only     \$103,943.843”

- (7) the summary identified a “Mutual Fund Self Retention”, being \$8,200,000 “[i]n the aggregate over all claims from Member Councils”; and
- (8) the summary contained the following “*Remarks*” (emphasis added):

“Please **refer to your Statewide Wording** for details of Terms, Conditions and Exclusions. The wording, by its application to Primary insurance, applies to cover under the Scheme.  
**In determining the cover afforded by the Scheme, the provisions of the Deed are paramount.**”

305 The Renewal Report then set out various matters in a section entitled “*Important Information*” including the information about “*Mutual Schemes*” set out at [293] above.

306 Mr Wilkinson reviewed the Renewal Report and signed the authorisation form on 23 June 2010.<sup>[248]</sup> Mr Wilkinson deposed that he authorised the placement of RVC’s property insurance by signing that authorisation form and he authorised the placement of RVC’s liability insurance by approving the payment of the Statewide Liability Scheme Contribution invoice.<sup>[249]</sup> It will be recalled that the Statewide Liability Scheme

Contribution invoice was issued before RVC completed and returned the Insurance Declaration documents to JLT and before JLT issued the Renewal Report. Mr Wilkinson gave evidence that he approved payment of that invoice. Whilst there is no evidence of the date of that approval, Ms Parry recommended that the invoice be approved for payment on 18 June 2010, prior to the issue of the Renewal Report.<sup>[250]</sup>

307 I infer that Mr Wilkinson distinguished between the authorisation processes for property insurance and liability insurance because the Renewal Report did not refer to liability cover. It is clear from the Statewide Renewal Letter that the Board had determined the Liability Scheme Contribution rates and the Property Scheme Contribution rates before gathering information from RVC and other Members through the Insurance Declaration process. The property information provided through that process was relevant to the calculation of the amount of a Member's Contribution to the Property Scheme for the forthcoming year, applying the rates already determined by the Board to the Members' declared asset values and other information. The Property Scheme Contribution amount was advised in the Renewal Report, which was followed by the Property Scheme Contribution invoice referred to below. As I have observed at [256] above, the Board's determination of the Liability Scheme Contribution amounts and the Property Scheme Contribution rates in advance of the completion of the Insurance Declaration process and the negotiation of the Primary Insurance terms is explicable by the need for stability of Contributions and by the provisions of the Deed and the practices adopted by the Board in relation to surplus funds within the Property Scheme and the Liability Scheme.<sup>[251]</sup>

308 On 8 July 2010, JLT sent RVC the Statewide invoice for RVC's Property Scheme Contribution for the 2010-2011 year in the amount of \$293,880.43 (plus GST). Enclosed with the invoice was a summary of the protection afforded to RVC as the "Member" of the Property Scheme and "Important Information", including information in the same or substantially the same terms set out at [292] above under the headings "Mutual Schemes", "Duty of Disclosure" and "Remuneration and Other Income".<sup>[252]</sup>

309 JLT issued a Summary of Insurances to RVC on 23 July 2010.<sup>[253]</sup>

310 The Summary of Insurances contained the same introductory statement as the Insurance Declaration and the Renewal Report in the terms set out at [284] above and stated that it provided "an outline of all insurance policies we have arranged on your behalf".

311 The outline for each insurance policy issued for RVC's non-Statewide lines of cover (councillors and officers liability, motor vehicle, marine cargo, personal accident and workers compensation top up) specified the "Insured" or "Policy Holder", "Period of Insurance", "Insurance Coverage" or "Scope of Cover", "Insurer" and "Policy Number" together with other information including limits, sub-limits and deductibles.

312 By contrast, the outline for each of the Statewide lines of cover (property, liability, casual hirer's liability, and fidelity guarantee) referred to RVC as the "Member" (not the "Insured"), identified the "Period of Protection" (not the "Period of Insurance"), identified

the relevant Scheme as the “*Protection Provider*”<sup>[254]</sup> and specified RVC’s certificate number (not an insurance policy number). The outline for “*Property*” described the “*Limit(s) of Liability*” and “*Declared Values*” in the same terms as in the Renewal Report referred to at [304] above and identified the “*Mutual Fund Self Retention*” as \$9,000,000 “[i]n the aggregate over all claims from Member Councils” (excluding boiler and machinery claims from Members under certain additional cover). The outline for “*Public Liability – Professional Indemnity*” described the “*Scope of Cover*” in the same terms as in the Insurance Declaration referred to at [176] above. The outlines for “*Property*” and “*Public Liability – Professional Indemnity*” concluded with “*Remarks*” directing RVC to the relevant “*Statewide Mutual Liability Wording*” or “*Statewide Wording*” and stated (emphasis added):<sup>[255]</sup>

“The wording, by its application to Primary insurance, applies to cover under the Scheme.

**In determining the cover afforded by the Scheme, the provisions of the Deed are paramount.”**

- 313 Mr Wilkinson gave evidence that he approved payment of all of the invoices received from JLT for RVC’s insurances, including property insurance and liability insurance.<sup>[256]</sup>
- 314 I have rejected Mr Wilkinson’s evidence referred to at [263] above for the reasons already explained.<sup>[257]</sup> Mr Wilkinson gave the evidence referred to at [264]-[265] above concerning his knowledge of the Deed and his understanding of JLT’s role in the annual renewal process during which RVC was contractually bound to continue its membership of the Property Scheme and the Liability Scheme for the forthcoming year commencing on 30 June 2010. On or about 1 June 2010, Mr Wilkinson had received the Discussion Paper referred to at [276] above, the preparation of which had been endorsed by the NOROC General Managers Group in February 2010. The Discussion Paper outlined options ranging from Northern Rivers Region Councils collectively issuing tenders for insurance to maintaining the Councils’ then current arrangements with Statewide. Mr Wilkinson was aware from his knowledge of the Deed and from the Discussion Paper itself that it was too late as at 1 June 2010 for RVC to be considering alternatives to Statewide for the insurance year commencing on 30 June 2010.<sup>[258]</sup>
- 315 For the purpose of his affidavit, Mr Wilkinson was asked to assume that public liability and professional indemnity insurance was “*available from reputable insurance providers other than Statewide Mutual*” for the 2010-2011 insurance year, that such insurance “*would have been identified by JLT as suitable to Richmond Valley’s insurance needs*” in that insurance year and that the premium payable for such insurance would have been \$213,000.<sup>[259]</sup> It will be recalled that the Contribution payable by RVC in respect of the Liability Scheme for the 2010-2011 year was

\$319,010 (excluding GST),<sup>[260]</sup> which was subsequently reduced to \$303,335 after rebates.<sup>[261]</sup> The Liability Scheme accumulated surplus funds even after paying rebates to Members.<sup>[262]</sup>

316 Mr Wilkinson gave evidence that, if JLT had informed him that such alternative insurance was available, *“I would have directed JLT to obtain the Alternative Liability Insurance, instead of the Liability Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.”* Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost of the alternative liability insurance relative to other insurance available to RVC for those risks and *“the fact that it was identified as suitable to Richmond Valley’s needs”* by JLT.<sup>[263]</sup> Mr Wilkinson did not identify what RVC’s liability insurance *“needs”* were as at the commencement of the 2010-2011 insurance year.

317 Mr Wilkinson was also asked to assume that property insurance was *“available from reputable insurance providers other than Statewide Mutual”* for the 2010-2011 insurance year, that such insurance *“would have been identified by JLT as suitable to Richmond Valley’s insurance needs”* in that insurance year and that the premium payable for such insurance would have been \$130,000.<sup>[264]</sup> It will be recalled that the Contribution payable by RVC in respect of the Property Scheme for the 2010-2011 year was \$293,880.43 (plus GST), which was subsequently increased to \$301,735 after an adjustment of \$42,650 for an increase in RVC’s property values during that year and after allowing for a rebate of \$34,795.<sup>[265]</sup> The Property Scheme accumulated surplus funds even after paying rebates to Members.<sup>[266]</sup>

318 Mr Wilkinson gave evidence that, if JLT had informed him that such alternative insurance was available, *“I would have directed JLT to obtain the Alternative Property Insurance, instead of the Property Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.”* Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost of the alternative property insurance relative to other property insurance available to RVC and *“the fact that it was identified as suitable to Richmond Valley’s needs”* by JLT.<sup>[267]</sup> Mr Wilkinson did not identify what RVC’s property insurance *“needs”* were as at the commencement of the 2010-2011 insurance year.

319 The assumptions that Mr Wilkinson was asked to make are unrealistic for the reasons explained at [270]-[272] above. Moreover, notwithstanding that Mr Wilkinson was a member of the NOROC General Managers Group that had been discussing potential alternatives to Statewide since at least February 2010, there is no evidence that RVC told JLT prior to 1 April 2010 that it was considering retiring from the Property Scheme and/or the Liability Scheme or that it required quotations for insurance for those risks as an alternative to its continuing membership of the Schemes.

320 I attribute no weight to Mr Wilkinson’s evidence referred to at [316] and [318] above because it is based on assumptions that are unproven and unrealistic for the reasons explained at [270]-[272] and [319] above.

## Renewal process for the 2011-2012 year

- 321 Mr Wilkinson was the General Manager of RVC with responsibility for authorising the placement of RVC's insurance cover for the 2011-2012 year.
- 322 Following the Discussion Paper referred to at [314] above, RVC and nine other local councils issued a tender for an insurer or insurance broker to provide "*General Insurance Services*" commencing on 1 July 2011 for the councils' non-Statewide lines of cover only.<sup>[268]</sup> That is to say, RVC and the nine councils chose to maintain the existing arrangements with Statewide. The tender process closed on 16 March 2011. On 22 June 2011, RVC accepted the tender submitted by JLT.<sup>[269]</sup> Mr Wilkinson understood that the contract that RVC thereby entered into with JLT did not relate to the Statewide lines of cover and that provision of insurance services to RVC for those lines of cover continued to be governed by the Deed.<sup>[270]</sup>
- 323 The timing and contents of the renewal documentation issued by JLT for the 2011-2012 year were substantially the same in all material respects as the documentation for the 2009-2010 and 2010-2011 years referred to above.
- 324 JLT wrote to RVC on 21 March 2011 enclosing the Statewide Renewal Letter for the 2011-2012 year.<sup>[271]</sup> The letter advised that the Finance Committee (under delegation from the Board) had met on 15 March 2011 and "*resolved that renewal on each scheme will be offered at the same terms as applied for the 2010-2011 Fund Year. This is the second consecutive year in which terms have remained [sic] unchanged, and it follows on from the 5% reduction applied to the Liability Scheme renewal two years ago.*" The letter stated that, while the Property Scheme terms remained unchanged, any increase in RVC's declared asset values would result in a commensurate increase in the Contribution payable.
- 325 The Statewide Renewal Letter then set out the terms offered to RVC for each of the Liability, Property, Fidelity Guarantee and Casual Hirers' Scheme renewals. The terms offered in respect of the Liability Scheme were a premium of \$319,010 with an excess of \$12,500 for protection up to \$400 million for each of public liability and product liability and up to \$300 million for professional indemnity. In relation to the Property Scheme, the letter stated:
- "While the terms offered for renewal have been determined, we are in negotiation with Statewide's Underwriters on the Wording to be offered and any amendments will be advised for your consideration prior to the due date.
- On receipt of Council's updated Asset Schedule, the renewal contribution, and any adjustment on the 2010-2011 contribution, will be calculated."
- 326 The Statewide Declaration was in the same terms as previous years,<sup>[272]</sup> save that it referred to the Fund Year commencing 30 June 2011.<sup>[273]</sup>
- 327 JLT sent the Insurance Declaration suite of documents to RVC on 7 April 2011.<sup>[274]</sup> The Insurance Declaration contained the same introductory statement as the previous year.<sup>[275]</sup> The Insurance Declaration followed the same structure and the same differentiation as in previous years between non-Statewide lines of cover and RVC's four Statewide lines of cover (casual hirers liability, fidelity guarantee, property and liability). Whilst

there are some differences in the contents of the Insurance Declaration compared to previous years, they are not material to the issues to be determined in these proceedings. The differences do not detract from (and, in some instances, reinforce) the clear indications that the information sought in the sections of the Insurance Declaration relating to property insurance and liability insurance was for Scheme renewal purposes. The Insurance Declaration included the same "*Collection Statement under Privacy Act 1988*" as in previous years.<sup>[276]</sup>The "*Important Information*" section at the end of the Insurance Declaration included statements in the same or substantially the same terms as previous years concerning "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*".<sup>[277]</sup>

328 On 25 May 2011, JLT forwarded to RVC a Statewide invoice dated 16 May 2011 for RVC's Liability Scheme Contribution for the 2011-2012 year in the amount of \$319,010 (excluding GST).<sup>[278]</sup>The Liability Scheme invoice contained the same "*Important Information*" as had been set out in the Insurance Declaration concerning "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*". Attached to the invoice was a summary of the protection afforded to RVC as a member of the Liability Scheme in substantially the same terms as the summary in the Insurance Declaration.

329 On 27 May 2011, Mr Wilkinson signed the Insurance Declaration to record that he had read and approved its contents and Ms McLean forwarded the completed questionnaires, schedules and declarations (including the signed Statewide Declaration) to JLT.<sup>[279]</sup>

330 JLT sent the Renewal Report to RVC on 29 June 2011.<sup>[280]</sup>The Renewal Report contained the same introductory statement as the Insurance Declaration.<sup>[281]</sup>The Executive Summary of the Renewal Report included a statement in the same terms set out at [247] above, followed by JLT's assessment of market conditions and, in particular, the impact of floods and other natural disasters in Australia and overseas on the market. The Executive Summary stated:<sup>[282]</sup>

"The Board of Statewide have worked hard to limit the effect the changing market conditions and has advised that there will not be any contribution increases for the 2011-2012 insurance period for Property, Liability, Casual Hirers and Fidelity."

331 The "*Comments and Recommendations*" set out in the Renewal Report were described in the same terms as in the previous years' reports.<sup>[283]</sup>

332 As in previous years, the Renewal Report contained a "*Summary of Costs*", listing each "*Class of Insurance*", the renewal premium and the "*Recommended Insurer*". As in previous years, the Summary of Costs named "*Statewide Property Mutual*" as the "*Recommended Insurer*" for the "*Property*" class of insurance but did not refer to liability insurance. As in previous years, the Board had already determined the renewal terms for the Liability Scheme and the Property Scheme and Statewide had invoiced RVC for its 2011-2012 Liability Scheme Contribution prior to the completion of the Insurance Declaration process, as referred to at [328] above. The Renewal Report advised the amount of RVC's Property Scheme Contribution for the 2011-2012 year, calculated in accordance with the renewal terms determined by the Board in March 2011 and based

on the declared asset values and other information provided by RVC through the Insurance Declaration process. The Renewal Report noted that RVC's declared values had increased from \$106,226,165 as at 30 June 2010 to \$135,609,977 as at 30 June 2011.<sup>[284]</sup>

- 333 The Renewal Report summarised the terms of cover for each line of insurance referred to in the Summary of Costs table. As in the previous years' Renewal Reports, the summary in relation to "*Property*" differed from the other summaries in the respects identified at [253] and [304] above. The "*Declared Values*" had been updated to \$135,609,977 as mentioned above, the aggregate limit of liability was \$2,000,000 (unchanged from the previous year) and the "*Mutual Fund Self Retention*" had increased to \$9,300,000 "*in the aggregate over all claims from Member Councils*".
- 334 The Renewal Report attached the "*Important Information*" that had been included in the Insurance Declaration, including the information about "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*".<sup>[285]</sup>
- 335 Mr Wilkinson deposed that he authorised the placement of RVC's property insurance by signing the authorisation form in the Renewal Report and he authorised the placement of RVC's liability insurance by approving the payment of the Statewide Liability Scheme Contribution invoice.<sup>[286]</sup> I repeat my observations at [307] above.
- 336 JLT issued the Summary of Insurances to RVC on 4 July 2011.<sup>[287]</sup> The observations in relation to the previous years' Summary of Insurances at [260]-[261] and [309]-[312] above apply equally to the Summary issued on 4 July 2011, save that the limits of liability and the declared values and retention for property insurance had been updated for the 2011-2012 year.
- 337 On 5 July 2011, JLT forwarded to RVC a Statewide invoice dated 1 July 2011 for RVC's Property Scheme Contribution for the 2011-2012 year in the amount of \$352,702.94 (excluding GST). The invoice was accompanied by a summary of the protection afforded to RVC by membership of the Property Scheme in the same or substantially the same terms as the summary that had been included in the Renewal Report.<sup>[288]</sup>
- 338 Mr Wilkinson approved payment of the invoices received from JLT for RVC's insurances, including property insurance and liability insurance.<sup>[289]</sup>
- 339 I have rejected Mr Wilkinson's evidence referred to at [263] above for the reasons already explained.<sup>[290]</sup> Mr Wilkinson gave the evidence referred to at [264]-[265] above concerning his knowledge of the Deed and his understanding of JLT's role in the annual renewal process during which RVC was contractually bound by the Deed to continue its membership of the Property Scheme and Liability Scheme for the forthcoming year commencing on 30 June 2011.
- 340 For the purpose of his affidavit, Mr Wilkinson was asked to assume that liability insurance was "*available from reputable insurance providers other than Statewide Mutual*" for the 2011-2012 insurance year, that such insurance "*would have been identified by JLT as suitable to Richmond Valley's insurance needs*" in that insurance year and that the premium payable for such insurance would have been \$181,000.<sup>[291]</sup>



It will be recalled that the amount of RVC's Liability Scheme Contribution for the 2011-2012 year was \$319,010 (excluding GST),<sup>[292]</sup> which was subsequently reduced to \$301,048 after rebates.<sup>[293]</sup> The Liability Scheme accumulated surplus funds even after paying rebates to Members.<sup>[294]</sup>

341 Mr Wilkinson gave evidence that, if JLT had informed him that such alternative insurance was available, "I would have directed JLT to obtain the Alternative Liability Insurance, instead of the Liability Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year." Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost of the alternative liability insurance relative to other insurance available to RVC for those risks and "the fact that it was identified as suitable to Richmond Valley's needs" by JLT.<sup>[295]</sup> Mr Wilkinson did not identify what RVC's liability insurance "needs" were as at the commencement of the 2011-2012 insurance year.

342 Mr Wilkinson was also asked to assume that property insurance was "available from reputable insurance providers other than Statewide Mutual" for the 2011-2012 insurance year, that such insurance "would have been identified by JLT as suitable to Richmond Valley's insurance needs" in that insurance year and that the premium payable for such insurance would have been \$159,000.<sup>[296]</sup> It will be recalled that the amount of RVC's Property Scheme Contribution for the 2011-2012 year was \$352,702.94 (excluding GST), which was subsequently reduced to \$332,283 after rebates.<sup>[297]</sup> The Property Scheme accumulated surplus funds even after paying rebates to Members.<sup>[298]</sup>

343 Mr Wilkinson gave evidence that, if JLT had informed him that such alternative insurance was available, "*I would have directed JLT to obtain the Alternative Property Insurance, instead of the Property Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.*" Mr Wilkinson gave evidence that, in considering whether to give that direction to JLT, he would have had regard to the cost of the alternative property insurance relative to other property insurance available to RVC and "the fact that it was identified as suitable to Richmond Valley's needs" by JLT.<sup>[299]</sup> Mr Wilkinson did not identify what RVC's property insurance "needs" were as at the commencement of the 2011-2012 insurance year.

344 The assumptions that Mr Wilkinson was asked to make are unrealistic for the reasons explained at [270]-[272] above. Moreover, notwithstanding that Mr Wilkinson was a member of the NOROC General Managers Group that had been discussing potential alternatives to Statewide during the period from about February to June 2010, there is no evidence that RVC told JLT prior to 1 April 2010 that it was considering retiring from the Property Scheme and/or the Liability Scheme or that it required quotations for property insurance and liability insurance in order to consider alternatives to its

continuing membership of the Schemes. On the contrary, the outcome of the NOROC discussion was that RVC participated in a tender process for insurance services in respect of its non-Statewide lines of cover only, as referred to at [322] above.

345 I attribute no weight to Mr Wilkinson's evidence referred to at [341] and [343] above because it is based on assumptions that are unproven and unrealistic for the reasons explained at [270]-[272] and [344] above.

### **Renewal process for the 2012-2013 year**

346 Mr Walker was the General Manager of RVC with responsibility for authorising the placement of RVC's insurance cover for the 2012-2013 year.

347 JLT wrote to RVC on 19 March 2012 enclosing the Statewide Renewal Letter dated 14 March 2012 and Statewide Declaration.<sup>[300]</sup>

348 The Statewide Renewal Letter stated that each of the Liability, Property, Fidelity Guarantee and Casual Hirers' Schemes were due for renewal from 30 June 2012. The letter advised that, in accordance with the Finance Committee's recommendations to the Board, renewal terms for the Liability Scheme would be increased by 3.5% as a result of advice that "*reinsurance terms will increase by up to 8.5%*". The letter noted that this was the first increase in Contributions for the Liability Scheme since the 2008-2009 insurance year. The terms offered to RVC in respect of the Liability Scheme renewal were a premium of \$330,175 with an excess of \$12,500 for protection of up to \$400 million for each of public liability and products liability and up to \$300 million for professional indemnity.

349 The Statewide Renewal Letter advised that the Contribution rate for the Property Scheme would remain unchanged for the third consecutive year, notwithstanding an anticipated increase in "*reinsurance terms*". Any increase in RVC's declared asset values would result in a commensurate increase in the Contribution payable and calculation of RVC's renewal terms for the Property Fund was dependent on the provision of an updated asset schedule.

350 The Statewide Declaration was entitled "*Declaration Form for Fund Year Commencing 30 June 2012*" and was otherwise in the same terms as previous years.<sup>[301]</sup>

351 JLT issued the Insurance Declaration suite of documents to RVC on or about 30 March 2012.<sup>[302]</sup> The suite of documents included an "*Insurance Handbook*".<sup>[303]</sup> Section 1 of the Insurance Handbook was an "*Insurance Reference Guide*". Contrary to RVC's submissions, there is nothing in the Insurance Reference Guide that indicates that it was a bespoke document created for RVC. The Insurance Reference Guide contained generic information about changes that may occur within an organisation and affect its insurance programme, including changes in directors or holding company directors that were plainly of no potential relevance to RVC. The Insurance Reference Guide also included a brief explanation of claims made policies, contractual liabilities and claims procedures, an explanation of various insurance terms and a brief description of the protection typically provided under various classes of insurance. Under the heading

“JLT’s Specialist Services”, the Insurance Reference Guide set out a description of services that JLT was able to provide to clients. Those services included consultancy and administration services in relation to superannuation and other employee benefits, credit insurance, risk management services and:.<sup>[304]</sup>

#### “Public Sector

Public Sector Division primarily provides insurance and risk related services to Local Government and Government Authorities. Since its inception Public Sector has grown to become the major Local Government broker in Australia and currently has a market share in excess of 96% nationally.

Its specialty products & services include:

- General Insurance Broking services with a range of insurance products specifically designed to meet the needs of our Government clients.
- Management of self insured funds for Public Liability/Professional Indemnity, Workers’ Compensation, Property and Fidelity Guarantee.
- Design and placement of National Reinsurance Programmes for our State operated Liability Mutual’s.
- Provision of Claims, Risk Management, Rehabilitation and Occupational Health & Safety services to our Local, State and Federal government clients.”

352 The Insurance Reference Guide described JLT as the 8<sup>th</sup> largest international insurance broking group and the third largest insurance broker in Australia. It also stated that:.<sup>[305]</sup>

“Jardine Lloyd Thompson specialises in the blending of traditional insurance broking methods with innovative risk management and loss control techniques. This ensures our clients have a properly designed insurance programme at a competitive premium cost.”

353 The Insurance Declaration contained the same introductory statement as the previous two years.<sup>[306]</sup>The Insurance Declaration followed the same structure and employed the same differentiation as in previous years between non-Statewide lines of cover and RVC’s four Statewide lines of cover (casual hirers liability, fidelity guarantee, property and liability). Whilst there are some differences in the contents of the Insurance Declaration compared to previous years, they are not material to the issues to be determined in these proceedings. The differences do not detract from (and, in some instances, reinforce) the clear indications that the information sought in the sections of the Insurance Declaration relating to property insurance and liability insurance was for Scheme renewal purposes. The Insurance Declaration included the same “*Collection Statement under Privacy Act 1988*” as in previous years.<sup>[307]</sup>The “*Important Information*” section at the end of the Insurance Declaration included the statements in the same or substantially the same terms as previous years concerning “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*”.<sup>[308]</sup>

354 On 1 June 2012, JLT forwarded to RVC a Statewide invoice dated 15 May 2012 for RVC’s Liability Scheme Contribution for the 2012-2013 Fund Year in the amount of \$330,175.00 (excluding GST).<sup>[309]</sup>The invoice contained the same “*Important Information*” as had been set out in the Insurance Declaration concerning “*Mutual*

*Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*”. Attached to the invoice was a summary of the protection provided by RVC’s membership of the Liability Scheme in substantially the same terms as in the Insurance Declaration.

355 Mr Walker gave evidence that he reviewed and approved the contents of the Insurance Declaration in about June of each year during his tenure as General Manager of RVC after it had been completed by Ms McLean or Ms Parle.<sup>[310]</sup> For the 2012-2013 insurance year, Mr Walker signed the Insurance Declaration and approved its contents on 7 June 2012 and signed the Statewide Declaration on the same date.<sup>[311]</sup> I infer that RVC sent these signed documents to JLT, together with the completed questionnaires and schedules within the Insurance Declaration pack, at some time before JLT issued the Renewal Report to RVC on 27 June 2012.<sup>[312]</sup>

356 The Renewal Report included the “*Distinctive. Choice.*” introductory statement in the now familiar terms that had been included in the Insurance Declaration and in renewal documentation.<sup>[313]</sup>

357 The “*Executive Summary*” of the Renewal Report stated:<sup>[314]</sup>

“Jardine Lloyd Thompson is the Australian insurance broking and consultancy subsidiary of the Jardine Lloyd Thompson Group plc which is an associate of the Jardine Matheson Group - a diverse and progressive organisation with a history ranging back over 160 years.

We believe the benefits of this diversification and the ability to call upon the resources of other group members provides us with a more commercial outlook than the traditional broking houses.

#### **Worldwide**

Jardine Lloyd Thompson Group:

- is the 8th largest international insurance broking group;
- operates in 36 countries with over 6,250 staff;
- places over £3 billion in insurance premiums;
- our international network assures us of direct access to all major insurance markets and our premium pool provides the necessary negotiating strength for our clients.

#### **Australia**

Our insurance broking foundations extend back many years, having been developed through re-mergers of several long standing and respected insurance broking companies. This experience, together with the professional expertise of senior staff and management, has culminated in an insurance broking group which:

- is the third largest insurance broker in Australia;
- has over 20 offices throughout mainland Australia;
- employs over 800 people;
- services in excess of \$900 million of premiums;
- provides modern techniques in risk evaluation and analysis;
- has a diversified client base including some of Australia’s foremost corporations.

This combination of international experience and Australian expertise allows JLT to deliver the most comprehensive range of insurance and risk solution products and services available to Local Government Authorities across Australia. This report provides Council with the details of JLT’s proposed insurance program.

In this report we:

- comment on existing insurance market conditions and outline our marketing activity;

- suggest optional approaches and provide costs comparisons where applicable;
- provide renewal terms based on the updated information you have provided JLT;
- state credit terms and provide premium payment options;
- outline a proposed service plan to help with administering your insurance program;
- detail the various insurance policies where we have obtained quotations on your behalf;
- profile other products and services which may be of interest to you.

Jardine Lloyd Thompson specialises in the blending of traditional insurance broking methods with innovative risk management and loss control techniques. This ensures Council receives a well designed insurance programme at a competitive premium cost, and also receives professional assistance in identifying and analysing potential areas of loss. This becomes the foundation for an effective loss prevention, risk transfer and safety programme.

We aim to provide quality insurance and risk management services to you and look forward to working with you throughout the year.”

358 The Executive Summary then set out JLT’s assessment of the global insurance market and continued:<sup>[315]</sup>

#### **“Local Government Insurance Market**

The Local Government sector has the potential to create extreme premium volatility with scope for increases in premiums across all general insurance policy lines as a result of its broad operational activity and vast geographical areas of operation. As a client of JLT, this exposure is drastically minimised and in some cases completely removed. With over 30 years of experience and 150 Local Government clients in New South Wales, including the head body of Local Government and Shires Association and other affiliated Government businesses, JLT is recognised as the clear market leader in Local Government insurance solutions in Australia.

#### **Statewide Property and Liability Mutual**

Through membership of the Statewide Property and Liability Mutual, Council have had the fortune of being sheltered from the large increase in premiums being applied external to Statewide. This being evident through renewal terms presented to Council including a slight increase in liability premium by 3.5%. Statewide Property premiums remain unchanged with expiring rates being on offer which is a true credit to Council and its forward thinking approach to risk management.”

359 The “*Comments and Recommendations*” set out in the Renewal Report were described in substantially the same terms as in the previous years’ reports,<sup>[316]</sup> with the addition of a reminder to read and understand the “*Important Information*” located at the end of the Renewal Report prior to reviewing the terms presented in the Report.<sup>[317]</sup>

360 As in previous years, the Renewal Report contained a “*Summary of Costs*”, listing each “*Class of Insurance*”, the renewal premium and the “*Recommended Insurer*”. As in previous years, the Summary of Costs named “*Statewide Property Mutual*” as the “*Recommended Insurer*” for the “*Property*” class of insurance but did not refer to liability insurance. As in previous years, the Board had already determined the renewal terms for the Liability Scheme and the Property Scheme, as advised in the Statewide Renewal Letter. Statewide had invoiced RVC for its 2012-2013 Liability Scheme Contribution prior to receipt of RVC’s completed Insurance Declaration, as referred to at <sup>[354]</sup> above. RVC’s Property Scheme Contribution for the 2012-2013 year had been calculated in accordance with the renewal terms determined by the Board in March 2012 and based on the declared asset values and other information provided by RVC through the Insurance Declaration process. The Renewal Report advised the amount of

RVC's Property Scheme Contribution for 2012-2013 and an adjustment payable by RVC in respect of the 2011-2012 year due to the increase in declared asset values during that year.<sup>[318]</sup>

361 The Renewal Report summarised the terms of cover for each line of insurance referred to in the "Summary of Costs" table. As in the previous years' Renewal Reports, the summary in relation to "Property" differed from the other summaries in the respects identified at [252] and [304] above save that the "Mutual Fund Self Retention" had increased to \$9,600,000.<sup>[319]</sup>

362 The Renewal Report attached the "Important Information" that had been set out in the Insurance Declaration, including the information under the headings "Mutual Schemes", "Duty of Disclosure" and "Remuneration and Other Income".<sup>[320]</sup>

363 Mr Walker gave evidence that he read the contents of the Renewal Report in each year that he was the General Manager of RVC and signed the authorisation form. For the 2012-2013 year, Mr Walker signed the authorisation form on 29 June 2012.<sup>[321]</sup>

364 On 4 July 2012, JLT forwarded to RVC Statewide invoices dated 2 July 2012 for RVC's Property Scheme Contribution for the 2012-2013 year in the amount of \$364,136.67 (excluding GST). The invoice contained the same "Important Information" that had been set out in the Insurance Declaration and Renewal Report, including the information concerning "Mutual Schemes", "Duty of Disclosure" and "Remuneration and Other Income".<sup>[322]</sup>

365 On 7 August 2012, JLT sent RVC the Summary of Insurances dated 2 July 2012.<sup>[323]</sup> The observations concerning previous years' Summary of Insurances at [260]-[261] and [309]-[312] above apply equally to the Summary dated 2 July 2012.

366 In his affidavit, Mr Walker deposed that:<sup>[324]</sup>

"30. I understood that JLT was responsible for sourcing appropriate cover for Richmond Valley's needs at the best rates available.

31. For at least several years prior to, and during each of the Relevant Insurance Years, JLT arranged for Richmond Valley's Liability Insurance and Property Insurance to be renewed with Statewide Mutual.

32. In renewing Richmond Valley's Liability Insurance and Property Insurance each year, I expected that JLT would inform Richmond Valley if a better option (in terms of price, assuming the cover and excesses were appropriate for Richmond Valley's insurance needs) than Statewide Mutual was available.

33. JLT never informed me or, to the best of my knowledge, anyone else at Richmond Valley, that Richmond Valley was able to obtain suitable Property Insurance or suitable Liability Insurance from any provider other than Statewide Mutual, or from Statewide Mutual at a lower price.

34. I accordingly was not aware of any other insurance provider from whom Richmond Valley could obtain a better deal for its Liability Insurance and Property Insurance for the Relevant Insurance Years compared to the insurance it obtained through Statewide Mutual.

35. Based on the matters that I describe at paragraphs 30 to 34 above, I authorised JLT to renew Richmond Valley's Liability Insurance and Property Insurance with Statewide Mutual."

367 As JLT submitted, Mr Walker's evidence in chief did not identify any basis for the understanding that he claims to have had in paragraph 30 of his affidavit or the expectation that he claims to have had in paragraph 32 of his affidavit. It emerged in

cross-examination that Mr Walker had no sound basis for that understanding or expectation.

368 In cross-examination, Mr Walker gave evidence that he understood that RVC and the other Members of the Scheme had appointed JLT as the broker for the Scheme and that JLT's role was to advise the Board on the insurance to be obtained on behalf of Members collectively and to effect insurance for Members collectively on the instructions of the Board. Mr Walker understood that JLT would look at alternatives for the insurance that was to be effected for Members collectively and would give advice to the Board about what insurance should be obtained for Members collectively. Mr Walker expected the Board to consider that advice carefully and make a decision for Members about the insurance to be placed.<sup>[325]</sup>

369 There is no evidence in these proceedings, and it is no part of RVC's case, that JLT failed to identify and consider alternatives for liability insurance and property insurance to be placed on behalf of Members collectively in the process of formulating its advice and recommendations for the Statewide Board.

370 Mr Walker also gave evidence in cross-examination that he understood that JLT had an obligation under the Deed to "*provide efficient insurance coverage*". He then said that he understood that all of JLT's obligations to RVC in relation to Statewide cover arose under the Deed.<sup>[326]</sup>

371 Mr Walker went on to say that, because of the communications from JLT, he expected that JLT was working in RVC's interests and he assumed that JLT had a role in advising RVC as well as advising the Statewide Board.<sup>[327]</sup> However, Mr Walker then acknowledged that he had made those assumptions without being closely familiar with the Deed. He had read the Deed, but relied on Ms McLean to know the detail of it. RVC did not adduce any evidence from Ms McLean. Mr Walker also said that he did not consider that JLT could be relied on to be independent in any consideration of alternatives to Statewide cover and that any such exercise would need to be undertaken by "*somebody outside the group*".<sup>[328]</sup>

372 Mr Walker also said in cross-examination that he knew that it was too late for RVC to retire from the Scheme by the time he authorised the renewal of RVC's liability cover and property cover each year. Mr Walker knew that there was no point in looking for alternatives to Statewide at that time.<sup>[329]</sup>

373 I reject Mr Walker's evidence in paragraphs 32 and 35 of his affidavit, extracted at [366] above, in light of his evidence given in cross-examination, including his evidence that he did not consider that RVC could rely on JLT to provide independent consideration of any potential alternatives to Statewide and that there was no point in looking for such alternatives at the time that he was authorising the renewals in any event.

374 For the purpose of his affidavit, Mr Walker was asked to assume that liability insurance was "*available from reputable insurance providers other than Statewide Mutual*" for the 2012-2013 insurance year, that such insurance "*would have been recommended by JLT as suitable to Richmond Valley's insurance needs*" in that year and that the

premium payable for such insurance would have been \$213,000.<sup>[330]</sup> Mr Walker referred to this as the “*Alternative Liability Insurance*”. It will be recalled that the amount of RVC’s Liability Scheme Contribution for the 2012-2013 year was \$330,175 (excluding GST),<sup>[331]</sup> which was subsequently reduced to \$311,226 after rebates.<sup>[332]</sup> The Liability Scheme accumulated surplus funds even after paying rebates to Members.<sup>[333]</sup>

375 Mr Walker was also asked to assume that property insurance was “*available from reputable insurance providers other than Statewide Mutual*” for the 2012-2013 insurance year, that such insurance “*would have been identified by JLT as suitable to Richmond Valley’s insurance needs*” in that insurance year and that the premium payable for such insurance would have been \$179,000.<sup>[334]</sup> Mr Walker referred to this as the “*Alternative Property Insurance*”. It will be recalled that the amount of RVC’s Property Scheme Contribution for the 2012-2013 year was \$364,137 (excluding GST), which was subsequently reduced to \$328,755 after adjustments and rebates.<sup>[335]</sup> The Property Scheme accumulated surplus funds even after paying rebates to Members.<sup>[336]</sup>

376 Mr Walker deposed that:<sup>[337]</sup>

“48. In each of the Relevant Insurance Years, if JLT had informed me that the Alternative Property Insurance was available, I would have directed JLT to obtain the Alternative Property Insurance, instead of the Property Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.

49. In each of the Relevant Insurance Years, if JLT had informed me that the Alternative Liability Insurance was available, I would have directed JLT to obtain the Alternative Liability Insurance, instead of the Liability Insurance that Richmond Valley in fact obtained from Statewide Mutual in the Relevant Insurance Year.

50. In considering whether to direct JLT to obtain the Alternative Property Insurance and the Alternative Liability Insurance for Richmond Valley, I would have had regard to the following considerations:

- (a) the cost of the insurance;
- (b) the suitability of the cover for Richmond Valley’s needs;
- (c) the reputation and performance of the alternative insurance provider;
- (d) the applicable excesses;
- (e) the risk of moving to a new insurance provider with whom Richmond Valley did not have an established and long-term relationship.”

377 I attribute no weight to paragraphs 48 to 50 of Mr Walker’s affidavit extracted immediately above in the absence of any evidence of the matters referred to in paragraph 50(b)-(e) and without any evidence that Mr Walker was provided with information or assumptions about those matters and in fact considered them (as he claims he would have done in the hypothetical scenario addressed in his affidavit) before giving his evidence in paragraphs 48 and 49 about what he would have done in that hypothetical scenario.

378 A second fundamental difficulty with Mr Walker’s evidence in paragraphs 48 to 50 of his affidavit is that it implicitly assumes that Statewide cover for property and liability risks was something that was available for JLT to choose to “*obtain*” at the time Mr Walker made his decisions in June of each year concerning insurance for the forthcoming year.



In June of each year, RVC was contractually bound under the Deed to continue its membership of the Liability Scheme and the Property Scheme for the forthcoming year due to the retirement notice requirements that Mr Walker acknowledged in cross-examination.<sup>[338]</sup> In short, the assumptions that Mr Walker was asked to make for the purpose of his affidavit are contrary to the reality of RVC's circumstances at the time for the reasons identified at [270] above. As I have already mentioned, Mr Walker acknowledged in cross-examination that he knew that it was too late for RVC to retire from the Scheme by the time he authorised the renewal of RVC's liability cover and property cover each year. Mr Walker knew that there was no point in looking for alternatives to Statewide at that time.<sup>[339]</sup>

### **Renewal process for the 2013-2014 year**

379 Mr Walker was the General Manager of RVC with responsibility for authorising the placement of RVC's insurances for the 2013-2014 year.

380 JLT sent the Insurance Declaration suite of documents to RVC by email Ms McLean on 28 March 2013. The email stated:<sup>[340]</sup>

"We recently posted to Council the 'Statewide Declaration Form for Fund year commencing 30 June 2013', together with the Statewide renewal terms. Council post the completed Form to us as soon as convenient as Statewide require an original signature."

381 The Statewide Renewal Letter was not in evidence. I infer that it contained similar information to the Statewide Renewal Letters issued in previous years, setting out renewal terms offered to RVC for the Liability Scheme, notifying any change to the contribution rates for the Property Scheme and advising that the Property Scheme Contribution payable by RVC would be calculated based on RVC's updated assets schedule to be prepared in accordance with the instructions in the Insurance Declaration.

382 The Insurance Declaration<sup>[341]</sup> contained a slightly revised introductory statement compared to previous years:<sup>[342]</sup>

"JLT is an international group of Risk Specialists and Employee Benefits Consultants and one of the largest companies of its type in the world. We offer a distinctive choice to our clients and partners through our combination of Specialism, innovation and geographical reach.

We bring the best of JLT to all of our clients through collaboration and operate with autonomy and flexibility. We have the scale to provide solutions to the complex demands of the world's leading companies and to deliver global servicing whilst recognising that the needs of each of our clients are unique. By developing highly specialised services, we provide our clients with a depth of expertise and experience."

383 The Insurance Declaration followed the same structure and employed the same differentiation as in previous years between non-Statewide lines of cover and RVC's four Statewide lines of cover (casual hirers liability, fidelity guarantee, property and liability) as referred to at [229]-[239] and [284] above. Whilst there are some differences in the contents of the Insurance Declaration compared to previous years, those differences are immaterial to the issues to be determined in these proceedings. The differences do not detract from (and, in some instances, reinforce) the clear indications

that the information sought in the sections of the Insurance Declaration relating to property and liability was for Scheme renewal purposes. The Insurance Declaration included the same “*Collection Statement under Privacy Act 1988*” as in previous years.<sup>[343]</sup> The “*Important Information*” section at the end of the Insurance Declaration included the statements in the same or substantially the same terms as previous years concerning “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*”.<sup>[344]</sup>

384 On 15 May 2013, Statewide issued an invoice to RVC for its Liability Scheme Contribution for the 2013-2014 year in the amount of \$341,400 (plus GST).<sup>[345]</sup>

385 On 17 June 2013, Ms McLean signed the Insurance Declaration in her capacity as Governance Officer of RVC recording that she had read and approved its contents and sent it to JLT by email together with the completed questionnaires and schedules.<sup>[346]</sup>

386 There was no evidence of the signed Statewide Declaration, but neither party suggested that it had not been signed for the 2013-2014 year.

387 JLT issued the Renewal Report to RVC on or about 25 June 2013.<sup>[347]</sup>

388 The Renewal Report included the following introductory statement, which was also repeated within the “*Executive Summary*” section of the Report:<sup>[348]</sup>

“JLT is one of the world’s largest providers of insurance and employee benefits related advice, brokerage and associated services. Our client proposition is built upon our deep specialist knowledge, client advocacy, tailored advice and service excellence. Together, we place our clients first, champion innovative thinking and expect to be judged on the results we deliver.”

389 The Executive Summary also included the following statements (emphasis added):<sup>[349]</sup>

**“What we do**

JLT conducts its business in three main areas; Risk and Insurance, Employee Benefits and Thistle Insurance Services (underwriting services). The Group is the largest specialist insurance broker in the world and provides a distinct alternative over our competitors in that we do not try to cover the field and be all things to all Clients. Instead, we operate only in sectors where we are, or can become, a market leader.

**Risk and Insurance**

- Our Risk and Insurance group encompasses our global speciality insurance and reinsurance broking operations and wholesale insurance broking business. Our specialist teams focus on those sectors where we have a distinct level of knowledge and expertise, such as Local Government. Working in partnership with our clients to manage the risks they face, we act as their intermediary with insurers and reinsurers as well as providing related risk management, analytical, advisory and other administrative services.

...

**Australia**

Drawing on more than 30 years’ experience in the Australian marketplace, JLT Australia is a leading provider of specialist insurance and risk related products and services. We pride ourselves on developing our expertise across several niche market or product segments. **This results in a targeted approach to client engagements and we focus on providing tailored services to our partners, rather than delivering generic solutions to all.**

**Our clients are those who seek competitively priced, personal service with structured risk and insurance programs tailored specifically to meet their needs. Our focus is to ensure that we continuously deliver innovative solutions that provide our clients with a competitive edge.**

JLT’s experience, together with the professional expertise of senior staff and management, has culminated in an insurance broking group which:

- is the third largest insurance broker in Australia;
- has over 22 offices throughout mainland Australia;
- employs over 850 people;
- services in excess of \$900 million of premiums;
- has a diversified client base including some of Australia's foremost corporations.

**Our combination of international experience and Australian expertise allows JLT to deliver the most comprehensive range of insurance and risk solution products and services available to Local Government Authorities across Australia"**

390 The Executive Summary continued:-<sup>[350]</sup>

"This report provides Council with the details of JLT's proposed insurance program. In this report we:

- comment on existing insurance market conditions and outline our marketing activity;
- suggest optional approaches and provide cost comparisons where applicable;
- provide renewal terms based on the updated information you have provided JLT;
- state credit terms and provide premium payment options;
- outline a proposed service plan to help with administering your insurance program;
- detail the various insurance policies where we have obtained quotations on your behalf;
- profile other products and services which may be of interest to you.

JLT specialises in the blending of traditional insurance broking methods with innovative risk management and loss control techniques. This ensures Council receives a well designed insurance programme at a competitive premium cost, and also receives professional assistance in identifying and analysing potential areas of loss. This becomes the foundation for an effective loss prevention, risk transfer and safety programme.

We aim to provide quality insurance and risk management services to you and look forward to working with you throughout the year."

391 The Executive Summary then set out JLT's assessment of the global insurance market, emphasising the impact on the market of costly natural disasters since 2011, including in Queensland and Northern New South Wales. This was followed by JLT's observations about the Local Government insurance market and some "*general commentary*" on "*strategic market initiatives*" developed by JLT.<sup>[351]</sup> That general commentary contained information in relation to the Scheme, including the following:  
<sup>[352]</sup>

"Statewide Mutual is a NSW Local Government mutual, which commenced operation on 31 December 1993 with a membership of 96 Councils. It now manages 147 general purpose and county Councils in NSW. It currently offers cover to Member Councils on:

- Liability under a Mutual Liability Scheme,
- Assets under a Property Mutual, and
- Fidelity Guarantee (Crime).

Each Scheme (Liability, Property and Fidelity) is owned by the participating Member Councils.

The Mission Statement of Statewide is:

Applying innovative practices in the management of Local Government insurance which ensure the protection of Members through stable premiums, cost containment and spread of risk

The Mutual Scheme is not an insurance company; it is Councils working together for the benefit of the members (i.e. Councils). It is for the benefit of the Scheme that Council are able to effectively manage potential risks that could influence the Scheme. It is a reciprocal arrangement. Every Council has the responsibility to ensure they are doing all they can to prevent adverse impacts on the Scheme that will affect all other Member Councils.”

392 As in the previous year’s Renewal Report, the “*Comments and Recommendations*” section contained a reminder to read and understand the “*Important Information*” at the end of the Report, which included information about “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*” in the same terms as the Insurance Declaration.<sup>[353]</sup>

393 The “*Comments and Recommendations*” section of the Renewal Report also included the following “*Important Commentary*”:<sup>[354]</sup>

**“Property Mutual**

The contribution for the Property Protection is adjustable at the end of each protection period and is calculated at 50% of the difference in asset values (Section 1 only) at the beginning and end of the Protection Period:

Declared Values at 30 June 2012: \$.....140,052,567

Declared Values at 30 June 2013: \$.....121,214,034

Difference: \$.....18,838,533-

Resulting in an adjustment Contribution of: \$.....24,490.09CR- Plus GST

A separate tax invoice will be issued for this adjustment.

The Property Mutual is in the fortunate position of experiencing sound claims performance in the two latest Fund years which has enabled Statewide renewal terms to remain unchanged for the fourth consecutive year.

Statewide Property Mutual currently provides protection to an estimated total asset value of \$19.0 billion. From 30 June 2013, the Self-Insured Retention is increasing from \$9.6 million to \$10.0 million. Above this limit, Reinsurance is currently arranged in layers and placed with nine local Underwriters as well as various London markets participating.

**Special Conditions**

If you have not yet provided your updated asset values, this renewal contribution will be based on your 30 June 2012-2013 asset values. Please note an additional contribution will be calculated on receipt of your asset values for the 30 June 2013-2014 period.”

394 As in previous years, the Renewal Report contained a “*Summary of Costs*”, listing each “*Class of Insurance*”, the renewal premium and the “*Recommended Insurer*”. As in previous years, the Summary of Costs named “*Statewide Property Mutual*” as the “*Recommended Insurer*” for the “*Property*” class of insurance, but did not refer to liability insurance. As in previous years, the Board had already determined the renewal terms for the Liability Scheme and the Property Scheme<sup>[355]</sup> and Statewide had invoiced RVC for its 2013-2014 Liability Scheme Contribution prior to receipt of RVC’s completed Insurance Declaration.<sup>[356]</sup> RVC’s Property Scheme Contribution for the 2013-2014 year had been calculated in accordance with the renewal terms determined by the Board in March 2013 and based on the declared asset values and other information provided by RVC through the Insurance Declaration process. The Renewal Report noted the decrease in RVC’s declared asset values, as referred to immediately

above, and advised the amount of RVC's Property Scheme Contribution for 2013-2014 and the amount to be credited to RVC in respect of the 2012-2013 year due to the decrease in declared asset values during that year.<sup>[357]</sup>

395 The Renewal Report summarised the terms of cover for each class of insurance referred to in the "Summary of Costs" table. As in the previous years' Renewal Reports, the summary in relation to "Property" referred to RVC as the "Member" and named "Statewide Property Mutual" as the "Protection Provider". The summary specified the "Period of Protection" and identified the property to which the protection applied by reference to "locations in the schedule advised to and on file with Statewide Property Mutual". The total limit of liability was specified as \$2 billion "in the Aggregate over all Member Councils" and the "Mutual Fund Self-Retention" was specified as \$10 million "[i]n the aggregate over all claims from Member Councils". The summary identified the declared values that had been "used for the calculation of the Member's Contribution to the Property Mutual". The "Protection Wording and Conditions" were described by reference to a specific version of the "Statewide Wording" subject to specified endorsements. The summary concluded with the following "Remarks":<sup>[358]</sup>

"Please refer to your Statewide Mutual Protection Wording for details of Terms, Conditions and Exclusions. The Wording, by its application to Primary Insurance, applies to cover under the Scheme."

396 As I have already mentioned, the "Important Information" at the end of the Renewal Report included the "Mutual Schemes", "Duty of Disclosure" and "Remuneration and Other Income" information that had been set out in Insurance Declarations and Renewal Reports since at least the 2009-2010 year. As in previous years, the "Mutual Schemes" information included the following statement:<sup>[359]</sup>

"The Deed is the primary document which governs the operation of the Mutual Schemes. Wordings on each Scheme are issued as a guide as to the terms under which a claim will be considered and settled. A copy of the Deed is available on the website at [www.statewide.nsw.gov.au](http://www.statewide.nsw.gov.au)."

397 There is no evidence of the signed authorisation form, but neither party suggested that RVC had not provided a signed authorisation for the 2013-2014 year. On the contrary, Mr Walker gave evidence that he read the Renewal Report and signed the authorisation in each year during which he was the General Manager of RVC.<sup>[360]</sup>

398 On 3 July 2013, JLT forwarded to RVC a Statewide invoice dated 1 July 2013 for RVC's Property Scheme Contribution for the 2013-2014 year in the amount of \$315,156.49 (excluding GST), together with a credit note for the rebate of \$24,490.09 (excluding GST) referred to at [393] above.<sup>[361]</sup>

399 On 8 August 2013, JLT forwarded RVC the Summary of Insurances dated 30 July 2013.<sup>[362]</sup> The Summary of Insurances contained the same introductory statement as the Renewal Report<sup>[363]</sup> and stated that it provided "an outline of all insurance policies we have arranged on your behalf".<sup>[364]</sup> The outline in respect of "Public Liability and

*Professional Indemnity*” and the outline in respect of *“Property”* differed from the outlines in respect of non-Statewide lines of cover essentially in the same manner as in previous years as referred to at [260]-[261] and [309]-[312] above.

400 Mr Walker gave the evidence referred to at [366]-[372] above concerning his understanding, beliefs and expectations about JLT’s role. I have rejected his evidence referred to at [366] above for the reasons explained at [373] above.

401 For the purpose of his affidavit, Mr Walker was asked to assume that liability insurance was *“available from reputable insurance providers other than Statewide Mutual”* for the 2013-2014 insurance year, that such insurance *“would have been recommended by JLT as suitable to Richmond Valley’s insurance needs”* in that year and that the premium payable for such insurance would have been \$222,000.<sup>[365]</sup> Mr Walker referred to this as the *“Alternative Liability Insurance”*. It will be recalled that the amount of RVC’s Liability Scheme Contribution for the 2013-2014 year was \$341,400 (excluding GST),<sup>[366]</sup> which was subsequently reduced to \$326,340 after rebates.<sup>[367]</sup> The Liability Scheme accumulated surplus funds even after distributing rebates to Members.<sup>[368]</sup>

402 Mr Walker was also asked to assume that property insurance was *“available from reputable insurance providers other than Statewide Mutual”* for the 2013-2014 insurance year, that such insurance *“would have been identified by JLT as suitable to Richmond Valley’s insurance needs”* in that insurance year and that the premium payable for such insurance would have been \$148,000.<sup>[369]</sup> Mr Walker referred to this as the *“Alternative Property Insurance”*. It will be recalled that the amount of RVC’s Property Scheme Contribution for the 2013-2014 year was \$315,156 (excluding GST) which was subsequently adjusted to \$316,309. No rebates were paid in the 2013-2014 year.<sup>[370]</sup>

403 Mr Walker gave the evidence referred to at [376] above that he would have directed JLT to obtain the *“Alternative Liability Insurance”* and *“Alternative Property Insurance”* rather than continuing RVC’s Statewide cover for those risks. I attribute no weight to that evidence due to the unreality of the assumptions on which it is based, as explained at [377]-[378] above.

### **Renewal process for the 2014-2015 year**

404 It will be recalled that, from 1 July 2013, Members wishing to retire from a Fund were required to give twelve months’ notice of retirement. The Board had resolved on 8 March 2013 to amend clause 10.3 of the Deed to extend that notice period from three months to twelve months. The minutes of that Board meeting record the reasons for the amendment:<sup>[371]</sup>

“Renewal negotiation is generally not completed prior to mid-June on each Scheme, yet renewal terms are required to be provided to Members before 31 March each year, so they have information on which to base their decision to renew or seek alternative terms.

It is recommended that Clause 10.3 of the Statewide Mutual Deed of Establishment be amended with effect from 1 July 2013 to read 'A Member may retire from one or more Funds with effect from the end of a Fund Year by giving at least 12 months' written notice to the Executive Officer of the Board of Management, JL T and the Fund Manager.'

There are Commercial reasons for suggesting this amendment, revolving around difficulties in completing negotiation of renewal terms when Members have given advance notice of their possible resignation of membership of one or more of the Statewide Mutual Schemes.

By extending the notification period to 12 months, it gives more certainty in negotiating terms and provides for more accurate budgets to be set"

405 Mr Walker was the General Manager of RVC with responsibility for authorising the placement of RVC's insurances for the 2014-2015 insurance year.

406 Prior to the commencement of the renewal process for the 2014-2015 insurance year, the Executive Officer of NOROC had forwarded on to Ms McLean of RVC an email received on 5 September 2013 from the insurance broker and adviser Willis Australia Limited (**Willis**). Willis sought to meet with NOROC to "*see whether we can assist your members to achieve a better outcome on their existing insurances*" and claimed that it could "*definitely assist by providing your members with a credible means by which their existing instance premium and coverage can be benchmarked against what is available in the commercial insurance market*". According to Willis, it had recently been involved in an exercise with another regional organisation of councils that "*showed considerable savings on offer by moving to a regional insurance program*".<sup>[372]</sup>

407 Ms McLean exchanged emails with an officer of another NOROC member on 24 September 2013 expressing interest in Willis' approach and stating that "*we need to ensure that we are getting the best premiums and service*".<sup>[373]</sup>

408 Mr Walker recalls that there were discussions in about September 2013 about Willis' approach. He understood at the time that Willis was saying that there were insurers who could provide RVC with a better deal for its insurance, including property and public liability and professional indemnity insurance.<sup>[374]</sup>

409 There is no evidence that RVC took any steps after September 2013 to have Willis or any other broker or advisor benchmark its existing insurance program (including its Statewide cover) against what might be available in the commercial market.

410 JLT issued the Insurance Declaration suite of documents on or about 11 March 2014.<sup>[375]</sup>

411 The Insurance Declaration contained an introductory statement in the same terms as the previous year's Renewal Report:

"JLT is one of the world's largest providers of insurance and employee benefits related advice, brokerage and associated services. Our client proposition is built upon our deep specialist knowledge, client advocacy, tailored advice and service excellence. Together, we place our clients first, champion innovative thinking and expect to be judged on the results we deliver."

412 The introductory section of the Insurance Declaration also stated:

"This Insurance Declaration details the insurance covers due for renewal for this insurance period and will enable JLT to collect information from Richmond Valley Council that is required to:

- Assist insurers and reinsurers understand the risks that Council is exposed to; and

- Negotiate renewal for each of your current insurance policies with the limits and excesses or deductibles requested by Council for the coming period

It is important that you review all of the information about your current insurance policies in detail and advise us of any changes needed.

We have included a questionnaire section that asks specific questions so that JLT can provide insurers with updated information, e.g. changes to the physical risk, acquisitions or disposals, adoption or cessation of processes or systems. This allows insurers to re-assess the risk covered by your policies.

It is important to provide information as accurately as possible as this will help insurers to accurately rate the risk that Council presents. It will also assist JLT in negotiating terms and conditions for each of Council's insurance policies and risk related products.

...

For more details refer to the Important Information at the rear of this document."

- 413 The *"Important Information"* section at the end of the Insurance Declaration included the statements in the same or substantially the same terms as previous years concerning *"Mutual Schemes"*, *"Duty of Disclosure"* and *"Remuneration and Other Income"*.<sup>[376]</sup>
- 414 The *"Client Profile"* section of the Insurance Declaration named RVC as the *"Named Insured"* and stated: *"We will give the following information to insurers when negotiating terms and costing for your renewal programme."*<sup>[377]</sup>The Insurance Declaration then set out summaries of existing information (where applicable) and required information relevant to the following classes of risk for RVC: contract works, cyber liability, carriers liability, personal accident, workers compensation top up, casual hirers liability, councillors' and officers' liability, councillors' and officers' companion liability, motor vehicle, fidelity guarantee, property and public liability and professional indemnity.
- 415 Each summary contained instructions for RVC to check the accuracy of the existing information and amend it where necessary.
- 416 The *"Property"* summary:
- (1) referred to RVC as the *"Member"*;
  - (2) defined the *"Period of Protection"* as 30 June 2014 to 30 June 2015 *"and any further period for which the Scheme agrees to provide cover"*;
  - (3) described the *"Limit(s) of Liability"* in the following terms (emphasis added):
 

**"All risks of direct physical loss or damage, as defined and limited in the Scheme Wording, on Real Property, Personal Property, Business Interruption, including the Extensions of Coverage applying at the following described locations in the schedule advised to and on file with Statewide Property Mutual.**

The maximum limit of liability will not exceed the respective Sub-Limits of Liability shown elsewhere for the coverages involved.

However, **in no event will the total Limit of Liability exceed \$1,200,000,000 as a result of any one occurrence**, regardless of the number of perils, coverages or locations involved, in the **Aggregate over all Member Councils.**"
  - (4) described the *"Mutual Fund Self-Retention"* (emphasis added):
 

**"In the aggregate over all claims from Member Councils \$10,000,000"**
  - (5) described the *"Declared Values"* (emphasis added):



“The declared values listed below have been **used for the calculation of the Member’s Contribution to the Property Mutual** and will apply to the basis of valuation from the commencement of the ensuing Period of Protection.

Section 1: Declared Values Only \$121,214,032”

- (6) referred throughout the summary to the “*Protection Wording*”, including stating that: “*Basis of Valuation is as per the Protection Wording*”;
- (7) contained a questionnaire, section 1 of which set out a schedule of RVC’s assets and their value to be updated, with instructions to RVC to maintain JLT’s layout of the schedule because this allowed JLT to “*combine all Members’ Schedules of Assets into a single ‘Master’ Schedule of Assets*” and to “*filter and sort the Master Schedule of Assets items in a variety of ways that assist in underwriting analysis*”, which is a “*very useful and important presentation element to existing and prospective insurers*” that “*does assist in lowering premium costs when negotiating the Property Mutual placement*”; and
- (8) contained the following notations in section 2 of the questionnaire relating to business interruption (emphasis added):

“This declaration is based on the expectation that, in the event of significant financial loss to the organisation **as a result of a loss to assets covered by the Scheme Protection Wording**, it would be Council’s intention to continue the business either at the current situation or elsewhere.

If this is not correct it is important that your Client Risk Advisor is informed because this section of the cover only responds to the extent the business is ongoing.”

...

“In the event of damage causing a reduction in Revenue, **Statewide Mutual will not pay for** any savings in the expenses of your business, payable out of Revenue, which may cease or be reduced. Therefore the declared value you select should represent Gross Revenue less the value of such savings.”

417 The summary in respect of “*Public Liability - Professional Indemnity*”:

- (1) referred to RVC as the “*Member*”;
- (2) defined the “*Period of Protection*” as 30 June 2014 to 30 June 2015 “and any further period for which the Scheme agrees to provide cover”;
- (3) described the “*Interest Protected*” in the following terms (emphasis added):

“1. **Statewide Mutual will pay to or on behalf of The Member** all sums for which The Member shall become legally liable to pay by way of compensation in respect of:

- Death or Personal Injury
- Loss or Damage to Property

happening during the Period of Protection and caused by an occurrence in connection with the Business, from:

- a) Public Liability
- b) Products Liability

All as defined in the Scheme Wording.

2. Professional Indemnity (this is a Claims Made Coverage)

**Any Claim or Claims first made against The Member and notified to Statewide** during the Period of Protection arising out of any negligent act, error or omission whenever or wherever the same was or may have been committed

or alleged to have been committed by The Member in the conduct of The Member's Business (other than any indemnity provided by this Scheme under 1) (a) Public Liability and (b) Products Liability).”

(4) stated that:

“To enable us to finalise arrangements for the placement of this cover, Council will need to complete and return the following Statewide Mutual Declaration.”

(5) included that declaration, bearing the Statewide logo, in the following terms:

“DECLARATION FORM FOR FUND YEAR COMMENCING 30 June 2014

i) Is Council aware after enquiry of any allegations or incidents which may give rise to a claim and which has not to date been advised to the Scheme Manager? If so, please give details. (The provision of information does not limit Council's right to seek indemnity under the Mutual Protection Scheme)  
YES / NO

ii) Are there any variations to Council's activities or additional activities or functions undertaken since Council last renewed its public liability and professional indemnity policy? If so, please give details YES / NO

Council hereby declares that the above statements are true. Council has not suppressed nor misstated any facts. If any of the information given by council shall alter between the date of this declaration and the commencement of the new fund year on 30 June 2014, Council will give immediate notice thereof. Council agrees that the information contained in this declaration may be used by Statewide when negotiating with primary and excess insurance underwriters.”

(6) contained the following information concerning the nature of the cover (emphasis added):

“Sections of this cover are written on a “Claims Made” basis. This means that **the Scheme provides (subject to its terms and conditions) cover for claims which are made against you and notified to the Scheme during the period of protection**, irrespective of the date when the cause of action may have occurred.

The cover will not respond to:

- Acts or omissions giving rise to a claim, which occurred prior to any retroactive date stated in the Schedule;
- Claims or circumstances known to you or notified to an Insurer prior to inception of the cover;
- **Circumstances notified after expiry of the Council's membership of the Scheme;**
- **Claims notified after expiry of the Council's membership of the Scheme.**  
**Claims notified after expiry of the Council's membership of the Scheme may be covered** (at least in part and subject to any prejudice suffered by the Scheme or its reinsurers) in some circumstances by the continuous cover provisions of the Scheme. However we strongly recommend that you implement a programme to ensure that all claims or circumstances which may give rise to a claim are identified and notified immediately within the period of protection to avoid difficulties.

When you become aware of a claim or circumstances that might give rise to a claim against you, you should forward to us a notice in writing detailing the claim or circumstances as soon as reasonably practicable and before expiry of the period of protection. **We will forward the notice to Statewide Mutual on your behalf.**

To protect your interests, please ensure that any claims or circumstances which you believe may give rise to a claim, and which have not been notified by you on the Declaration Form or previously notified to Statewide Mutual, are notified immediately or in any event prior to expiry of the current period of protection.”

- 1988” as in previous years.<sup>[378]</sup>
- 419 Ms Parle of RVC emailed the completed questionnaires, schedules and declarations to JLT on 20 May 2014.<sup>[379]</sup>
- 420 On 27 May 2014, JLT sent an email to Ms McLean and Ms Parle of RVC entitled “*Statewide Renewal Premium Advice 2014-2015*”. The email referred to attached Statewide Renewal Letters for public liability and professional indemnity, fidelity guarantee and casual hirers liability. The email stated that “*Statewide Property will be invoiced upon receipt of Council’s Schedule*”.<sup>[380]</sup>The Statewide Renewal Letters attached to the email were not in evidence.
- 421 On 26 June 2014, JLT forwarded to RVC a Statewide invoice dated 19 June 2014 for RVC’s Liability Fund Contribution for the 2014-2015 year in the amount of \$349,252.20 (excluding GST).<sup>[381]</sup>The invoice included the same “*Important Information*” concerning “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*” that had been included in Insurance Declarations and Renewal Reports since at least the 2009-2010 year.<sup>[382]</sup>
- 422 On 27 June 2014, JLT wrote to RVC stating: “*We have negotiated quotations for the forthcoming insurance period based on information provided by you*”.<sup>[383]</sup>The letter enclosed the Renewal Report.<sup>[384]</sup>
- 423 The inside cover page of the Renewal Report included a statement in the same terms as the introductory statement in the Insurance Declaration set out at [411] above.
- 424 The Executive Summary of the Renewal Report stated (emphasis added):

“JLT have been providing insurance and risk management solutions to Richmond Valley Council (Council)

Our focus is to ensure that we continuously deliver innovative solutions that provide our clients with a competitive edge.

We are aware that Local Government will experience significant challenges in the coming decade as Councils are faced with the tasks of maintaining community growth and delivering services to the communities you serve, whilst working to preserve the natural areas and the local identity of the area. All this, while ensuring Council remains relevant and accessible to its community members by providing convenient access to a range of facilities in the technological and physical environment.

**Our unrivalled expertise with Local Government Authorities ensures Council will continue to receive the optimum risk and insurance advice to ensure your risk portfolio adapts quickly to your changing business needs.**

**In this report we will:**

- **comment on market conditions and outline our marketing activity;**
- **suggest optional approaches and provide cost comparisons where applicable;**
- **detail the various insurance policies where we have obtained quotations on your behalf;**
- **provide renewal terms based on the updated information you have provided JLT;**
- **provide you with information about the JLT Group;**
- **profile other products and services which may be of interest to you.**

**JLT operates strictly on a Client First basis. We do not seek to be the world’s biggest insurance broker. Instead, we aim to be the best in our chosen areas of specialisms such as the government sector for which**

**we provide individual, tailored solutions rather than an off-the-shelf service offering.**

**Contained within our offering are a variety of alternatives in respect of deductibles, optional covers and liability limits all of which may be tailored to Council's needs. Importantly, throughout the period of ongoing change Council will be able to utilise JLT's expertise with local governments of all types and sizes to find the best solutions for Council's changing risk profile.**

We remind Council you must tell your insurer and Statewide everything relevant to their decision to accept the risk and on what terms. This Duty of Disclosure applies at all times. For more details and other important information, refer to the attached 'JLT – Our Commitment to You and Financial Services Guide'.

Through JLT you will continue to have access to competitive and broad covers available in the international insurance market including the knowledge and experience of Australia's leading Local Government insurance specialist."

425 The Renewal Report contained the following "Summary of Costs":

<b>Class of insurance</b>	<b>Total Annual Premium</b>	<b>Suggested Option</b> (i.e. increased limits/additional cover/excess options)	<b>Recommended Provider</b>
Cyber Liability	\$8,453.50		Zurich Australia Insurance Limited
Carriers Liability	\$3,217.50		Zurich Australia Insurance Limited
Personal Accident	\$3,320.97		ACE Insurance Limited
Workers' Compensation Top Up	\$4,892.80		ACE Insurance Limited
Property	\$349,207.90		Statewide Property Mutual
Casual Hirers Liability	\$2,948.00	Invoiced	Statewide – Casual Hirers Scheme
Public Liability- Professional Indemnity	\$384,177.42	Invoiced	Statewide Liability Scheme
Councillors and Officers Liability	\$57,563.50		Statewide Liability Scheme
C&O Companion	\$1,100.00		Statewide Liability Scheme

Motor Vehicle	\$	Refer Options end Motor Section, page 55	Statewide Motor Vehicle Scheme
Fidelity Guarantee	\$2,211.64	Invoiced	Statewide – Fidelity Guarantee Scheme
<b>Total</b>			

426 Under the heading “*Market Synopsis*”, the Renewal Report set out JLT’s assessment of the local government insurance market, including the impact of an estimated \$200 million of losses in South Queensland and Northern New South Wales during 2013. The “*Market Synopsis*” section stated: “*We believe the overall results of our marketing activity demonstrate the ability of JLT to negotiate a competitive insurance programme in the current market conditions and without compromising ultimate insurer security*”. This was followed immediately by a sub-section of the “*Market Synopsis*” relating to Statewide (emphasis added):

**“Statewide Mutual**

**‘Applying innovative practices in the management of Local Government insurance which ensure the protection of Members through stable premiums, cost containment and spread of risk’**

The scheme was established on 31 December 1993 in response to Underwriters withdrawing their support for Local Government in Public Liability and Professional Indemnity Insurance. It commenced with a membership of 96 Councils and has grown to a membership of 147 general purpose and Country Councils in NSW. It now provides cover to Member Councils on:

- Liability under a Mutual Liability Scheme
- Assets under a Property Mutual
- Fidelity Guarantee (Crime)
- Motor Vehicle; and
- Councillors and Officers

The Scheme is owned by the members and run in accordance with the Deed Establishing the NSW Local Government Mutual Liability Scheme. The Scheme is run by the Statewide Board of Management (the Board).

The Board comprises of senior level managers from Member Councils representing each of the 11 Statewide regions in NSW. The Board representative is elected by a ballot of the member councils within the region. In addition, there are three representatives of JLT on the Board, including JLT’s CEO for Australia and New Zealand. **Jardine Lloyd Thompson (JLT) manages the Scheme on behalf of Statewide and place other insurance required outside of these Schemes for Member Councils.**

**The Statewide Difference**

**The Mutual’s offerings, across all its lines, are built on 20 years of providing solutions to Local Government for the risks faced by the industry. We can safely say that the covers offered are as comprehensive as the market allows and have a demonstrated history of responding to the wide variety of activities, services and facilities the member Councils provide and the related risk exposure.**

Underlying the comprehensive cover in our wordings is the discretion of the Statewide Mutual Board of Management (the Board). In the unlikely event that Council suffers a fortuitous loss that falls outside the Mutual’s wordings Council can submit a claim to the

Board which is comprised of its peers for consideration of an ex-gratia payment. This provides a further layer to the already broad cover offered.

Members of the Statewide Mutual derive maximum benefit from economies of scale. Not only are Member Councils one of a group of 147 Members in the NSW Mutuals, but similar Mutuals are also in operation in all other Australian states.

Reinsurance for the Statewide Liability mutual is arranged through Lloyds and other London underwriters under a national arrangement. **As a member of Statewide you are part of the majority of Councils around Australia seeking reinsurance.**

The benefit for individual Councils is twofold. Firstly, **the sheer magnitude of the business placed ensures JLT can obtain the best possible rates for reinsurance on Statewide and its Members behalf.**

More importantly, it removes the volatility from individual Council's insurance costs. In essence, "bigger is better", liability claims by their nature are random and in the case of catastrophic injury or commercial misadventure the costs can be astronomical.

As part of a large group of Councils Australia wide, this type of loss, whilst still significant, can be absorbed into the greater scheme with minimal impact on the individual Council or indeed the group as a whole. However, if Council were placing its insurance as a single entity the effect on future premium could be disastrous. Even if the Council was a member of a smaller group of Councils the effect of such a loss on the premium pool could have a significant impact.

**Ultimately, this is Statewide's primary advantage:** there have been numerous instances throughout the history of the Scheme losses of the type mentioned above and indeed hundreds of occasions where Councils claims costs have exceeded the premium paid yet our contribution costs remain stable.

#### **Board involvement in marketing the program**

The Board recognises that it has been the capacity of the multiple Councils within the Scheme acting in a common interest that has guided the industry through the trying times in the insurance market. In better times and as the corporate memory fades the relevance of that message is less compelling, as such it falls upon the Board to ensure that the Members continue to appreciate the great benefit mutuality has afforded them.

Statewide is currently embarking on a strategy to stimulate engagement with its members. The Board of management is at the forefront of this initiative. A sub-committee has been formed to provide a strategy to the Board with the aid of an external consultant. However, it has been clearly identified that the Board members profile in their regions is imperative in delivering our message.

As a Mutual the engagement of the Board member with the region they represent is essential in the proper functioning of the Scheme.

As a Mutual, Statewide has the strength of numbers and contributions to seek out the most cost effective insurance rates for its Member Councils. It also shares the impact of a major incident among all Members, taking the pressure of one individual entity.

Since the formation of Statewide Mutual, surplus dividends and Risk Management Incentive Bonuses rebated to Member Councils have totalled approximately \$46,000,000 an added bonus of Mutual Membership."

427 Under the heading "*General Information*", the Renewal Report stated (emphasis added):

"Your policies are subject to terms, conditions, endorsements and exclusions which impact on the extent of cover provided. Full details appear in the policy documents. Contact your Account Manager if you do not have a copy of the policy document.

**Statewide Mutual and Insurers** reserve the right to amend the quoted terms if the claims experience or underwriting information changes significantly prior to renewal. It should also be noted that **premiums/contributions** on some classes of protection are adjustable at expiry based on actual vehicle numbers, declared turnover, wages and asset values.

Once renewal of your program is finalised and placed we will make available to you a Summary of Insurances confirming cover details.

Prior to reviewing the terms presented in this report, please ensure that you read and understand the Important Information notice located at the end of this document.”

428 The “*Important Information*” section at the end of the Renewal Report included the statements relating to “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*” that have been included in Insurance Declarations and Renewal Reports since at least the 2009-2010 year.<sup>[385]</sup>

429 The “*General Information*” section of the Renewal Report also stated that:

“New Claims

Any quotation we have obtained on your behalf is based on the understanding that there will be no deterioration in the claims experience between the date insurers quoted their terms and the expiry date of the insurance or the date of inception of new risks.”

430 The “*General Information*” section of the Renewal Report also stated:

“Liability

**Rebate Distribution**

Rebates are made at the Discretion of the Board and as such reflect the strong emphasis on risk management principles. They are called a Risk Management Incentive Bonus.

Member Councils are required to participate in the Continuous Improvement Pathway whereby they agree, with the Statewide Regional Risk Manager to a program of Risk management Initiatives specific to the individual Council. This will be audited at the end of the year and a score given.

Along with Council’s loss ratio for the past twelve months and its contribution a formula will be applied to determine the percentage of the allocated money for each Member.”

431 The “*General Information*” section of the Renewal Report also stated:

“Property

The contribution for the Property Protection is adjustable at the end of each protection period and is calculated at 50% of the difference in asset values (Section 1 only) at the beginning and end of the Protection Period...

There is surplus capacity in the property market driving pricing reductions for general insurance in most industries however we are not likely to see any significant increased capacity for local government property risks in the short term. Insurers are still selective on the risks given the natural catastrophe profile.

Despite this, the rates charged to members have not increased since 2009 and have only been subject to changes in the declared Total Asset Value (TAV).

The Scheme is placed with a number of large local insures on multiple layers. There is great stability in their support of the Scheme and it has enabled Mutual to maintain premiums at sustainable but competitive levels.

**Special Policy Features**

The Board’s discretion to pay claims which are not strictly covered by the wording is a substantial benefit for Members. The ability to submit a fortuitous loss to a board comprised of Council’s peers is a distinct advantage and has been used to assist Members on several occasions in recent years.

The Mutual is not subject to the doctrine of co-insurance, The Member is entitled to the cost of repair and rebuild notwithstanding the declared value on its schedule.

As part of the offering, risk assessments of Council’s largest assets are undertaken from time to time by engineers from Statewide’s primary reinsurer. This not only assists the Mutual to avoid losses but the obvious inconvenience to Council business services and facilities if the community was deprived of these assets as a result of a major loss.

The Mutual also undertakes a valuation program on behalf of all Members to ensure all assets are correctly protected. The program, commenced with an evaluation of Buildings only and it has been going for 4 years. The entire Mutual will have been evaluated by the end of 2014.

At the beginning of 2014, the Mutual commenced a program of content valuations for Members to complement the building asset valuations.

### **Rebate Distribution**

Rebates are made at the Discretion of the Board and are contingent upon good claim results in each protection period. Generally, a certain amount will be allocated to redistribution among Members apportioned according to the contribution and reduced for any losses sustained.”

432 The Renewal Report set out a summary of the cover negotiated in respect of each class of risk referred to in the “*Summary of Costs*” table.

433 The summary in respect of “*Property*”:

- (1) referred to RVC as the “*Member*” and referred to “*Statewide Property Mutual*” as the “*Protection Provider*”;
- (2) defined the “*Period of Protection*” as 30 June 2014 to 30 June 2015 “and any further period for which the Scheme agrees to provide cover”;
- (3) described the “*Limit(s) of Liability*”, “*Mutual Fund Self-Retention*” and “*Declared Values*” in the same terms as in the Insurance Declaration set out at [416] above, save that the declared values amount was updated to \$122,100,666;
- (4) referred throughout the summary to the “*Protection Wording*”, including stating that: “*Basis of Valuation is as per the Protection Wording*”;
- (5) identified the “*Protection Wording and Conditions*” as a specific version of the “*Statewide Mutual Protection Wording*” subject to specified endorsements and variations;
- (6) contained the following “*Remarks*”:

“Please refer to your Statewide Mutual Protection Wording for details of Terms, Conditions and Exclusions. The Wording, by its application to Primary insurance, applies to cover under the Scheme.”

434 The summary in respect of “*Public Liability - Professional Indemnity*”:

- (1) referred to RVC as the “*Member*” and referred to “*Statewide Liability Scheme*” as the “*Protection Provider*”;
- (2) defined the “*Period of Protection*” as 30 June 2014 to 30 June 2015 “and any further period for which the Scheme agrees to provide cover”;
- (3) described the “*Interest Protected*” in the same terms as in the Insurance Declaration set out at [417] above;
- (4) identified the “*Scheme Wording and Conditions*” as a specific version of the “*Statewide Mutual Liability Scheme Wording*”; and
- (5) contained the following “*Remarks*”:

“Please refer to your Statewide Mutual Liability Scheme Wording for details of Terms, Conditions and Exclusions. The Wording, by its application to insurance, applies to cover under the Scheme. In determining the cover afforded by the Scheme, the provisions of the Deed are paramount.

The Professional Indemnity Section of this Wording is on a claims made basis. This means that claims, or possible claims, must be notified to Statewide during the currency of the protection period. The Scheme may not provide indemnity



for claims, or possible claims, notified after the cover expires.”

435 The Renewal Report then set out the following information under the heading “*About JLT*” (emphasis added):

“JLT is a wholly owned subsidiary of Jardine Lloyd Thompson Group plc. (the Group), a leading provider of insurance-related risk solutions and corporate services. For 150 years, we have guided our clients with a security and stability which has enabled them to focus on growing their businesses. Today, the Group is a FTSE250 company, employing over 9,000 risk specialists and employee benefits consultants worldwide.

The Group conducts its business in three main areas, Risk & Insurance, Employee Benefits and Thistle Insurance Services (underwriting services). The Group is the largest specialist insurance broker in the world and provides a distinctive alternative over our competitors in that we do not try to cover the field and be all things to all insured’s. Instead, we operate only in industry sectors or product segments where we are, or can become, a market leader.

### **JLT Australia**

In Australia, JLT is a leading provider of insurance-related risk solutions and corporate services employing approximately 900 staff around the country.

### **JLT Public Sector Division**

The Insurance Sector, both around the world and in Australia tend to specialise in certain Industries. In the case of JLT, our specialty is local government.

Since 1975 JLT has been organised into separate specialist Public and Private Sector teams. This is core to our client-centred approach. We ensure that each client, each project, and each relationship enjoys hands-on involvement and support from, skilled and focused teams.

In Australia we employ over 300 professionals within our Public Sector division giving JLT a unique, in depth understanding of both the risk issues and entity protocols which apply to local government.

As a result of our substantial involvement within this sector, **JLT has developed several exclusive and specialist insurance markets and products, both locally and overseas, to meet our client’s needs. Through this innovation, JLT has accumulated substantial purchasing power with those insurers by virtue of the local government premium volume generated through these exclusive products to achieving competitive premium outcomes and market stability.**

In addition to this in VIC, TAS, NSW, WA, QLD and SA JLT manage Insurance Property Schemes for Local Councils. Each Scheme is owned by the participating Member Councils. Members receive advice as to their ‘equity’ at the time of any surplus distribution.

**As owners of the Scheme, each individual Member has the option to have a tailored solution. JLT, as Scheme managers, recommends what we believe to be the best options in terms of the self-insured retentions for Council. However there is the flexibility in the Schemes for Councils to choose from a range of options if and where required.**

### **Advice in relation to insurance and brokerage issues**

JLT’s proposition is built on deep specialist knowledge, client advocacy, tailored advice and service excellence. We strive to be a trusted adviser to our clients.

**Currently we provide advice to operational boards and administer the day-to-day account management for several state-based local government schemes or funds as well as a robust portfolio of corporate clients. JLT provides a full range of insurance and services to our clients and the Statewide Board, including:**

- Designing insurance and risk strategy to ensure strategic alignment;
- Reviewing uninsured exposures;
- Benchmarking;
- Exploring the on-going suitability of the program considering risk tolerance and scenario testing;
- Developing a renewal strategy having consideration to risk issues and program performance;

- Policy design;
- Obtaining questionnaires to develop tailored underwriting submissions;
- Program marketing and negotiation, with both insurers and reinsurers;
- Strategic policy placement;
- Recommending on-going improvements and amendments to coverage including drafting and negotiating policy wordings and amendments;
- Proactive and considered account servicing;
- Claims management and advice to maximise indemnity;
- Conduct education and training seminars;
- Organising and presenting regional seminars and annual conference forums.

JLT provides a distinct alternative to our competitors in that we do not try to cover the field and be all things to all clients. Instead, we operate only in sectors where we are, or can become, a market leader.

Outside of the Public Sector team, JLT conducts business in three main areas; Risk and Insurance, Benefit Solutions and Thistle Underwriting Services.”

- 436 The Financial Services Guide referred to in the Executive Summary of the Renewal Report was issued in March 2014.<sup>[386]</sup> Under the heading “*JLT – Working For You*”, the Financial Services Guide Stated (emphasis added):

**“Our commitment to you**

**We are committed to providing you with the highest quality of service and the combination of insurance and related products most suited to your needs.** In the provision of our insurance and other services, we will act professionally at all times, **endeavouring to advise you efficiently and effectively**, and respond to your instructions.

**Ensuring individual service**

One or more advisers will take responsibility for providing you with our services. They will be your primary point of contact and will work to ensure a simple, quick and personalised relationship with JLT. Other employees will work to support your JLT Client Risk Adviser.

**JLT’s expertise: At your service**

JLT is a leading provider of insurance-related risk solutions and corporate services in Australia. We employ over 850 staff around the country who work to ensure quality risk management outcomes for you. JLT is a wholly owned subsidiary of the largest quoted British and European insurance broking group, which is also one of the largest firms of its type in the world.

This combination of international experience and Australian expertise allows us to deliver you the most comprehensive range of insurance and risk solution products and services available.”

- 437 Under the heading “*Our Local and Global servicing capabilities*”, the Financial Services Guide then stated:

“Under the Corporations Act 2001, JLT is licenced to provide advice on general insurance products, life insurance products and managed investment schemes as an insurance broker and also to deal in these products and interests.

...

JLT can arrange/provide a vast range of Insurance/Risk Products and Services including the following:

**Insurance/Risk Products**

- ...
- Liability
- ...

- Professional Indemnity
- Property and Business Interruption
- Protection and Indemnity
- Reinsurance
- ...

#### **Services**

- Insurance Broking & Marketing
- Claims Management
- Captive Management
- Arranging of Mutual Risk Products/Discretionary Trusts/Affinity Schemes
- ...
- Risk Management
- ...”

438 The Financial Services Guide then set out the following information concerning insurance broking services (emphasis added):

#### **“Insurance broking: How it works for you**

##### **Tailoring insurance products to your needs**

Before our negotiations with insurers commence on your behalf, we will help establish your insurance requirements. To do this we may need to gather and collate risk information about you. Please see the Duty of Disclosure section for more information about this.

##### **Quoting and placing insurance on your behalf**

**Once we have established your needs, we will identify the local and overseas markets to be approached to determine the most competitive insurance coverage for you. Your JLT Client Risk Adviser will provide you with expert advice to help you to make an informed decision.**

When you have made your decision, we will ensure that your instructions are implemented quickly and efficiently. Any inability to fulfil your instructions will be brought to your attention immediately.

##### **Whom do we act for when we provide services?**

We normally provide financial services on your behalf. Occasionally, where we have negotiated facilities to the benefit of our clients, we may act as agent of the insurer and not for you. For example, we may have an authority to arrange an insurance policy under a binding arrangement with the insurer, which means we can enter into the contract on the insurer’s behalf. When we do this, we will specifically advise you.

##### **Your invoice and payment terms**

Your invoice will state the amount of total premium, statutory charges plus any fees you need to pay and the date on which they are payable. Our usual terms of payment are 14 days from the date of our invoice. Failure to pay on time may lead to your insurance becoming ineffective.

##### **Your insurance documents**

When your insurance arrangements are complete, we will confirm this with you in writing and will forward the appropriate policy documentation to you. This will provide you with any evidence of the insurance held you may need in the future. The policy or JLT document will comprehensively set out the contractual terms and conditions of the insurance.

You should check the document and satisfy yourself that it is entirely in accordance with your understanding and instructions. Just let your JLT Client Risk Adviser know if you have any concerns.”

439 The Financial Services Guide then set out information concerning claims management services, including the following:

## **“Claims Services: How they work for you**

...

### **Claims under Mutual Schemes**

Where JLT administer a Mutual Scheme which includes the handling of all claims, then each loss reported by a Member will be managed by our qualified and experienced claims officers, who will:

- negotiate with third parties
- appoint solicitors or loss assessors where appropriate
- negotiate the most advantageous terms
- arrange speedy resolution/settlement”

440 The Financial Services Guide then set out the following information concerning remuneration:

#### **“How are we paid for the services we provide?”**

As an insurance broker, there are several ways we can be paid. In general, our principal remuneration for arranging insurance in your behalf is either by way of commission paid by the Insurer and/or a fee including a service fee and an administration fee to be paid by you:

- Commission paid to us by the insurer as a percentage of the insurance premium paid by you before stamp duty, fire services levy, GST and any other government charges, taxes, fees or levies. It will vary depending on the insurer and the policy and we will advise you of the range of commission upon request.

OR

- a Fee

OR

- a combination of Commission paid by the Insurer and a Fee.

Commission and Fees are earned for the policy period. We are entitled to retain all commission and fees covering the full policy period for policies placed by us on your behalf.

We may also charge you (with your agreement) a fee for any special advisory or additional claims-related services.

In addition to the fees above the JLT Group may also receive other types of income from insurers, including:

- interest earned on insurance monies passing through our bank accounts
- expense allowances or commissions from insurers for managing binding authorities and other similar facilities (including any claims which may arise under such arrangements)
- profit commissions or profit shares paid by insurers on certain classes of business
- administrative service fees or expense reimbursements for some services we provide to insurers as part of providing them business or through the claims process.

In line with our policy of openness and transparency we will, when requested, endeavour to calculate and disclose the amount or a reasonable estimate of any additional income which we may receive from the above and any other sources in relation to insurances we arrange. This also applies to any non monetary remuneration we may receive from insurers such as gifts, entertainment and other incidental benefits where such remuneration could impact in any way on the services we provide to you.

We may also act as reinsurance broker to arrange facultative or treaty reinsurance for insurers with whom we have placed your insurances and we receive additional remuneration by way of commission or administrative fee for such services.

These reinsurance placements are separate and distinct contracts where we act as the agent of the insurers concerned.

Where we act as managers of a Mutual Scheme or Discretionary Trust, our fee is negotiated according to the services to be provided.”

441 The Financial Services Guide then set out the following information concerning conflicts of interest:

**“Protecting you: Avoiding conflicts of interest**

In all areas of business, conflicts of interest sometimes arise. JLT has designed efficient procedures to assist in the handling of such situations to ensure your protection at all times.

Where we act as the agent for two or more clients involved in the same (or related) loss situation, we will advise the clients involved of any conflicting interests. We will then take immediate steps to segregate the claim servicing functions for each of the clients. These steps will normally include the assignment of different JLT Client Risk Advisers within JLT and the establishment of direct communication procedures.

Should a situation arise where our own interests conflict with any duty we owe to you, we will not proceed until we have fully informed you of the position and you have provided your informed consent on the manner in which we will proceed. We understand that for conflicting interest situations you may wish to secure the services of another broker to assist you with matters.”

442 Mr Walker read the Renewal Report and signed the authorisation form on 30 June 2014 for JLT to place RVC’s insurances in accordance with the Renewal Report.<sup>[387]</sup>

443 On 2 July 2014, JLT forwarded to RVC a Statewide invoice dated 1 July 2014 for RVC’s Property Scheme Contribution for the 2014-2015 year in the amount of \$317,461.73 (excluding GST).<sup>[388]</sup> The invoices included the same “*Important Information*” concerning “*Mutual Schemes*”, “*Duty of Disclosure*” and “*Remuneration and Other Income*” that had been included in Insurance Declarations and Renewal Reports since at least the 2009-2010 year.<sup>[389]</sup>

444 JLT sent the Summary of Insurances to RVC on 22 July 2014.<sup>[390]</sup>

445 The Summary of Insurances contained the same introductory statement as the Insurance Declaration and Renewal Report referred to at [411] and [423] above and stated that it provided “*an outline of all insurance policies we have arranged on your behalf*”. As in previous years, the outlines in respect of “*Property*” and “*Public Liability – Professional Indemnity*” identified RVC as the “*Member*” and identified “*Statewide Property Mutual*” and “*Statewide Liability Scheme*” (respectively) as the “*Protection Provider*”. By contrast, the outlines for RVC’s non-Statewide lines of cover referred to RVC as the “*Insured*” or “*Policy Holder*” and identified an “*Insurer*”. Each of the “*Property*” and “*Public Liability – Professional Indemnity*” outlines contained the information as had been set out in the Renewal Report referred to at [433] and [434] above.

446 The Summary of Insurances included a description of the operations of JLT’s Public Sector Division in Australia, which stated:<sup>[391]</sup>

“... in VIC, TAS, NSW, WA, QLD and SA JLT manage Insurance Property Schemes for Local Councils. Each Scheme is owned by the participating Member Councils. Members receive advice as to their ‘equity’ at the time of any surplus distribution.

As owners of the Scheme, each individual Member has the option to have a tailored solution. JLT, as Scheme managers, recommends what we believe to be the best options in terms of the self-insured retentions for Council. However, there is flexibility in the Schemes for Councils to choose from a range of options if and where required.”

447 The following additional information was set out in the description of JLT’s Public Sector Division in the Summary of Insurances: <sup>[392]</sup>

“Advice in relation to insurance and brokerage issues

JLT’s proposition is built on deep specialist knowledge, client advocacy, tailored advice and service excellence. We strive to be a trusted adviser to our clients.

Currently we provide advice to operational boards and administer the day-to-day account management for several state-based local government schemes or funds as well as a robust portfolio of corporate clients. JLT provides a full range of insurance and services to our clients and the Statewide Board, including:

- Designing insurance and risk strategy to ensure strategic alignment;
- Reviewing uninsured exposures;
- Benchmarking;
- Exploring the on-going suitability of the program considering risk tolerance and scenario testing;
- Developing a renewal strategy having consideration to risk issues and program performance;
- Policy design;
- Obtaining questionnaires to develop tailored underwriting submissions;
- Program marketing and negotiation, with both insurers and reinsurers;
- Strategic policy placement;
- Recommencing on-going improvements and amendments to coverage including drafting and negotiating policy wordings and amendments;
- Proactive and considered account servicing;
- Claims management and advice to maximise indemnity;
- Conduct education and training seminars;
- Organising and presenting regional seminars and annual conference forums”.

448 Mr Walker gave the evidence referred to at <sup>[366]</sup>-<sup>[372]</sup> above concerning his understanding, beliefs and expectations about JLT’s role. I have rejected his evidence referred to at <sup>[366]</sup> above for the reasons explained at <sup>[373]</sup> above.

449 For the purpose of his affidavit, Mr Walker was asked to assume that liability insurance was “available from reputable insurance providers other than Statewide Mutual” for the 2014-2015 insurance year, that such insurance “would have been recommended by JLT as suitable to Richmond Valley’s insurance needs” in that year and that the premium payable for such insurance would have been \$282,000. <sup>[393]</sup> Mr Walker referred to this as the “Alternative Liability Insurance”. It will be recalled that the amount of RVC’s Liability Scheme Contribution for the 2014-2015 year was \$349,252.50

(excluding GST),<sup>[394]</sup> which was subsequently reduced to \$306,177 after rebates.<sup>[395]</sup>

The Liability Scheme accumulated surplus funds even after distributing rebates to Members.<sup>[396]</sup>

450 Mr Walker was also asked to assume that property insurance was “*available from reputable insurance providers other than Statewide Mutual*” for the 2014-2015 insurance year, that such insurance “*would have been identified by JLT as suitable to Richmond Valley’s insurance needs*” in that insurance year and that the premium payable for such insurance would have been \$149,000.<sup>[397]</sup> Mr Walker referred to this as the “*Alternative Property Insurance*”. It will be recalled that the amount of RVC’s Property Scheme Contribution for the 2014-2015 year was \$317,461.73 which was subsequently reduced to \$297,734 after adjustment and rebates.<sup>[398]</sup> The Property Scheme accumulated surplus funds even after distribution of rebates to Members.<sup>[399]</sup>

451 Mr Walker gave the evidence referred to at [376] above that he would have directed JLT to obtain the “*Alternative Liability Insurance*” and “*Alternative Property Insurance*” rather than continuing RVC’s Statewide cover for those risks. I attribute no weight to that evidence due to the unreality of the assumptions on which it is based, as explained at [377]-[378] above. The matters referred to at [378] above have even greater significance in the context of the 2014-2015 renewal process and subsequent renewal processes when the notice period for retirement from the Property Scheme or Liability Scheme was twelve months rather than the three month notice period that had previously applied.

### **Renewal process for the 2015-2016 year**

452 Mr Walker was the General Manager of RVC with responsibility for authorising the placement of RVC’s insurance cover for the 2015-2016 year.

453 Prior to the commencement of the renewal process for the 2015-2016 year, Aon Risk Solutions (**Aon**) made an approach to RVC in February 2015. Mr Walker was aware of the approach and was aware that Aon was claiming that there were commercial

insurers expressing interest in providing RVC with a better deal on its insurances.<sup>[400]</sup>

In his then role as RVC's Chief Operating Officer, Mr Macdonald was also aware of

Aon's approach from March or at least April 2015.<sup>[401]</sup>

454 JLT issued the Insurance Declaration suite of documents on 16 March 2015.<sup>[402]</sup>

455 The Insurance Declaration contained introductory statements in the same terms as the previous year,<sup>[403]</sup> contained the same *Privacy Act* statement as in previous years<sup>[404]</sup> and set out the same "*Important Information*" concerning "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*" as in previous years.<sup>[405]</sup>

456 The structure and contents of the Insurance Declaration, including the "*Property*" and "*Public Liability – Professional Indemnity*" sections, was the same in all material respects as the previous year's Insurance Declaration referred to at [414]-[417] above.

457 Mr Walker was aware that Ms McLean and Ms Parle of RVC met with Aon representatives on 16 March 2015. Aon followed up the meeting on 30 March 2015 with a letter to Ms Parle that was likely shown to Mr Walker at the time. Aon's letter thanked Ms Parle and Ms McLean for meeting and "*sharing your insights and understanding of Council*". The letter stated:<sup>[406]</sup>

"I can reaffirm Aon's advice that highly competitive and viable insurance product and service choices exist in the commercial insurance marketplace.

As mentioned, Aon can provide Council with a Benchmark Advisory report for Council to gain an indication of the commercial market insurance options available"

458 Aon's letter enclosed lists of information required from RVC in order for Aon to obtain "*non-binding indicative benchmarks*" from insurers for liability, property and motor vehicle insurance. RVC provided that information to Aon for the purpose of obtaining a benchmark report from Aon. Mr Walker was interested in finding out whether RVC could in fact obtain a better deal for its insurance on the commercial insurance market, as Aon claimed.<sup>[407]</sup>

459 On 9 April 2015, Ms McLean met with Aon representatives to discuss RVC's insurance portfolio.<sup>[408]</sup>

460 Aon wrote to Mr Walker on 27 April 2015 in the following terms (emphasis in original):<sup>[409]</sup>

"We previously wrote to you in February to advise that a number of commercial insurers continue to express their desire, ability and commitment to provide Council with the level of insurance cover required, at competitive rates and to deliver significant potential savings to Council.

Aon's continuous research of market conditions, trends, expectations and Aon's Market Update report continue to indicate that significant saving opportunities are available. In the last 12 months, our experience of councils with no abnormal claims experience has been for them to achieve significant savings on purchasing their insurance program.

As a member of Statewide Mutual, unlike other state based Schemes, there is a requirement for Council to give at least 12 months' written notice in accordance with terms of the Deed establishing the Scheme and the Funds managed within it.

Giving notice of retirement provides you and Council the opportunity of testing the commercial insurance market, exercise choice around Council's insurance purchase and demonstrate that Council is delivering the best value to the Community.

**To have unrestricted choice for Council's 2016-2017 insurance renewal, Council need to give notice of retirement to Statewide Mutual before 30 June 2015.** Should Council choose not to give notice, you will surrender the opportunity to investigate or



realise potential savings available to Council for 2016-2017.

Aon looks forward to supporting the review or tender of your insurance program to provide you with options and choice to realise significant savings and deliver value for money to Council and your Community.”

461 The letter enclosed a copy of “*Aon’s Local Government Market Update 2015*”.

462 Mr Walker was aware when he read the Aon’s letter that RVC needed to give notice of retirement from the Statewide Schemes in order to test the market for alternative insurance arrangements. Mr Walker had been aware of the notice requirement throughout the whole of his time as General Manager of RVC.<sup>[410]</sup>

463 Aon sent similar letters to other local councils, including to the General Manager of Queanbeyan City Council.<sup>[411]</sup> At the time, Mr Warne was a member of the Executive Team of Queanbeyan City Council. Mr Warne had been a member of the Statewide Board since September 2010 and was Acting Chair of the Board as at April 2015.<sup>[412]</sup> Mr Warne became aware of Aon’s letter to the General Manager of Queanbeyan City Council and forwarded the letter on to other Board members, Mr Eurell and Mr Demer by email on 30 April 2015. Mr Warne’s email stated:<sup>[413]</sup>

“I received the following attachment from AON today which I will handle are a QCC responsibility.

I understand that others have also received similar approaches.

As Statewide we need to respond, particularly to some of the assertions in the Market Update, and I have asked Naamon to prepare an appropriate response and this will be discussed with Cuckoo. I have also suggested that the response document be run by the Marketing Committee prior to distribution.

Feedback from London does not support some of the assertions by AON particularly in respect of premiums or claims.”

464 I infer that the reference to the “*Marketing Committee*” is a reference to the Committee established by the Board in about March 2013.

465 The reference to “*Cuckoo*” is a reference to the firm Cuckoo Creative, which subsequently prepared a recommended response to the Aon letter. Mr Dave Deveny of Cuckoo Creative sent an email to Mr Eurell and a Mr Ron Barnes of JLT on 12 May 2015 attaching the recommended response and recommending that “*we integrate a determined push against competitor offers in a number of relevant communications already in the pipeline*”. The email set out a proposed timetable for those communications, which included a “*comparison document*” to be sent to all General Managers of Scheme Members at the end of May 2015. Mr Deveny’s email stated: “*This plan of action will leave no doubt as to the Mutual’s support of its members on this front. It should also promote debate, which can only be good given the quality of information we’ll be sending.*”<sup>[414]</sup>

466 Mr Warne’s report to the Board at its meeting on 12 June 2015 included a report concerning Aon’s marketing activities. That aspect of the report was recorded in the Board minutes:<sup>[415]</sup>

“Aon Representation – AON Insurance brokers have been active in the NSW Local Government market in the past 6 months. With representation to several Councils and broad mail outs.

The last mail out encouraged Council to give notice to withdraw from Statewide in order to review their insurance options and made some false and broad statements, which we don't believe could be substantiated.

I asked staff to provide a prompt response to "counter" some of the claims made by AON, and this advice has been sent to all Councils.

There were some false assertions that needed a prompt reply and clarification. This exercise has emphasised the need to be proactive in our communications."

- 467 While awaiting Aon's report that had been foreshadowed in its 27 April 2015 letter, RVC continued to attend to the 2015-2016 renewal process by sending to JLT on 9 June 2015 the completed Insurance Declaration which had been signed by Mr Walker indicating that he had read and approved its contents.<sup>[416]</sup>
- 468 On 23 June 2015, Aon issued its report to RVC entitled "*Indicative pricing model*".<sup>[417]</sup> The report principally contained broad statements in general terms about Aon's assessment of the market and Aon's confidence that "*the market can provide the level of insurance cover required [by] Richmond Valley Council at competitive rates, deliver significant potential savings and provide improved value for money to Council and the Community*". The report did not contain any quotations from insurers for RVC's property insurance or liability insurance. Nor did the report identify any insurer as being willing to provide such insurance cover to RVC. Rather, the report contained "*indicative prices*" produced by Aon's modelling. The report stated (emphasis in original):
- "Indicative Price Modelling is provided only as a guide to Richmond Valley Council.** The main pricing factors such as cover, limits and claims experience (especially current, undeveloped open claims) can materially affect the insurance arrangements subsequently evaluated and decided on by Council. **Full disclosure of Council's claims information (open and closed claims) would be required for an insurer to confirm premium and cover terms."**
- 469 Aon's modelled indicative pricing for public liability cover of \$100 million for any occurrence and in the aggregate, products liability cover of \$100 million for any occurrence and in the aggregate and professional indemnity cover of \$50 million for any one claim and in the aggregate was \$290,000. I note that the equivalent limits of liability applicable to cover obtained by RVC through Statewide for those risks in the 2015-2016 year (and in prior years) were \$400 million, \$400 million and \$300 million respectively.<sup>[418]</sup>
- 470 Aon's modelled indicative pricing for property liability cover with a \$100 million maximum limit of liability for any one occurrence and in the aggregate (within which lesser sub-limits of liability applied to specific risks) was \$55,000. I note that the \$100 million maximum limit of liability was less than the \$124,853,185 value of RVC's assets as declared to JLT for the 2015-2016 year. The total limit of liability applicable to the property cover obtained by RVC through Statewide in the 2015-2016 year was \$1.2 billion in the aggregate over all Members.<sup>[419]</sup>
- 471 On 24 June 2015, Mr Walker received a Briefing Note from Ms McLean enclosing Aon's "*Indicative Pricing Model*" and stating that it "*indicates that there is a competitive market which is not necessarily being explored by Statewide*".<sup>[420]</sup> The Briefing Note did not refer to the issues identified at [469]-[470] above, but it did remind Mr Walker that RVC was required to give 12 months' notice under the Deed "*to go out to tender*". Mr Walker

was aware of that notice requirement and was aware that it was too late to give notice for the purpose of putting RVC's insurance program for the forthcoming 2015-2016 year out to tender.<sup>[421]</sup> As referred to above, Mr Walker was aware from Aon's 27 April 2015 letter that, at this stage, notice given prior to 30 June 2015 would facilitate Council putting its insurance program for the 2016-2017 year out to tender.

472 Mr Walker gave evidence that, on reviewing the Briefing Note, he "*became concerned that Richmond Valley may not be getting the best deal for its insurance arrangements*".<sup>[422]</sup> Mr Macdonald, who also reviewed Aon's "*Indicative Pricing Model*" in June 2015, held a similar concern.<sup>[423]</sup> Notwithstanding those concerns, there is no evidence that RVC questioned JLT about the amount of its Contributions to the Property Scheme and Liability Scheme for the 2015-2016 year as set out in the Renewal Report issued on 26 June 2015. There is no evidence of RVC questioning those Contributions at any time before paying them. RVC did not give notice of retirement from the Property Scheme and/or the Liability Scheme after receiving Aon's "Indicative Pricing Model" on 23 June 2015 so as to facilitate RVC going to tender for the 2016-2017 year as Aon's 27 April 2015 letter had suggested.<sup>[424]</sup>

473 On 26 June 2015, JLT sent RVC the Renewal Report for the 2015-2016 year to RVC together with JLT's Financial Services Guide.<sup>[425]</sup>

474 Once again, JLT was described in the Renewal Report as:

"... one of the world's largest providers of insurance and employee benefits related advice, brokerage and associated services. Our client proposition is built upon our deep specialist knowledge, client advocacy, tailored advice and service excellence. Together, we place our clients first, champion innovative thinking and expect to be judged on the results we deliver."

475 The "*Executive Summary*" in the Renewal Report stated (emphasis added):

"In accordance with your completed declaration, JLT has negotiated insurance terms with your incumbent providers on current Policy Limits, Sub-Limits and Deductibles. We also negotiated alternative deductible options in some instances for your consideration.

Furthermore, there have been some enhancements to your covers, and where applicable we have provided an overview herein.

**Richmond Valley Council (Council) has been receiving proactive insurance brokerage services from Jardine Lloyd Thompson Pty Ltd (JLT) for close to 20 years. We reiterate our commitment to delivering Council a first class insurance broking and risk management solution to you and look at this year's renewals as the next stage in our already successful partnership.**

**As Richmond Valley Council current insurance broking partner, JLT understands your expectations and ongoing program and service needs.** As a result, our service solution is focused on the following key value drivers:

- An unrivalled understanding of the unique needs of Local Government and specifically those of Council
- Extensive experience in managing the insurance placement and service requirements of Local Government across Australia, providing a holistic overview and benefits of economies of scale
- Continuing to take a proactive, hands-on approach to the management of your program, bringing Council the benefits of understanding of the history of your program and shared vision of your strategic plans for the future
- Continuity of committed resources by several of JLT's most senior and experienced public sector specialists, who bring a thorough understanding of your organisation, vision and values

- Access to specialist Local Government advice on all insurance related areas especially our specialist Local Government risk and claims teams
- Continuity of Client First service delivery for Council, ensuring value for money across all facets of the program requirements.

Our focus is to ensure we continuously deliver innovative solutions that provide our clients with a competitive edge. **While your program contains covers placed in the traditional insurance market, at the core of our general insurance offering is participation in the Statewide Mutual.**

**Council has been a member of the Statewide Mutual since its inception in 1998, 5 years after we delivered the scheme to our Local Government clients in response to the abandonment of the industry by the majority of local underwriters."**

476 The "*Instructions for Renewal*" section of the Renewal Report reminded RVC of its duty of disclosure to insurers and to Statewide and set out the following "*Summary of Costs*":

<b>Class of insurance</b>	<b>Total Annual Premium</b>	<b>Suggested Option</b>	<b>Recommended Provider</b>
Property	\$315,878.56	As per expiring. Alternative excess pricing included in report	Statewide Property Mutual
Public Liability- Professional Indemnity	\$393,397.68	As per expiring	Statewide Liability Scheme
Councillors and Officers Liability	\$59,002.58	As per expiring	Statewide Liability Scheme
Councillors and Officers Companion Liability	\$1,100.00	As per expiring	Statewide Liability Scheme
Motor Vehicle	\$51,400.42	As per expiring	Statewide Motor Vehicle Scheme
Crime including Cyber Liability	\$9,696.04	As per report	Statewide - Fidelity Guarantee Scheme
Casual Hirers Liability	\$2,948.00	Increased limit options available	Statewide - Casual Hirers Scheme
Personal Accident	\$3,320.97	As per expiring	ACE Insurance Limited

Journey Injury	\$4,381.30	As per expiring	CGU Insurance Ltd through Accident & Health Intl Underwriting P/L
Workers' Compensation Top Up	\$5,195.30	As per expiring	ACE Insurance Limited
Carriers Liability	\$2,887.50	As per report	QBE Insurance (Australia) Ltd through Thistle Underwriting Services Pty Ltd
<b>Total</b>	<b>\$849,208.35</b>		

477 The next section of the Renewal Report, entitled “*Market Leader*”, stated:

“As the insurance broker to over 500 Local Government entities around Australia, JLT is the undisputed market leader in the placement of Local Government insurance. Our access to underwriters with the experience and knowledge of Richmond Valley Council particular risk profile in both the local and international market is unrivalled.

At present Council uses the following types of covers to address its risk profile:

- Mutual based self-insurance
- Mutual placed local reinsurance
- Mutual placed international reinsurance
- Direct insurance with local underwriters’
- Direct insurance with international underwriters.

The diversity of the program is testament to our understanding of the risk solutions available to Council’s profile and capacity to tailor the best possible arrangement for that profile.

JLT has a demonstrated capacity to deliver a program that meets Council’s requirements but it didn’t happen overnight.

### **30 YEARS OF EVOLUTION NOT A THREE MONTH PLACEMENT**

30 plus years of experience in arranging insurance for Local Government entities has allowed us to constantly refine our offering to ensure that it meets all the challenges that the years have provided. The nature in which the business has been conducted has allowed JLT to work with the underwriters on Council’s program to ensure market leading endorsements are in place but more powerfully respond to the losses Councils have suffered over the period.

Over three decades of providing insurance solutions to the Local Government sector, we have strived to take our clients away from ‘boom or bust’ cycles in the insurance market. We therefore concentrate on delivering sustainable, cost effective yet robust solutions to Council’s risk needs.

The delivery of stable premiums along with optimal claims outcomes are our paramount considerations.

Over the course of the renewal process, we continued to build upon the insurance products available in order to provide Council with the security and stability it has enjoyed through our partnership.

To complement the negotiated specialised products, we have also established an experienced and dedicated, regionally based team of Account Managers, Claims Managers and Risk Managers to deliver high level, hands on service as required by

Councils.

In fact our Account Management team, Claims Management team and Risk Management team each has in excess of 100 combined years of specialist Local Government experience. Such experience is unparalleled in our industry and all of this experience is involved in the renewal and management of your Councils insurance portfolio.

Ultimately, it has been JLT's recommendation to act co-operatively between Local Government entities which has resulted in Council's achieving the outcomes of premium stability and superior breadth of coverage. Either through utilisation of the Statewide Mutual or simply through being part of JLT's Local Government book, Council has derived the benefit of substantial market influence. Not only does the bulk placement ensure competitive premiums, it provides individual Council's with insulation against adverse results and market conditions.

### **LOYALTY COUNTS**

Insurance is about mitigating risk.

This is why JLT delivers a program to Council supported by reinsurers, with a proven track record in delivering fair premiums and responding to our clients' claims expeditiously and properly. The proven model delivered by JLT has withstood the ebbs and flows of the insurance market cycle and the variations of the judicial and legislative climate.

The underwriters involved in our program are long term business partners of JLT and Local Government. Many reinsurers on the Statewide Liability Mutual were the only underwriters prepared to write the business prior to the Civil Liability Act. They understand your business.

Things have changed and now the participation in the Statewide Mutual Scheme is highly prized amongst both local and international underwriters, with other underwriters now showing an appetite to explore a business they had once spurned.

Our business partners work with us to ensure the Scheme remains both competitive and viable. We have multi-year agreements in place to deliver members our core promise of stable premiums.

### **SECURITY**

The size of the placement undertaken by JLT for members of the Statewide Mutual allows sufficient volume for reinsurers to entertain the high limits of liability obtained for the Schemes. In NSW the Property Mutual covers in excess of \$22 billion in assets. The Liability Mutual has experienced class actions from property owners, commercial disputes with multi-national corporations and exposure to claims related to bush fires, obviously the exposure to loss is astronomical. This is without considering newer exposures relating to changes development procedures in response to climate change and possible sea level rise.

As such the Statewide Mutual can provide limits with unrivalled levels of cover.

However, such cover is of little value unless Council has the utmost confidence in the reinsurance program that stands behind it. For this reason Statewide Mutual's are supported by a layered program reinsured by multiple insurers in both the local and international market. All the underwriters involved are subject to the comprehensive scrutiny of the JLT Security team.

The placement of the Liability program is undertaken by JLT's Chief Executive Officer, Leo Demer primarily in the London market with various Lloyd's syndicates. JLT has a specialist team in London liaising with those underwriters to ensure premium service delivery to our members.

### **JLT SERVICE APPROACH**

The JLT Service Approach enables us to improve the way we provide services to Council. It allows us to tailor the offerings to suit your risk appetite and ensure you have access to the entire catalogue of JLT services.

Critical centrepiece of our approach is a personalised, flexible and transparent service delivery, with a clear focus on holistic strategic portfolio management. This results in better informed risk and insurance decisions.

### **PERSONAL SERVICE**

Whilst the benefits of being part of a strong group are many, ultimately unless the outcomes present solutions for you they will not meet your needs. The personalised service provided by your Account Manager, Adam Hellier enables Council to tailor its own program from within the broader facilities available.”

478 The Renewal Report then contains three pages of information concerning “*The Statewide Mutual*”, including the following:

“As Council will be aware, the Statewide Mutual is owned by its Members and run by a Board of Management elected by those Members. As the Scheme Manager, JLT provides the insurance expertise to ensure the Mutual delivers the most fit-for-purpose insurance cover for members at unrivalled security.

...

The scheme was established on 31 December 1993 in response to Underwriters at the time withdrawing their support for Local Government in Public Liability and Professional Indemnity Insurance. It now provides cover to Member Councils on:

- Liability under a Mutual Liability Scheme
- Assets under a Property Mutual
- Crime/Fidelity Guarantee
- Motor Vehicle;
- Councillors and Officers Liability

The Scheme is owned by the members and run in accordance with the Deed Establishing the NSW Local Government Mutual Liability Scheme. The Scheme is run by the Statewide Board of Management (the Board).

The Board recognises that it has been the capacity of the multiple Members within the scheme, acting in a common interest that has guided the industry through the trying times in the insurance market. In better times and as the corporate memory fades the relevance of that message is less compelling, as such it falls upon the Board to ensure Members continue to appreciate the great benefit mutuality has afforded them.

Statewide Mutual is currently embarking on a strategy to stimulate engagement with its Members. The Board is at the forefront of this initiative. A sub-committee has been formed, led by the Chair of the Board to provide a marketing strategy to the Board with the aid of an external consultant. At this early stage it has been clearly identified that the Board Members profile in their regions is imperative in delivering the Mutual’s message.”

479 The Renewal Report’s summary of the cover for “*Property*” for the forthcoming 2015-2016 year did not differ in any material respect from the summary in the previous year’s Renewal Report.<sup>[426]</sup>

480 The “*Public Liability – Professional Indemnity*” section of the Renewal Report set out the following information:

“Statewide Mutual and its Member Councils are provided their liability insurance protection by way of JLT’s national liability reinsurance programme which was developed in response to the public liability purchasing crisis of the 1990s. The majority of insurers/reinsurers continue to place exclusions under their treaties for the writing of Local Government liability risks.

Council is part of a Mutual of 147 Councils and part of a reinsurance placement involving 500 Councils. As such the Mutual has an unrivalled capacity to absorb adverse claims. As a Mutual, losses incurred are met by the group and Council’s own contribution is only subject to the changes applied to the Scheme generally

As at 30 June, 2014 the Liability Mutual had an accumulated surplus of \$25,820,403, whilst the Board strives for a balanced budget the accumulated surplus could be exercised to meet any unforeseen reinsurance costs which may arise.”

481 The Renewal Report’s summary of the cover for “*Public Liability – Professional Indemnity*” for the forthcoming 2015-2016 year did not differ in any material respect

from the summary in the previous year's Renewal Report.<sup>[427]</sup>

482 The Renewal Report concluded with the same "*Important Information*" concerning "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*" that had been included in all annual renewal documentation since the commencement of the Relevant Period.<sup>[428]</sup>

483 The Financial Services Guide that JLT sent to RVC together with the Renewal Report was dated January 2015<sup>[429]</sup> and its contents were the same in all material respects as the March 2014 Financial Services Guide that JLT had provided to RVC in the previous year.<sup>[430]</sup>

484 On 30 June 2015, Mr Walker signed the declaration in the Renewal Report, confirming that he had considered the contents of the report and requesting JLT to place the covers as indicated in the "*Summary of Costs*" table.<sup>[431]</sup>

485 On 6 July 2015, JLT forwarded to RVC invoices for all 2015-2016 insurance premiums and Contributions. The amount invoiced for RVC's Property Scheme Contribution for the 2015-2016 year was \$262,191.69 (excluding GST). The amount invoiced for RVC's Liability Scheme Contribution for the 2015-2016 year was \$357,634.25 (excluding GST). Both invoices were on "*Statewide Mutual*" letterhead and attached the same "*Important Information*" concerning "*Mutual Schemes*", "*Duty of Disclosure*" and "*Remuneration and Other Income*" that had been included in the Insurance Declaration and in all annual renewal documentation since the commencement of the Relevant Period.<sup>[432]</sup>

486 JLT issued a Summary of Insurances dated July 2015.<sup>[433]</sup>

487 The Summary of Insurances contained the same introductory statement as the Insurance Declaration and Renewal Report referred to at [455] and [474] above and stated that it provided "*an outline of all insurance policies we have arranged on your behalf*". As in previous years, the outlines in respect of "*Property*" and "*Public Liability – Professional Indemnity*" identified RVC as the "*Member*" and identified "*Statewide Property Mutual*" and "*Statewide Liability Scheme*" (respectively) as the "*Protection Provider*". Each of the "*Property*" and "*Public Liability – Professional Indemnity*" outlines contained the same information that had been set out in the Renewal Report.

488 Mr Walker gave the evidence referred to at [366]-[372] above concerning his understanding, beliefs and expectations about JLT's role. I have rejected his evidence referred to at [366] above for the reasons explained at [373] above.

489 For the purpose of his affidavit, Mr Walker was asked to assume that liability insurance was "*available from reputable insurance providers other than Statewide Mutual*" for the 2015-2016 insurance year, that such insurance "*would have been recommended by JLT as suitable to Richmond Valley's insurance needs*" in that year and that the premium payable for such insurance would have been \$185,000.<sup>[434]</sup> Mr Walker referred to this as the "*Alternative Liability Insurance*". It will be recalled that the amount of RVC's Liability Scheme Contribution for the 2015-2016 year was \$357,634.25



(excluding GST),<sup>[435]</sup> which was subsequently reduced to \$341,276 after rebates.<sup>[436]</sup>

The Liability Scheme accumulated surplus funds even after distributing rebates to Members.<sup>[437]</sup>

490 Mr Walker was also asked to assume that property insurance was “available from reputable insurance providers other than Statewide Mutual” for the 2015-2016 insurance year, that such insurance “would have been identified by JLT as suitable to Richmond Valley’s insurance needs” in that insurance year and that the premium payable for such insurance would have been \$129,000.<sup>[438]</sup> Mr Walker referred to this as the “Alternative Property Insurance”. It will be recalled that the amount of RVC’s Property Scheme Contribution for the 2015-2016 year was \$262,191.69 (excluding GST),<sup>[439]</sup> which was reduced to \$229,409 following the meeting between Mr Walker and Mr Eurell on 9 November 2015 referred to below.<sup>[440]</sup>

491 Mr Walker gave the evidence referred to at [376] above that he would have directed JLT to obtain the “Alternative Liability Insurance” and “Alternative Property Insurance” rather than continuing RVC’s Statewide cover for those risks. I attribute no weight to that evidence due to the unreality of the assumptions on which it is based, as explained at [377]-[378] and [451] above.

#### **Renewal process for the 2016-2017 year**

492 Prior to the commencement of the renewal process for the 2016-2017 year, Mr Walker met with Mr Eurell on 9 November 2015 to discuss his concerns about the Contributions RVC was paying compared to the indicative pricing that Aon had provided in June 2015.

493 Mr Eurell gave evidence that he understood from his discussion with Mr Walker during that meeting that Aon had offered indicative pricing that was less than the Contributions that RVC was paying to the Scheme. Mr Eurell told Mr Walker during the 9 November 2015 meeting that:<sup>[441]</sup>

“Statewide abides by its Mission Statement, which is to ensure the protection of members through stable premiums, containment of costs, and spread of risk. Statewide offers superior coverage year on year. This means that you might not always be paying rock bottom price, but Statewide is able to offer year on year stable premiums for superior cover.”

494 Mr Eurell was cross-examined about whether he had, in effect, advised Mr Walker that RVC would be better off staying in the Scheme than taking up other alternatives. Mr Eurell denied this. He gave evidence that Statewide cover included certain endorsements that he understood from his discussions with underwriters would not be readily available to other insureds in the market. In describing the Statewide cover as “superior”, Mr Eurell had these endorsements in mind and was intending to convey to Mr Walker the benefits of being in the Scheme so that he could make a decision whether RVC should stay in the Scheme.<sup>[442]</sup> Mr Eurell said:<sup>[443]</sup>

“It was so that they could make their own decisions. They’d chosen to enter into the scheme for their own reasons; we considered that a lot of those reasons remained valued – valid, and they should consider those carefully before they decided whether or not they wanted to explore alternative options.”

“All I’m trying to do is give Mr Walker the ability to consider some of the differentiators between our offer and the offer made by Aon in light of the fact that one of the things that was heavily weighing on his mind was simply pricing.”

- 495 Mr Eurell had conducted a benchmarking analysis in respect of RVC prior to the meeting and determined that RVC’s ISR rate that applied to the calculation of its Property Fund Contributions should be reduced to 0.152% and that the resulting reduction in those Contributions should be applied from 1 January 2016. In his first affidavit, Mr Eurell attributed the reduction to RVC’s good claims results, which he said meant that its ISR rate could be brought in line with other councils of similar size, deductible and claims outcomes. This is consistent with an email that Mr Eurell received from Mr Adam Hellier of JLT on 23 October 2015, which stated that Mr Hellier had started comparing property values, rates, deductibles and claims for a few councils and had formed the view that RVC “*may be a little high by comparison in some respects*”. The email stated that Mr Hellier would add additional councils into his analysis. Mr Eurell readily acknowledged in cross-examination that he had been mistaken in his affidavit when he attributed part of the ISR rate reduction to a change in RVC’s deductibles. That change had already been made as at 1 June 2015. There is no evidence of the benchmarking exercise resulting in any change to RVC’s Liability Fund Contributions.<sup>[444]</sup>
- 496 Mr Eurell’s unchallenged evidence is that he took Mr Walker through his benchmarking analysis at the meeting and the resulting reduction in RVC’s Property Fund Contributions, that Mr Walker expressed satisfaction with this outcome at the time and that the reduction to RVC’s Property Fund Contributions was implemented with effect from 1 January 2016.<sup>[445]</sup> The reduction was not applied retrospectively.
- 497 It was put to Mr Eurell in cross-examination that the reduction was made and implemented mid-way through the insurance year solely to compete with Aon and to reduce the risk of RVC leaving the Scheme. Mr Eurell denied this and maintained that “*it was something that I felt should be done in order to get equity between members, after review of their particular circumstances*”.<sup>[446]</sup>
- 498 I accept Mr Eurell’s evidence of the reasons for adjusting RVC’s Property Fund Contributions in late 2015 with effect from 1 January 2016. That evidence is consistent with the contemporaneous correspondence between Mr Eurell and Mr Hellier and is also consistent with the fact that there was no adjustment to RVC’s Liability Fund Contributions at the same time, as referred to below. It is inherently improbable that no adjustment would have been made to RVC’s Liability Fund Contributions if JLT had simply been engaged in a competitive exercise of offering lower Contributions to reduce the risk of RVC retiring from the Scheme, without regard for equity between Members, as the cross-examiner put to Mr Eurell.
- 499 In December 2015, JLT presented a report to the Statewide Board as part of an ongoing review of Liability Fund Contributions that the Board had initiated in September 2013. The object of the review was to assess whether Members’ Contributions were

within acceptable tolerances for their size and location and to address any outliers to ensure that the load of Contributions was being shared equitably between members. [447]-JLT had presented a report arising from the review to the Finance Committee in March 2014 identifying ten councils whose Contributions were above and ten councils whose Contributions were below *“the optimal range”*. JLT’s further report presented on 10 December 2015 identified a further ten councils whose Contributions were above and a further ten councils whose Contributions were below *“the optimal range”*. The report identified the *“desired outcome”* as being *“to ensure the Scheme continues to provide equitable contributions from members”*. RVC was not identified as one of the councils with Contributions outside *“the optimal range”* in either of those two stages of the review and its Liability Fund Contribution rate was not changed. [448]

500 Mr Walker left RVC in February 2016 and was replaced by Mr Macdonald, who had been RVC’s Chief Operating Officer since February 2015. In his role as Chief Operating Officer, Mr Macdonald had been aware of Aon’s approach to RVC in 2015 and had been concerned after reviewing Aon’s *“Indicative Pricing Model”* in June 2015 that *“JLT may not have been obtaining the best value insurance for Richmond Valley’s needs”*. It will be recalled that the concern about value that was articulated in RVC’s internal Briefing Note at the time was that there may be *“a competitive market which is not necessarily being explored by Statewide”*. [449]-There is no evidence that Mr Macdonald was made aware of the outcome of Mr Walker’s discussions with JLT in November 2015. In any event, Mr Macdonald acted on his earlier concerns after his appointment as General Manager by causing RVC to give notice of retirement under the Deed on 6 June 2016 with a view to tendering the management of RVC’s insurance portfolio from the 2017-2018 year.

501 At the time that he caused the notice to be given, Mr Macdonald had read the Deed and understood from clause 10.3 that RVC could not obtain property insurance or liability insurance from a provider other than Statewide without first giving twelve months’ notice of retirement. Mr Macdonald understood that, because of the Deed, RVC had no choice but to leave its property cover and its public liability and professional indemnity cover with Statewide for the 2016-2017 year irrespective of the terms of that cover set out in JLT’s Renewal Report. Mr Macdonald therefore authorised the placement of RVC’s insurance cover for the 2016-2017 year in accordance with JLT’s Renewal Report notwithstanding his concerns about whether it represented the best value for RVC. [450]-As JLT submitted, it was with considerable reluctance that Mr Macdonald begrudgingly accepted in cross-examination that RVC had been bound by the Deed to continue its Statewide Membership for the 2016-2017 insurance year. Mr Macdonald’s reluctance to accept that proposition was surprising, as he had effectively already accepted it in his affidavit. His initial resistance to the

proposition in cross-examination involved a series of non-responsive answers to clear questions, in which he endeavoured to embark on little speeches critical of JLT and the 2016-2017 Renewal Report. That conduct did not reflect well on his credit.

502 Mr Macdonald's letter to Mr Eurell giving notice of RVC's retirement gave the following reason for RVC's decision to retire: <sup>[451]</sup>

"As part of a review of our procurement practices, Richmond Valley Council has decided to tender the management of its insurance portfolio. Council is committed to continuous improvement and best practice in achieving productivity and efficiency in all of Council's procurement practices.

The Deed of Establishment for the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme, dated 22 March 1994, (the Deed) appoints Jardine Lloyd Thompson to manage the scheme and does not provide for periodic tender of the scheme manager. This arrangement is contrary to achieving the most competitive outcome for Council.

To enable Council to tender the management of its insurance portfolio, it is advised that in accordance with Clause 10.3 of the Deed, Council is giving notice of its intention to retire from all funds managed under the Scheme, effective 30 June 2017.

This decision is in the best interests of the Richmond Valley community, as it will ensure the management of Council's insurance portfolio is achieving best value for money and ensures transparency in our procurement practices. It does not preclude Statewide Mutual from responding to the tender when it is issued and if successful would provide a fresh start to Council's relationship with the Mutual."

503 In cross-examination, Mr Macdonald accepted that the concern that he expressed in the letter was a concern that JLT might not be performing its role as Scheme manager satisfactorily and might not be giving the best advice to the Statewide Board concerning insurance that could be obtained for Members, including RVC. That is consistent with the concern expressed in the contemporaneous RVC Briefing Note referred to above. There is no hint of any complaint in Mr Macdonald's letter to Mr Eurell that JLT was not advising RVC of the best deal for RVC individually or was not presenting alternatives to Statewide for RVC's consideration. It is inherently implausible that such complaints existed in Mr Macdonald's mind at the time yet did not find their way into his letter to Mr Eurell.

504 Mr Macdonald nevertheless maintained in cross-examination that he saw JLT as RVC's broker in addition to being the Scheme manager and that he expected JLT to ensure that RVC was getting the best deal, to advise RVC of any alternatives to Statewide that

were “a better deal” and to give RVC the opportunity to at least consider alternative options.<sup>[452]</sup> reject that evidence, which is implausible in light of Mr Macdonald’s contemporaneous letter to Mr Eurell.

505 The salient aspects of the 2016-2017 renewal process and documentation may be summarised as follows.

506 On 15 March 2016, JLT issued the Insurance Declaration suite of documents and provided RVC with a copy of JLT’s Financial Services Guide.<sup>[453]</sup>

507 The Insurance Declaration contained introductory statements in the same terms as the previous two years,<sup>[454]</sup> contained the same *Privacy Act* statement as in previous years<sup>[455]</sup> and set out the same “Important Information” concerning “Mutual Schemes”, “Duty of Disclosure” and “Remuneration and Other Income” as in previous years.<sup>[456]</sup>

508 The structure and contents of the Insurance Declaration, including the “Property” and “Public Liability – Professional Indemnity” sections, was the same in all material respects as the Insurance Declarations issued in the previous two years referred to at [414]-[417] and [456] above.

509 The Financial Services Guide provided to RVC at the same time as the Insurance Declaration was dated December 2015.<sup>[457]</sup> There was no material difference between the contents of the December 2015 Financial Services Guide and the March 2014 and January 2015 Financial Services Guides referred to at [436]-[441] and [483] above.

510 The Insurance Declaration was completed by either Ms McLean or Ms Parle inserting the required information. On 6 May 2016, Mr Macdonald reviewed and signed the completed Insurance Declaration, approving its contents. The signed document and accompanying schedules were returned to JLT by email that day.<sup>[458]</sup>

511 JLT issued the Renewal Report to RVC on 21 June 2016.<sup>[459]</sup>

512 Once again, JLT was described in the Renewal Report as:

“... one of the world’s largest providers of insurance and employee benefits related advice, brokerage and associated services. Our client proposition is built upon our deep specialist knowledge, client advocacy, tailored advice and service excellence. Together, we place our clients first, champion innovative thinking and expect to be judged on the results we deliver.”

513 The “Executive Summary” in the Renewal Report stated (emphasis added):

**“Richmond Valley Council (Council) has been receiving proactive insurance brokerage services from Jardine Lloyd Thompson Pty Ltd (JLT) for over 20 years. Now more than ever, Councils across NSW require the support and expertise of a service provider that understands your operations and the political environment in which you serve your community.**

We recognise that while there may be significant change occurring around us in the NSW local government landscape, one thing remains the same: JLT has you covered.

**Through the development of a range of bespoke insurance protection and risk management services, we will continue to work with Richmond Valley Council to deliver to our core commitment of protecting local government through the benefits of Mutuality.**

For the upcoming period, our service solution is focused on the following key value drivers:

<p>The benefit of Mutuality for all members, including discretion and control over your programme, long-term stability shielded from market volatility and financial benefits through accumulated surpluses and annual disbursements</p>	<p>Our Client First philosophy ensures Councils receive customised services, enabling all members to access value-for-money benefits of claims and risk management as a result of the Mutual pooling</p>	<p>Provision of education and training across Councils as required, enhancing the skills within local government and driving significant improvements for the sector, sustainable across the long term</p>
<p>We negotiate on Councils' behalf to ensure catastrophe limits and appropriate coverage levels for all policy classes, backed by our market leverage as the largest provider of local government protection</p>	<p>Our experts advocate on your behalf across all areas including claims, which has resulted in amendments to unsuitable legislations through our role as active litigant for members</p>	<p>Our entrepreneurial spirit empowers our people to act for Councils, resulting in tailored policy wordings that protect your sector-specific risks, meaning adequate cover for all members within the Mutual</p>

Our focus is to ensure we continuously deliver innovative solutions that provide Councils with appropriate levels of protection and risk mitigation strategies. **While your programme contains covers placed in the traditional insurance market, at the core of our general insurance offering is Member participation in the Statewide Mutual – a Mutual Scheme that has protected its Members and withstood market volatility for more than 22 years.**

Richmond Valley Council has been a member of the Statewide Mutual since its inception., At this time, we delivered the Scheme to our Local Government clients in response to the abandonment of the industry by the majority of local underwriters.

Since then, Richmond Valley Council has received Public Liability and Property rebates of:

Public Liability      \$197,706.32

Property              \$466,618.19

**During this time, we have worked with NSW Local Government to ensure a bespoke, dynamic insurance programme that is fit for purpose, provides the comprehensive protection required by Councils and that is robust enough to weather any cycles of the insurance market. The programme continues to be reviewed and updated on an annual basis, meaning a current, relevant and competitive programme that has evolved to meet the changing needs of local government.**

We look forward to our ongoing partnership with Council as we continue to deliver risk solutions for local government in this new look era.”

514 The “*Instructions for Renewal*” section of the Renewal Report reminded RVC of its duty of disclosure to insurers and to Statewide Mutual and set out the following “*Summary of Costs*”:

<b>Class of insurance</b>	<b>Total Annual Premium</b>	<b>Suggested Option</b> (i.e. increased limits/additional cover/excess options)	<b>Recommended Provider</b>
Property	\$216,507.39	As per report	Statewide Property Mutual
Public Liability- Professional Indemnity	\$400,478.84	As per report	Statewide Liability Scheme
Councillors and Officers Liability	\$60,064.63	As per report	Statewide Liability Scheme
Councillors and Officers Liability	\$1,100.00	As per report	Statewide Liability Scheme
Motor Vehicle	\$56,716.55	See report for nil windscreen excess option and option to cover all vehicles comprehensively	Statewide Motor Vehicle Scheme
Crime	\$9,696.04	See report for increased Crime limit option	Statewide - Fidelity Guarantee Scheme
Casual Hirers Liability	\$2,948.00	As per report	Statewide - Casual Hirers Scheme
Personal Accident	\$3,320.97	As per report	ACE Insurance Limited
Journey Injury	\$4,574.90	As per report	CGU Insurance Ltd through Accident & Health Intl Underwriting P/L
Workers' Compensation Top Up	\$4,960.26	As per report	ACE Insurance Limited

Marine Cargo	\$632.50	As per report	QBE Insurance (Australia) Ltd through Thistle Underwriting Services Pty Ltd
Carriers Liability	\$2,887.50	As per report	QBE Insurance (Australia) Ltd through Thistle Underwriting Services Pty Ltd
<b>Total</b>	<b>\$763,887.58</b>		

515 The Renewal Report then stated (emphasis added):

“TRUE VALUE FOR COUNCILS

Last year’s renewal report outlined the benefits that we provide to Councils through:

- Our expertise derived through JLT’s 30-year evolution within the Local Government sector
- **The loyalty from within the Mutual’s underwriters and reinsurance networks, which has continued to ensure that Statewide Mutual remains both competitive and viable through the changing Local Government landscape**
- The **long-term security and unrivalled limits of cover afforded to Members** only through JLT
- Our dynamic and bespoke approach to client service for Councils, newly reinvigorated through the introduction of the JLTHub, which to date has succeeded in streamlining our internal interactions in order to bring about a more efficient and connected JLT team working in unison to the benefit of Richmond Valley Council. We touch further on the JLTHub model in the pages below
- JLT’s personal day-to-day service provision for Richmond Valley Council is led by Adam Hellier, an experienced and committed Account Manager.
- **Through JLT, Richmond Valley Council receives a tailored and agile programme adapted within the broader programme facilities available to all members within Statewide Mutual**
- Additional services, including Insurable Risk Profiling (IRP), which enables clarity across your current risk coverage and appetite. Our risk management services also extend to a host of additional value-adding options, including:
  - property and asset valuations,
  - integrity management training,
  - enterprise risk management and a range of bespoke risk assessments and educational support devised for the Local Government sector in NSW.

A TRUSTED PAIR OF HANDS

This year, we would like to take the opportunity to focus on the ongoing support JLT will provide to Richmond Valley Council throughout the changing Local Government landscape, highlighting above all that we remain business as usual for your organisation. **We have structured our entire operations to focus on your insurance and risk protection requirements, meaning quite simply that you don’t have to.**

The 2015/2016 insurance year brought a strong degree of market discussion from various local government stakeholders, bringing confusion and misinformation into an already uncertain period. **Throughout this time, the Statewide Mutual remained constant in its delivery of true value for Councils, and the membership has**



**showed its ongoing support of the Mutual through maintaining its participation and electing to receive value-added services within the Mutual and from JLT as a service provider.”**

516 The Renewal Report then set out four pages of information about the Scheme, the role of the Board, the role of JLT in “*managing the Statewide Mutual and providing insurance advice to the Board*” since the inception of the Scheme in 1983, and the current Board structure and governance. This section of the Renewal Report stated (emphasis in original):

**“The Mutual Difference**

The Mutual’s offerings, across all its policy classes, have been developed on 20+ years of providing solutions to Local Government for the risk exposures faced by the industry. The covers offered are as comprehensive as the market currently allows and have a demonstrated history of responding to the wide variety of activities, services and facilities the Member Councils provide their communities and the related risk exposure.

Reinsurance for the Statewide Mutual Liability scheme is arranged through Lloyds and other London underwriters under a national arrangement.

As part of a large group of Councils Australia wide, large losses, whilst still significant, can be absorbed into the greater Scheme with minimal impact on the individual Member or the group as a whole.

However, if Council were placing its insurance as a single entity on the open market, the effect on future premium could be disastrous.

Even if Council were a member of a smaller pool of Councils, the effect of such a loss on the premium pool could have a significant impact. The protection of each Member is directly correlated to the scale of the membership.

**Ultimately, this is the Mutual’s primary advantage:** there have been numerous instances throughout the history of the Scheme losses of the type mentioned above and indeed hundreds of occasions where Councils claims costs have exceeded the premium paid yet **our contributions remain stable.**

**A Claim Resolution Process Unmatched Across the Industry**

Risk protection only realises its value when a claim is made, and it is at this point that JLT and Statewide Mutual truly distinguish us from the wider insurance industry.

Our claims team deals with Members not insureds. It is this service-based claims philosophy that continues to provide Council with optimised claims outcomes. Our team of experts achieves this through their extensive knowledge of working with Local Government clients and determination to ensure Members’ communities are supported and repaired quickly in times of loss.

Statewide Mutual is not driven by lowering claims costs to increase an underwriters’ profit margin. The focus is ensuring members are supported at times of loss and represent the industry justly, reasonably and with determination when acting in litigation.”

517 The Renewal Report’s summary of the cover for “*Property*” for the forthcoming 2016-2017 year did not differ in any material respect from the summaries in the previous two years’ Renewal Reports.<sup>[460]</sup>

518 The Renewal Report’s summary of the cover for “*Public Liability – Professional Indemnity*” for the forthcoming 2016-2017 year did not differ in any material respect from the summaries in the previous two years’ Renewal Reports.<sup>[461]</sup>

519 The Renewal Report repeated the information from the previous year’s report concerning the manner in which “*reinsurance*” was arranged for the Liability Scheme.<sup>[462]</sup>

520 The Renewal Report stated:

“SERVICE COMMITMENT AND PLAN

Our service approach will be characterised by:

- Quality, experienced personnel;
- Sustained high service levels;
- Resources sufficient to meet requirements of Council; and
- Excellent back up from the JLT technical and support resources.

At all times we will follow the JLT service philosophy encompassing the following key elements:

### **Plan**

The purpose of this stage is for JLT to gain an understanding of your expectations, review the scope of our services and to agree on and to plan for the implementation of JLT's services.

### **Analyse**

The next phase will be to conduct a needs analysis to fully understand Council's needs and to analyse your business and insurable risks.

### **Design Solutions**

Taking the input from our analysis, the purpose of this stage is to explore design options for a risk and insurance programme that suits your needs and your risk profile.

### **Negotiate and Execute**

This stage entails the implementation of the agreed strategy. In conjunction with Council Working we will deliver the risk profile to insurance markets working to the strengths of each insurer and creating competitive tension to negotiate an optimum result.

### **Manage and Monitor**

Once the programme is placed, JLT see to the finalisation of procedural documentation and the implementation of the service plan, including review meetings, claims management and servicing your day to day needs ensuring your insurance programme remains aligned with your needs.

We have set out a proposed service plan to assist with the administration of Council's portfolio during the next twelve months. The items shown below represent the minimum services standard. We will ensure the provision of these services is delivered in a professional, efficient and timely manner. Please advise if you require any additional items included or amendments to this programme"

521 The Renewal Report concluded by setting out substantially the same "*Important Information*", including the statements concerning "*Mutual Schemes*" and "*Remuneration and Other Income*", that had been included in annual renewal documentation since at least the commencement of the Relevant Period.<sup>[463]</sup>

522 On 28 June 2016, Mr Macdonald read and signed the 2017 Renewal Report, thereby authorising JLT to place RVC's insurance in accordance with the Renewal Report.<sup>[464]</sup> In his affidavit, Mr Macdonald deposed that, in authorising the placement of those insurances "*it was my intention that Richmond Valley obtain insurance that offered the best value for money, with cover that was suitable having regard to Richmond Valley's risk profile*" and that he "*expected that JLT had taken steps to ensure that the insurance it was recommending to Richmond Valley was the best deal available to Richmond Valley*".<sup>[465]</sup> Insofar as Mr Macdonald implicitly claims to have expected that JLT had taken steps to recommend alternative (i.e. non-Statewide) property and liability

insurance to RVC if any such alternatives represented “*the best deal available to Richmond Valley*”, I reject that evidence. It is irreconcilably inconsistent with Mr Macdonald’s evidence referred to at [501] above.

523 Mr Macdonald also deposed that, in executing the renewal authorisation, he “*relied upon the recommendations of JLT set out in the 2017 Renewal Report*”.<sup>[466]</sup> I reject that evidence. Again, it is inconsistent with Mr Macdonald’s evidence in cross-examination referred to at [501] above that he understood that, because RVC had not given the twelve months notice of retirement required by the Deed, RVC had no choice but to leave its property cover and its public liability and professional indemnity cover with Statewide for the 2016-2017 year irrespective of the terms of that cover set out in JLT’s Renewal Report.

524 On 29 June 2016, JLT forwarded to RVC the Statewide invoices for RVC’s Liability Scheme Contribution and Property Scheme Contribution for the 2016-2017 year. The amounts invoiced were \$364,071.67 (excluding GST) for RVC’s Liability Scheme Contribution and \$196,824.90 (excluding GST) for its Property Scheme Contribution. Mr Macdonald approved payment of those invoices on 15 July 2016.<sup>[467]</sup>

525 JLT issued a Summary of Insurances on 12 September 2016.<sup>[468]</sup>

526 The Summary of Insurances contained the same introductory statement as the Renewal Report referred to at [512] above and stated that it provided “*an outline of all insurance policies we have arranged on your behalf*”. As in previous years, the outlines in respect of “*Property*” and “*Public Liability – Professional Indemnity*” identified RVC as the “*Member*” and identified “*Statewide Property Mutual*” and “*Statewide Liability Scheme*” (respectively) as the “*Protection Provider*”. Each of the “*Property*” and “*Public Liability – Professional Indemnity*” outlines contained the same information that had been set out in the Renewal Report, save that the “*Public Liability – Professional Indemnity*” outline in the Summary of Insurances included an additional component of protection described as “*Part B – Local Government Environmental Liability*”.

527 Like Mr Wilkinson and Mr Walker, Mr Macdonald was asked to assume that property insurance and liability insurance were available from reputable insurance providers other than Statewide for the 2016-2017 year, that JLT would have recommended such insurance as suitable to RVC’s needs and the premiums payable for those insurances would have been \$126,000 (for property insurance) and \$163,000 (for liability insurance). Like Mr Wilkinson and Mr Walker, Mr Macdonald deposed that, in that hypothetical scenario, he would have directed JLT to obtain those insurances rather than “*obtaining*” RVC’s property liability cover “*from Statewide Mutual*”. Mr Macdonald’s evidence suffers from the same fundamental difficulties as the equivalent evidence of Mr Wilkinson and Mr Walker referred to at [271]-[272], [378] and [451] above and is irreconcilable with Mr Macdonald’s evidence referred to at [492] and [522] above that he knew that RVC had no choice but to continue its membership of the Property

Scheme and Liability Scheme for the 2016-2017 year. I reject Mr Macdonald's evidence about what he would have done in the unrealistic, hypothetical scenario presented to him.

### **RVC insurance arrangements for the period after 1 July 2017**

- 528 In August 2016, RVC and nine other councils formed an insurance procurement group (the **IPG** and the **IPG councils**) and commenced a tender process for insurance broking services for the 2017-2018, 2018-2019 and 2019-2020 years (the **IPG tender**).<sup>[469]</sup>
- 529 The Request for Tender (**RFT**) was issued on 31 October 2016.<sup>[470]</sup> After identifying the participating councils, the RFT stated that the tender was for the provision of insurance brokerage services and insurance coverage and that the successful tenderer may be contracted separately to each of the participating councils or collectively by a number of councils.<sup>[471]</sup> The RFT required tenderers to submit indicative pricing *“for the period 1 July 2016 to 30 June 2017, based on a placement during the period immediately prior to 1 July 2016 and assuming market conditions in place at that time”* and based on assumed claims and exposure data set out in the RFT.<sup>[472]</sup> However, the assumed claims and exposure data had been anonymised by withholding the identity of the council to which each set of data related and by applying multiples to the data, including to councils' asset values and revenue. The RFT acknowledged that the *“anonymisation of data may result in a loss of important information for indicative pricing purposes.”*<sup>[473]</sup>
- 530 The IPG tender, being conducted on the basis of fictitious data for anonymised councils, and being conducted retrospectively (seeking indicative pricing in respect of the insurance year for which the IPG councils already had cover in place), was plainly not designed to elicit any binding insurance quote. None of the tender responses referred to below identified insurers who might provide insurance that was the subject of the indicative pricing based on the fictitious data.<sup>[474]</sup> Mr Ellison described the IPG tender as generating *“general results based on a fictitious situation”*.<sup>[475]</sup> Mr Saunders said that tenders are generally conducted prospectively and use actual or at least estimated data, because that approach is most likely to lead to a reliable indication from tendering brokers about the insurance that they expect to be able to obtain for the prospective client. In his 30 years' experience, Mr Saunders had only conducted one tender retrospectively and had never conducted a tender on the basis of fictionalised data. Mr Saunders considered that the IPG tender provided some general indication of how the brokers responding to the tender saw the market, based on the fictionalised data from which one might be able to extrapolate a likely response to actual data

- subject to an uncertainty factor. However, Mr Saunders emphasised that it did not provide any definitive indication of the insurance cover that could have been obtained for the 2016-2017 year because *“anything after the event cannot be definitive”*.<sup>[476]</sup>
- 531 JLT, Aon, Marsh and Willis responded to the IPG tender, which closed on 9 December 2016.<sup>[477]</sup>
- 532 The insurance cover indicative pricing for the 2016-2017 year in JLT’s tender response was approximately 40% lower than RVC’s Liability Scheme and Property Scheme Contributions for that same year. However, JLT was responding to fictionalised data in the IPG tender as explained above. Moreover, there were several differences between RVC’s Statewide Cover on the one hand and the insurance cover for which JLT was providing indicative pricing on the other hand. For example, JLT’s indicative pricing for liability insurance was provided *“net of expected rebates”*, meaning that the pricing was reduced in order to factor in the rebate that was expected to be payable to RVC in respect of its Statewide liability cover for the 2016-2017 year following the end of that year. JLT’s indicative pricing for property insurance excluded flood cover, which had been included in Statewide property cover for the 2016-2017 year. JLT’s indicative pricing for both liability and property insurance was for the lower limits of liability rather than the limits applicable under RVC’s Statewide cover.<sup>[478]</sup> An internal JLT document created at the time suggests that JLT’s indicative pricing for liability insurance also included a component for *“risk management funding”*. The document was not provided to Mr Eurell at the time it was created. The author of that document now works for Aon and was not called to give evidence in the proceedings. It was put to Mr Eurell in cross-examination that *“risk management funding”* was merely a euphemism for an additional discount in order to be competitive in the tender process. Mr Eurell’s understanding of the way in which JLT’s indicative pricing had been formulated, based on his own involvement in that process, did not align with the document. However, Mr Eurell readily accepted that JLT applied discounts to its indicative pricing in order to be competitive.<sup>[479]</sup>
- 533 It is unremarkable that JLT sought to make its indicative pricing competitive by approaching the pricing in a different manner from that which applied to setting Statewide Contributions. JLT and other tenderers were engaged in a process of competing to be appointed as insurance broker to one or more councils on the basis of indicative non-binding pricing for individual (anonymised) councils for the 2016-2017 year, in circumstances where each of those councils already had insurance cover in place for that year. By issuing the RFT, the IPG councils had invited JLT to compete. That is very different from the prospective exercise that JLT had undertaken before the commencement of the 2016-2017 insurance year of determining the amount of Contributions to be paid by each Member of the Scheme in order to make up the total

Contributions determined by the Board, taking into account the cost of the Primary Insurance to be placed on behalf of Members collectively on the basis that surplus funds could be rebated to Members following the end of the year.

534 The evidence does not support RVC's submission that JLT was unable to account for all but \$43,302 of the difference between its indicative pricing submitted for the IPG tender and the Contributions paid by RVC to the Scheme for 2016-2017. The relevant evidence is summarised at [532] above. As JLT submitted, the figure of \$43,302 is derived from an internal RVC briefing memo which referred to only some aspects of only two of the factors that differentiated the IPG tender indicative pricing and the actual 2016-2017 Contributions.<sup>[480]</sup>

535 The mandatory tender responses included a section describing the tenderer and its qualifications. JLT's tender response stated:<sup>[481]</sup>

"The Insurance Procurement Group (IPG) consists of ten Councils, all of whom are committed to placing appropriate insurance and developing a risk management framework to achieve better outcomes in their risk performance. In doing so, Councils are looking to have further insight into their risk profiles and obtain optimal insurance placements to protect themselves and their communities.

Councils look for an insurance provider who has the ability to deliver the best outcomes to benefit Council and its community. They need confidence that their insurance placements meet individual needs and, to be in the best position to achieve this, Councils need an insurance broker with a holistic understanding of Local Government.

To attain optimal premium costs, Councils need to have in place best practice risk management programmes which minimise risk. Effective risk management plays an important role in analysing and designing an insurance program and helping with the reduction of the cost of risk.

When going through this process, Councils within the IPG want reassurance that their insurance broker and risk managers have the relevant qualifications, specialisations and Local Government experience to work in partnership with Councils to place their insurance, develop, influence and implement their risk programmes and provide the best claim services on Council's behalf.

By having an effective claims management protocol, Councils within the IPG can have peace of mind that their claims are being managed with their best interests in mind.

The goal of the IPG is to create an end-to-end insurance service that enables Councils to individually manage their insurance. Furthermore, a Council needs to know its insurance broker will act in its best interest, provide a high standard of customer service and be proactive in communicating with them in relation to their insurance policies and coverage."

536 That part of JLT's tender response was plainly describing JLT's understanding of what the councils participating in the IPG tender were seeking to achieve from the tender. JLT's response then described how JLT could deliver those outcomes if it were awarded the tender to provide services as the broker to those individual councils:<sup>[482]</sup>

"JLT has an unrivalled track record in placing insurance for Local Government. Through Statewide Mutual (the Mutual), JLT has provided the ultimate in protection and risk management to NSW Local Government for over 20 years.

Our response outlines our understanding of the service and offerings required for us to work together with IPG Councils to deliver optimal insurance coverage that meets the specific risk profile of each Council. It describes our approach and showcases our credentials as a trusted and experienced adviser to Councils in NSW, as well as across Australia.

Councils within the IPG are looking for a trustworthy insurance broker to work in partnership with each respective Council to drive its insurance placement, develop a risk management program and manage their claims process. Councils are looking for a partner committed to helping them achieve their goals. JLT aims to do this through a transparent approach to obtaining coverage.

Through working with JLT, IPG Councils have access to our best insurance offering to Local Government. We provide insurance through mutual schemes and the open market to approximately 450 Councils across Australia and to 123 Councils in NSW. Our response outlines our understanding of Local Government and the importance of us working together to deliver the best outcomes for IPG Council and their communities.”

537 JLT’s tender response then referred back to its past role for the IPG tender councils while they had been Members of the Scheme: <sup>[483]</sup>

“JLT is proud to have been the trusted insurance adviser to all Members of the IPG for over 20 years. Over this time period JLT has provided not only the highest levels of service to IPG Councils, but also returned over \$4.408 million in combined rebates to these Councils and they have a combined Equity of \$2.766 million across the Property and Liability Mutuals.

Additionally, the Statewide Mutual Board has made discretionary claim payments totalling \$800,000 to two participating Members. These payments would normally fall outside of the scope of traditional wording/covers.”

538 Under the heading “*Client First*”, JLT’s tender response stated: <sup>[484]</sup>

“JLT operates strictly on a Client First basis. For Councils within the IPG, this means we put your interests at the centre of everything we do to provide a service that meets your current and future needs. This Client First focus is in line with our legal duty as a fiduciary to our clients and is taken very seriously at all levels of our organisation.

In line with Local Government best value principals, we have also developed our own internal principals and policies ensuring we achieve our goals.

We are confident we have the knowledge and experience to partner effectively with IPG Councils to deliver the best outcomes for Councils and their community.”

539 Read in context, that statement describes the duty that JLT considered it would owe to the IPG councils if JLT were the successful tenderer.

540 RVC’s submissions quoted selected extracts taken out of context from the passages that I have set out in full at <sup>[535]</sup>-<sup>[538]</sup> above. Based on those highly selective quotes, RVC submitted that JLT’s tender response was replete with references to JLT as council’s “*insurance broker*” and had stated that JLT was a fiduciary to councils, including RVC. It was submitted that JLT’s tender response had not limited those comments to non-Statewide lines of cover. I reject those submissions, which overlook the distinctions between the descriptions of JLT’s potential role if it were awarded the IPG tender to act as the broker to one or more of the IPG councils who were exiting the Scheme and JLT’s role in respect of the Scheme. As I have said above, those distinctions are obvious when the relevant passages are read as a whole.

541 On 21 February 2017, RVC awarded the tender to Aon and resolved to enter into a three year contract with Aon for insurance brokerage services and insurance coverage. <sup>[485]</sup>

542 The cost of the insurance cover that Aon subsequently placed for RVC under that contract for the 2017-2018, 2018-2019 and 2019-2020 years was significantly higher than Aon’s 2016-2017 indicative pricing submitted in its IPG tender response. In particular, the property insurance that Aon brokered for RVC in 2017-2018 had a base premium that was twice the base premium in Aon’s 2016-2017 indicative pricing and a total cost (including fire and emergency services levies and GST) of \$143,990. <sup>[486]</sup> The total cost increased by 14.5% to \$164,882 in 2018-2019 and by a further 7% to

\$176,828 in 2019-2020.<sup>[487]</sup>The limit of liability under the property insurance procured by Aon was \$100 million, compared to the \$1.2 billion limit under RVC's previous Statewide property cover.<sup>[488]</sup>

543 The liability cover that Aon procured for RVC initially had a limit of \$250 million, which was reduced to \$150 million during the course of Aon's retainer. By contrast, the limits under RVC's Statewide cover were \$400 million for public liability, \$400 million for products liability and \$300 million for professional indemnity. RVC reduced the limits on the recommendation of Aon, based on Aon's analysis of two loss scenarios. Each of the two scenarios involved two elements: the failure of a reservoir and a major bushfire.<sup>[489]</sup>

544 Mr Macdonald gave evidence that RVC had not experienced claims that eroded or even came close to eroding the limits of liability under its liability insurance or property insurance in the period from February 2015 (when Mr Macdonald was first employed by RVC) until his affidavit in December 2019.<sup>[490]</sup>However, RVC did not adduce any expert evidence in these proceedings concerning the suitability or otherwise of the reduced limits of RVC's liability insurance and property insurance procured by Aon for RVC's potential exposures to loss.

545 RVC submitted that the aggregate 40% difference between the Contributions paid by RVC to the Property Fund and Liability Fund in the 2016-2017 year and JLT's indicative pricing in its IPG tender response is "*strong evidence that RVC had overpaid for its insurance that year, and that JLT had failed to obtain the lowest price it reasonably could have from Statewide*".<sup>[491]</sup>I reject that submission, which wholly fails to grapple with the expert evidence and other matters referred to at [529]-[533] above. In light of those matters and the expert evidence, I accept JLT's submission that the IPG tender was conducted in such a manner that it provides no meaningful guidance as to whether or on what terms commercial market insurance was available to RVC in 2016-2017, let alone in any other year.<sup>[492]</sup>

546 Mr Demer of JLT wrote to Mr Macdonald on 19 June 2017 in the following terms:<sup>[493]</sup>

"We understand that Richmond Valley Council has chosen to retire from Statewide Mutual and has selected Aon as their insurance broker, with effect from 30 June 2017.

Equally, we understand that this decision was made on the basis of indicative pricing from Aon and so the premiums quoted as part of the IPG tender may vary from the firm insurer pricing now being quoted by Aon. With the recently proposed changes to the Emergency Services Levy (ESL) the premiums for those policies that attract ESL may have increased by as much as 40%.

In terms of Council's Property Insurance we expect this will add around \$30,000 to the premium indicated by Aon. Fortunately, as Statewide is a Discretionary Mutual and therefore not liable for the Levy to the same extent, our premium, in comparison to Aon's, will only increase by 10% or around \$7,000. This is a substantial difference of around \$23,000.

As Richmond Valley Council's current insurance broker it is incumbent upon JLT to provide renewal terms for the 2017 – 2018 period and so we have provided a summary of the renewal terms in this correspondence.

It is worth noting that the premium rates have not varied from those quoted in our response to the IPG tender. These premiums are firm and, in the case of the Public Liability-Professional Indemnity Insurance, are fixed for a period of three (3) years. On this class of insurance we can advise that Statewide's reinsurers have confirmed that they will be rebating a share of profit of around \$5.6m which will enable Statewide to



consider returning a further 12.5% of premium to members on renewal. In the case of Richmond Valley Council this could amount to a further premium reduction of \$22,500 off the \$180,000 for the 2017/18 Year as mentioned on page 2.

JLT's renewal premiums for the period 30 June 2017 to 30 June 2018 are confirmed below:

<b>Class of insurance</b>	<b>Annual Premium</b>	<b>Policy Terms</b>	<b>Recommended Provider</b>
Public Liability- Professional Indemnity	\$180,000	As per expiring	Statewide Liability Scheme
Property	\$87,742	As per expiring but excluding Flood. Additional premium for Flood can be supplied.	Statewide Property Mutual

547 Mr Demer wrote to Mr Macdonald again on 26 February 2018, referring to matters that had impacted the insurance market since June 2017, including one insurer announcing its withdrawal from the local government sector. The letter continued:<sup>[494]</sup>

“All in all it paints a very difficult period for insurance buyers on the way, with Councils being hit even harder than other buyers. It is very reminiscent of the prevailing conditions which led to the Statewide Mutual being established and how it became the only "insurer" prepared to offer cover for Local Government authorities.

Whilst I well understand the reasons why you chose to make other arrangements for the placement of your insurances, and I acknowledge that we at JLT may have let you down, I would welcome the opportunity to explore the possibility of holding discussions with you over the future of council's insurance placement.

I can give a commitment that the premiums that Statewide offered for Liability cover for 2017/18 will be available, unchanged, for 2018/19 and for the following year. The Property premium rates that were offered last year will also remain unchanged but will require a reinstatement Levy at no more than 5%, as opposed to the 35-40% that will be required by your current and other traditional insurers.”

548 RVC relied on this as letter as admission by Mr Demer that he “*well understood*” that JLT had “*caused RVC to overpay for its Property and Liability Insurance for years*”.<sup>[495]</sup> I do not accept that any such admission can be extracted from the letter. The letter states that Mr Demer understood the reasons why RVC chose to make “*other arrangements*”, re-entering the market as an individual insured. Any Statewide Member had the opportunity to make that choice at any time by giving notice under clause 10.3 of the Deed. RVC had taken that course almost two years prior to Mr Demer’s letter. The letter does not state that Mr Demer understood that JLT had let RVC down in any way. The acknowledgement that JLT “*may have let you down*” in the past implies that JLT may do things differently in the future and is the very sort of thing that JLT would be expected to say in an effort to pave the way to discussions with RVC about the future. That was the apparent purpose of this letter.

549 In 2019, RVC conducted a tender for insurance and insurance broking services for the period from 30 June 2020. From 1 July 2020, RVC ceased to use Aon as its broker and became a member of CivicRisk.<sup>[496]</sup>

## VI The alleged Broking Services and Recommendations

550 It is worth repeating at this point that each of RVC's three causes of action requires RVC to establish that JLT provided the alleged Broking Services in respect of property and liability insurance to RVC individually and made the alleged Recommendations in the course of providing those Broking Services to RVC. RVC relies on JLT's practices during the annual renewal processes as constituting the provision of the alleged Broking Services in respect of property and liability insurance. RVC relies on the Insurance Declarations, Renewal Reports, Financial Services Guides, Summary of Insurances documents and the invoices for Statewide Liability and Property Scheme Contributions as evidencing and describing those alleged Broking Services. RVC describes the alleged Recommendations as recommendations made by JLT to RVC in the course of providing the alleged Broking Services that RVC should "*obtain or renew*" its property and/or liability insurance "*through Statewide Mutual*". The alleged general law and contractual duties are duties to "*exercise reasonable care and skill in providing the Broking Services and making the Recommendations*". The fiduciary duties are alleged to have been owed by JLT "*as an insurance broker providing the Broking Services and making the Recommendations*".<sup>[497]</sup>

551 As I have said earlier in these reasons,<sup>[498]</sup> the alleged conduct of JLT that is sought to be impugned by RVC's pleaded causes of action is:

- (1) JLT's alleged failure in the course of providing the alleged Broking Services during each annual renewal process to make efforts or reasonable efforts to request, solicit, negotiate or obtain quotations, offers or terms for "*suitable*" property and/or liability insurance at the best premium rates that were allegedly reasonably available to RVC and each group member in the insurance market at that time (the **relevant market**) and its alleged failure to recommend or identify any provider of property and liability cover other than Statewide;<sup>[499]</sup>
- (2) the Recommendations allegedly made by JLT in the course of providing the alleged Broking Services during each annual renewal process by providing the Insurance Declarations and Renewal Reports to RVC and each group member (omitting to offer, recommend or identify any non-Statewide property and/or liability insurance policy, arrangement or underwriter) and the renewal of RVC's and each group member's Statewide property and liability cover at the conclusion of that annual renewal process, notwithstanding the conditions that RVC claims existed in the relevant market and in circumstances where JLT allegedly lacked reasonable grounds to believe that the Statewide Liability Fund and Property Fund Contributions payable for the immediately forthcoming year were competitive with premium rates allegedly available to RVC and each group

member in the relevant market or, alternatively, contribution rates that were allegedly reasonably available to RVC and each group member in the Statewide Liability and Property Funds at that time;.<sup>[500]</sup>

- (3) JLT's conduct in allegedly making the Recommendations and in renewing Statewide property and liability cover for RVC and each group member at the conclusion of each annual renewal process, notwithstanding the alleged conflict between its financial interests in earning fees and commissions for services provided in respect of Statewide and the interests of RVC and each group member in obtaining "*suitable*" liability insurance and property insurance at the best premium rates reasonably available to them in the relevant market; <sup>[501]</sup> and
- (4) JLT's alleged failure in the course of providing the alleged Broking Services during each annual renewal process to request, negotiate or obtain lower Statewide Contributions on behalf of RVC and each group member.<sup>[502]</sup>

552 As JLT submitted, it was plain from the terms of the Insurance Declarations that JLT was gathering information in respect of RVC's liability and property risks for the purpose of negotiating and placing the Primary Insurance that would provide liability cover for RVC and all other Members of the Statewide Liability Scheme collectively and property cover for RVC and all other Members of the Property Scheme collectively.

553 The terms of the Insurance Declarations that I refer to include:

- (1) the description of RVC as the "*Member*" in the property insurance and liability insurance sections of the Insurance Declarations, in contrast with the sections relating to non-Statewide lines of cover where RVC was described as "*the Insured*" or "*the Policy Holder*";.<sup>[503]</sup>
- (2) the description of the "*Interest Protected*" in the property insurance section of the Insurance Declarations as property belonging to "*the Members*" or for which "*the Members*" are responsible.<sup>[504]</sup> As JLT submitted, these terms are consistent only with JLT placing property insurance on behalf of RVC and other

- Members of the Property Fund. There was no indication in the Insurance Declarations that JLT would be seeking property insurance quotations or offers for RVC individually, independently of Statewide;
- (3) the definition of the limit of liability in the property insurance section of the Insurance Declarations as an amount “*in the Aggregate over all Member Councils*”.<sup>[505]</sup>As JLT submitted, these terms are only consistent with coverage through Statewide;
  - (4) references to the “*Mutual Fund Self Retention*” in the property insurance section of the Insurance Declarations which, as JLT submitted, is a concept only applicable in the context of a mutual fund;<sup>[506]</sup>
  - (5) the description of the “*Scope of Cover*” in the liability insurance section of the Insurance Declarations in terms of what “*Statewide will pay to or on behalf of The Member*”;<sup>[507]</sup>
  - (6) references to “*Statewide*”, “*the Scheme*” and “*the Mutual*” in the descriptions of the “*Protection Wording*” in the property insurance and liability insurance sections of the Insurance Declarations;<sup>[508]</sup>
  - (7) the detailed instructions for completion of the questionnaire in the property insurance section of the Insurance Declarations, which required information about property values to be provided in a specified format that would facilitate JLT combining all Members’ assets into a master schedule to assist in the underwriting analysis and in preparing presentations to existing and prospective insurers “*when negotiating the Property Mutual placement*”.<sup>[509]</sup>As I have already observed, the Insurance Declarations contained no indication that JLT would be negotiating or seeking quotations for property insurance for RVC individually;
  - (8) the terms of the “*Statewide Declaration*” required in relation to liability insurance, including the agreement by RVC that the information in the declaration “*may be used by Statewide when negotiating with primary and excess insurance underwriters*”. There was no indication in the Insurance Declarations that JLT would use the information provided by RVC to procure liability insurance quotations or offers for RVC individually, independently of Statewide;<sup>[510]</sup>and
  - (9) the information set out in the Insurance Declaration for the 2014-2015 year about the claims to which the Statewide liability cover, being written on a claims made basis, would not respond.<sup>[511]</sup>

554 As JLT submitted, when the terms of the Insurance Declarations are read as a whole, it is clear that only Statewide cover was in contemplation for RVC’s property insurance and liability insurance.

555 That is confirmed by the context in which the Insurance Declarations were issued. At the time the Insurance Declarations were issued, contemplation of alternatives to Statewide for the forthcoming insurance year would have been inconsistent with RVC’s existing membership of the Statewide Property Fund and Liability Fund and its

obligation under the Deed to pay Contributions to those Funds for that forthcoming year in circumstances where it had not given notice of retirement under clause 10.3 that would expire before the commencement of that year. If RVC had failed to pay those Contributions, JLT would have been obliged to take such action as required by the Board to recover the Contributions from RVC.<sup>[512]</sup> Any property or liability cover independently of Statewide would therefore have been surplus to RVC's requirements for the forthcoming year by the time JLT issued, or within days after it issued, the Insurance Declarations during each annual renewal process.<sup>[513]</sup> No reasonable person reading the Insurance Declarations with knowledge of those circumstances would have understood them to be collecting information for the purpose of JLT exploring the insurance market for potential property insurance and liability insurance for RVC independently of Statewide.

556 JLT issued the Renewal Reports in June each year in the context of the same circumstances referred to immediately above. Understood in that context, the inclusion of "*Statewide Property Mutual*" (for the years from 2009-2010 to 2016-2017) and "*Statewide Liability Scheme*" (for the years 2014-2015 to 2016-2017) as the "*Recommended Insurer*" or "*Recommended Provider*" in the "*Summary of Costs*" tables in Renewal Reports<sup>[514]</sup> cannot reasonably be understood as a recommendation by JLT that RVC's property insurance and liability insurance should be arranged "*through Statewide Mutual*". That was a choice that RVC had made when it became a party to the Deed and a choice that it continued to make unless and until it gave the requisite period of notice of retirement from the Property Fund and the Liability Fund. As Mr Eurell explained, that was a choice by RVC to opt out of the property and liability insurance markets as an individual insured and to offer its risks to those markets only as part of a pool of risks.<sup>[515]</sup>

557 Consistently with that reality, in the years up to and including 2014-2015, RVC had been informed about the Statewide renewal terms for the Property and Liability Funds for the forthcoming year.<sup>[516]</sup> and had received an invoice for its Liability Fund Contribution<sup>[517]</sup> before JLT issued the Renewal Report. Liability insurance was not addressed in the Renewal Report at all. The Contribution payable by each Member to the Property Fund was calculated on the basis of the updated information provided by each Member through the Insurance Declaration process about their declared asset values and other relevant matters. The amount of RVC's Property Fund Contribution was set out in the Renewal Report and in the Statewide invoice issued shortly thereafter.<sup>[518]</sup>

558 The Renewal Report for the 2014-2015 year expressly stated that JLT "*manages the Scheme on behalf of Statewide and place [sic] other insurance required outside of these Schemes for Member Councils*". As JLT submitted, this provided further confirmation of that which was already clear from the Insurance Declarations and

Renewal Reports read as a whole and in the context of the circumstances in which they were issued. JLT's role in placing insurance on behalf of individual councils was limited to "*other insurance*" that was outside the scope of Statewide.<sup>[519]</sup>

559 It appears that Statewide Renewal Letters were not issued in the 2015-2016 and 2016-2017 years. This change was presumably connected to the amendment to the retirement notice period under clause 10.3 of the Deed from three months to twelve months with effect from 1 July 2013.<sup>[520]</sup> As I have said above, it was clear from the Insurance Declarations issued in those years (and earlier years) that JLT was gathering information concerning RVC's property and liability risks for the purpose of negotiating and placing insurance for those risks on behalf of all Members of the Property Fund and Liability Fund collectively in accordance with the Deed. In the 2015-2016 and 2016-2017 years, the renewal terms for the Statewide Property Fund and Liability Fund were notified to RVC in the Renewal Report.<sup>[521]</sup> The Statewide invoices for RVC's Contributions to each Fund were issued a short time after RVC had authorised the placement of its insurances in accordance with the Renewal Report.<sup>[522]</sup>

560 As JLT submitted, RVC's annual authorisation of the renewal of its insurances in accordance with the Renewal Report did not operate as an authorisation for the continuation of its membership of the Statewide Property and Liability Funds. RVC's membership of the Property and Liability Funds continued on the terms of the Deed unless and until it gave notice of retirement under clause 10.3 of the Deed and that notice took effect. The Renewal Reports did not even address liability cover until the 2015-2016 year, as noted above. The authorisation did operate to confirm JLT's instructions to apply the sub-limits of liability and deductibles set out in the Renewal Report to RVC's property cover within the rubric of the Statewide Property Scheme.<sup>[523]</sup>

561 I note that all of the above objective matters are consistent with the evidence of RVC's three General Managers during the Relevant Period. Mr Wilkinson, Mr Walker and Mr Macdonald each gave evidence that he knew, at the time of reviewing each Renewal Report, that RVC was bound by the Deed to adhere to that choice by continuing its Statewide property and liability cover for the immediately forthcoming year. Mr Wilkinson and Mr Macdonald said that there was no point in JLT looking for alternative property and liability insurance for RVC for the immediately forthcoming year. Mr Walker said that he did not consider that JLT could be relied on to give independent consideration to any such alternatives in any event.<sup>[524]</sup> Contrary to RVC's submissions, the evidence of witnesses who held positions with other local councils about their subjective understanding of the nature of the services that JLT provided to those councils is not relevant to the question whether JLT provided the alleged Broking Services and made the alleged Recommendations to RVC during each annual renewal process.

562 RVC submitted that JLT prepared a "singular annual insurance programme for RVC and each group member each year that included both Statewide and non-Statewide lines of cover" and that the proposition that this "apparently unitary conduct is

appropriately analysed differently for different lines of insurance” was “unreal”. RVC further submitted that “[t]he unreality of that contention is underscored by the circumstance that JLT conveyed the insurance programme to each council by adopting a singular practice that used the same common form documents for both Statewide and non-Statewide lines of cover, adopted similar language and formatting for all lines of cover, and, in the case of the renewal reports, included what were expressed to be ‘Recommendations’ for all lines of cover.”<sup>[525]</sup> I reject those submissions. RVC’s continued membership of the Statewide Property and Liability Schemes had already been determined before JLT issued renewal documentation in any year during the Relevant Period. JLT’s renewal documentation incorporated information relating to RVC’s Statewide and non-Statewide lines of cover. Contrary to RVC’s submission, the language of the sections of the renewal documentation relating to Statewide lines of cover was very different from the language in sections relating to non-Statewide lines of cover, as explained above. RVC knew that it was a member of Statewide and knew the terms of the Deed. In that context, nothing in the renewal documentation evidences the provision of the alleged Broking Services to RVC in respect of property and liability insurance. For the reasons already explained at <sup>[556]</sup> above, RVC’s submissions relying on the words “Recommended Insurer” or “Recommended Provider” in the “Summary of Costs” tables in the Renewal Reports erroneously press for those two words in isolation to be read as overriding the contents of the Renewal Reports read as a whole and having regard to the context in which they were issued. Contrary to RVC’s submissions, it is not to the point that Mr Saunders expressed the opinion that the format of the Renewal Reports was typical of documents supplied by brokers to their client as part of the process of placing insurance on the client’s behalf.<sup>[526]</sup> Substance and context trump form.

563 RVC’s submissions relied on many short extracts from the Insurance Declarations and Renewal Reports, isolated from their context within the relevant document as a whole and read without regard to the reality of the circumstances in which the document was issued. In some instances, the extract relied on was carved out of one paragraph or section of a document, excluding words within the same paragraph or section that did not support RVC’s submission. I repeat my observations at <sup>[218]</sup>-<sup>[219]</sup> above concerning RVC’s reliance on the words “*broker*”, “*insurance broker*” and “*client*”.

564 I have considered all of the extracts from the Insurance Declarations and Renewal Reports on which RVC relied as evidencing the provision of the alleged Broking Services by JLT to RVC and as evidencing the alleged Recommendations. Understood in the context of the Insurance Declarations and Renewal Reports as a whole and against the reality that RVC was a party to the Deed and was bound thereby to

continue its membership of the Statewide Property Scheme and Liability Scheme at the time each Insurance Declaration and Renewal Report was issued,<sup>[527]</sup> none of those extracts support RVC's contentions. It suffices to refer to the examples below.

565 RVC relied on statements in the Insurance Declarations to the effect that JLT would provide the information sought from RVC to insurers "*when negotiating terms for your renewal programme*"<sup>[528]</sup> and that the information was being collected "*principally for the purpose of approaching the (re)insurance market, placing insurance, assessing and advising you on your insurance needs, claims handling or risk management (depending on your requirements)*" (emphasis added).<sup>[529]</sup> Those statements are general statements covering all lines of cover referred to in the Insurance Declarations, but expressly limited by the nature and extent of RVC's requirements. In their application to the Statewide liability and property cover described in the Insurance Declarations as part of RVC's renewal programme, those general statements evidence JLT's intention to use the information provided for the purpose of negotiating and placing the Primary Insurance for the Members of the Statewide Liability Scheme and Property Scheme on the instructions of the Board. I reject RVC's submission that this requires a "*tortured*" reading of the "*plain words*" of the Insurance Declarations. As JLT submitted, it involves reading the words in the context of the terms of the Insurance Declarations read as a whole and having regard to the other contextual matters referred to above. For the reasons explained above, RVC had no requirement for JLT to advise it about whether to continue its Statewide property and liability lines of cover at the time the Insurance Declarations were issued.

566 RVC also relied on statements in the Insurance Declarations instructing RVC to "*tell your advisor*" or "*tell your JLT advisor*" about any changes to the entities to be insured or the insured's business activities.<sup>[530]</sup> Again, these are general statements that do not override or diminish the documentary and other evidence referred to above that only the Statewide Liability and Property Schemes were in contemplation for RVC's liability and property cover and that JLT was not advising RVC about whether it should continue its membership of those Schemes. JLT was an advisor to RVC in relation to the placement of its non-Statewide lines of cover that were included in the Insurance Declarations. JLT also provided advice to RVC about choices to be made within its Statewide lines of cover about sub-limits of liability, deductibles and similar matters.<sup>[531]</sup> As JLT submitted, the provision of such advice to Statewide Members wishing to tailor their cover within the rubric of the Property Scheme and the Liability Scheme is consistent with JLT's role under clause 2.4.3 of the Deed to "*participate in the Scheme and provide advice and assistance in relation to all aspects of the Scheme*".<sup>[532]</sup> I reject RVC's submission that the general statements referring to JLT as "*your advisor*" demonstrate that JLT was advising RVC whether or not to cover its liability and property



risks by continuing its membership of the Statewide Liability and Property Schemes. That submission is irreconcilable with the contents of the Insurance Declarations as a whole and the circumstances in which they were issued, as referred to above.

567 RVC also relied on the following statement in the Renewal Reports for the 2015-2016 year: <sup>[533]</sup>

“Richmond Valley Council (Council) has been receiving proactive insurance brokerage services from Jardine Lloyd Thompson Pty Ltd (JLT) for close to 20 years. We reiterate our commitment to delivering Council a first class insurance broking and risk management solution to you and look at this year’s renewals as the next stage in our already successful partnership.”

568 RVC omitted to refer to the very next sentence, which stated that: <sup>[534]</sup>

“As Richmond Valley Council current insurance broking partner, JLT understands your expectations and ongoing program and service needs.”

569 As explained above, RVC’s membership of Statewide was central to its “*ongoing program*”. That is expressly referred to in the following statements in the same section of the 2015-2016 Renewal Report (which RVC’s submissions failed to acknowledge): <sup>[535]</sup>

“Our focus is to ensure we continuously deliver innovative solutions that provide our clients with a competitive edge. While your program contains covers placed in the traditional insurance market, at the core of our general insurance offering is participation in the Statewide Mutual.

Council has been a member of the Statewide Mutual since its inception in 1998, 5 years after we delivered the scheme to our Local Government clients in response to the abandonment of the industry by the majority of local underwriters.”

570 A similar statement about JLT providing “*proactive insurance brokerage services*” to RVC in the 2016-2017 Renewal Report (on which RVC also relied) is also qualified by statements about Statewide being at the “*core*” of JLT’s offering and RVC’s ongoing membership of Statewide (which RVC’s submissions again failed to acknowledge). <sup>[536]</sup>

571 RVC also relied on the following statements within the Executive Summary of the 2014-2015 Renewal Report: <sup>[537]</sup>

- (1) “*Our unrivalled expertise with Local Government Authorities ensures Council will continue to receive the optimum risk and insurance advice to ensure your risk portfolio adapts quickly to your changing business needs*”;
- (2) “*In this report we will: comment on market conditions and outline our marketing activity; suggest optional approaches and provide cost comparisons where applicable; detail the various insurance policies where we have obtained quotations on your behalf; detail the various insurance policies where we have obtained quotations on your behalf; provide renewal terms based on the*

*updated information you have provided JLT; provide you with information about the JLT Group; profile other products and services which may be of interest to you”;*

- (3) ***“JLT operates strictly on a Client First basis. We do not seek to be the world’s biggest insurance broker. Instead, we aim to be the best in our chosen areas of specialisms such as the government sector for which we provide individual, tailored solutions rather than an off-the-shelf service offering”;*** and
- (4) ***“Contained within our offering are a variety of alternatives in respect of deductibles, optional covers and liability limits all of which may be tailored to Council’s needs. Importantly, throughout the period of ongoing change Council will be able to utilise JLT’s expertise with local governments of all types and sizes to find the best solutions for Council’s changing risk profile.”***

572 RVC emphasised the reference to council receiving *“optimum risk and insurance advice”* in the first statement, the reference to JLT suggesting *“optional approaches and providing cost comparisons”* and obtaining quotations *“on your behalf”* in the second statement, the references to *“Client First”* and *“individual, tailored solutions”* in the third statement and the references in the fourth statement to optional covers and liability limits being *“tailored to Council’s needs”* and to JLT applying its expertise to *“find the best solutions for Council’s changing risk profile”*. However, it is clear from reading the Renewal Report as a whole that Statewide was central to JLT’s *“individual tailored solutions”*, and JLT had approached the renewal process for RVC on the basis that RVC was a Member of Statewide, that JLT was managing the Statewide Property and Liability Schemes, that *“tailoring”* in respect of property insurance, liability insurance and other Statewide lines of cover occurred within the broader framework of the Primary Insurance negotiated by JLT *“on behalf of”* RVC and each other Member on the instructions of the Board, and that JLT’s placement of insurances for Member Councils individually was limited to *“other insurance required outside these Schemes”*.<sup>[538]</sup> That JLT had approached the renewal process for RVC on the basis that RVC was a Member of Statewide was also clear from the Insurance Declaration that had preceded the Renewal Report for the 2014-2015 year.<sup>[539]</sup> The second statement relates to all of the Statewide and non-Statewide lines of cover within the Renewal Report. It refers to optional approaches and cost comparisons *“where applicable”*. As shown in the *“Summary of Costs”* table in the Renewal Report, JLT had identified various options in respect of RVC’s motor vehicle insurance.<sup>[540]</sup> The fourth statement is entirely consistent with the manner in which Statewide lines of cover could be *“tailored”* for an individual Member, as referred to at [566] above. Other sections of the 2014-2015 Renewal Report refer to the *“flexibility in the Schemes for Councils to choose from a*

*range of options if and where required*".<sup>[541]</sup>The same observations apply to references in annual renewal documentation to JLT recognising that *"the needs of each of our clients are unique"*.<sup>[542]</sup>

- 573 RVC also relied on a statement within the *"About JLT"* section of the 2014-2015 Renewal Report that *"JLT has developed several exclusive and specialist insurance markets and products, both locally and overseas, to meet our clients' needs."* That statement, read in the context of the Renewal Report as a whole and in the context of RVC's ongoing Statewide membership, does not support RVC's contention that JLT was providing the alleged Broking Services to RVC in respect of property and liability cover. I note that the statement was immediately followed by a reference to the Schemes operated by JLT in each State and the ability of Members of those Schemes to *"choose from a range of options if and where required"*, as referred to immediately above.<sup>[543]</sup>
- 574 RVC also relied on a statement in the 2014-2015 Renewal Report extolling the ability of JLT to *"negotiate a competitive insurance programme in the current market"*. As referred to at [426] above, that statement is made in the *"Market Synopsis"* section of the Renewal Report and is immediately followed by a description of the manner in which JLT has negotiated Statewide covers that are *"as comprehensive as the market allows"*, using *"economies of scale"* in its negotiations with underwriters to obtain the *"best possible rates for reinsurance on Statewide and its Members behalf"*. Contrary to RVC's submissions, the reference in that context to the negotiation of a *"competitive insurance programme"* is entirely consistent with JLT undertaking that negotiation on behalf of all Members of the Statewide Property Fund and Liability Fund collectively and is not indicative of JLT undertaking any negotiation of property or liability insurance for RVC individually and independently of Statewide. The statement does not support RVC's contention that JLT provided the alleged Broking Services to RVC in respect of property and liability insurance.
- 575 RVC submitted that the following statement within the 2013-2014 Renewal Report (and similar statements in Renewal Reports for other years) was *"difficult to reconcile with"* the proposition that JLT was not acting as an insurance broker to RVC individually in respect of each and every line of cover addressed in the Renewal Reports (emphasis in RVC's submissions):<sup>[544]</sup>
- "As an insurance broker**, there are several ways we can be paid. In general, our principal remuneration for arranging insurance **on your behalf** is either by way of commission paid by the Insurer and/or a service fee and an administration fee to be paid by you. ..."
- 576 That general statement appears below the *"Summary of Costs"* table in the Renewal Report, which sets out the cost of six lines of cover, three of which are non-Statewide lines of cover. Read in the context of the Renewal Report as a whole<sup>[545]</sup> and in the context of RVC's ongoing Statewide membership and the provisions of the Deed concerning JLT's fees and remuneration, the statement does not support RVC's contention that JLT was providing Broking Services to RVC in respect of property and

liability cover. The 2013-2014 Renewal Report did not even address liability cover as the Statewide Board had already determined the renewal terms for the Liability Scheme and had invoiced RVC for its contribution to the Liability Fund.<sup>[546]</sup>

577 RVC's submissions omitted to mention that the Renewal Reports contained an "Important Information" section which stated under the heading "Remuneration and Other Income" (emphasis added):<sup>[547]</sup>

"Our principal remuneration for arranging insurance on your behalf is either by way of commission paid by the Insurer and/or a fee including a service fee and an administration fee to be paid by you.

In addition to the above the Jardine Lloyd Thompson Group may receive income from insurers as follows: interest earned on insurance monies passing through our bank accounts; profit commissions or profit shares paid by insurers on specific classes of business; administrative service fees or expense reimbursements for limited specific services we provide to insurers as part of the placing or claims process.

**Where we can as managers of a Mutual Scheme or Discretionary Trust, our fee is negotiated according to the services to be provided for that Scheme."**

578 For all of the reasons explained above, the terms of the Insurance Declarations and Renewal Reports made it clear that JLT was negotiating and placing the property and liability lines of cover on behalf of Statewide Members collectively and not on behalf of RVC individually. In those circumstances, the emphasised words within the "Important Information" statement referred to immediately above were plainly applicable to the property and liability lines of cover referred to in the Renewal Reports.

579 RVC also relied on the "Insurance Handbook" issued by JLT to RVC together with the Insurance Declaration for the 2012-2013 year.<sup>[548]</sup> The generic information contained in the Handbook does not support RVC's contentions that JLT provided the alleged Broking Services and made the alleged Recommendations.<sup>[549]</sup>

580 RVC relied on various statements within the Renewal Reports extolling the benefits of Statewide as supporting its contentions that those reports did convey the alleged Recommendations and that JLT knew and intended that RVC would rely on those alleged Recommendations by authorising JLT to place or arrange its property and liability insurance through Statewide.<sup>[550]</sup> That submission suffers from the same fundamental problem as RVC's other contentions referred to above, in that it simply cannot be reconciled with the objective circumstances that existed when the Renewal Reports were issued. RVC was obliged to continue its membership of the Statewide Property and Liability Funds for the immediately forthcoming year. In any event, as JLT submitted, the statements the RVC has picked out are general promotional statements and do not purport to be advice directed specifically to RVC. Contrary to RVC's submissions, the promotion of the Statewide Schemes was within the broad remit of JLT under clause 2.4.3 of the Deed.<sup>[551]</sup> Contemporaneous documents record the Board tasking JLT with certain promotional activities.<sup>[552]</sup> Even if promotional activities had been beyond the scope of JLT's role under the Deed as RVC contends, the general promotional statements identified by RVC would not have warranted the

characterisation of the Renewal Reports and other annual renewal documents as constituting the provision of the alleged Broking Services and containing the alleged Recommendations.

581 RVC also relied on the Financial Services Guides issued by JLT in 2014 and 2015 as demonstrating that JLT was acting as an individual broker to RVC, including in respect of RVC's property insurance and liability insurance. The terms of the Financial Services Guides are referred to at [436]-[441], [483] and [509] above. As JLT submitted, the Financial Services Guides are general documents that describe a wide range of services offered by JLT, many of which were not being provided to RVC. The Financial Services Guides need to be read in the context of the services that JLT was actually providing to RVC in respect of its many different lines of insurance cover. As was clear from the Insurance Declarations and Renewal Reports that JLT issued to RVC at the same time as enclosing a copy of its Financial Services Guides,<sup>[553]</sup> its services in respect of RVC's property and liability cover were the negotiation and placement of Primary Insurance on behalf of the Members of the Statewide Property Scheme and Liability Scheme collectively and ancillary advice relating to RVC's selection of deductibles and sub-limits within the rubric of those Schemes. None of the general statements in the Financial Services Guides support RVC's contentions that JLT provided the alleged Broking Services in respect of property and liability insurance and made the alleged Recommendations.

582 For example, the Financial Services Guide stated: "*We are committed to providing you with the highest quality of service and the combination of insurance and related products most suited to your needs.*"<sup>[554]</sup> During the annual renewal processes for the 2009-2010 to 2016-2017 years, RVC's needs in respect of property insurance and liability insurance were informed by its membership of the Statewide Property Scheme and Liability Scheme which meant that insurance for those risks for the forthcoming year would be placed for RVC and other Members of those Funds collectively and RVC had no requirement for individual broking services for those insurances. Statements in the Financial Services Guide about "[t]ailoring insurance products to your needs" and determining "the most competitive insurance coverage for you" and the statement that "[y]our JLT Client Risk Adviser will provide you with expert advice to help you to make an informed decision" must be read in that context.<sup>[555]</sup> Consistently with the provisions of the Deed and with the conduct of the annual renewal process summarised above and set out in greater detail in Section V of these reasons, the advice that JLT provided to RVC in respect of its property and liability insurances concerned deductibles and sub-limits to be applied to its cover within the Statewide Property and Liability Schemes. JLT's advice concerning the Primary Insurance to be placed for Members of those Schemes collectively was advice given to the Board.

583 I reject RVC's submission that all of the statements in the Financial Services Guides must be read as applying directly to RVC's Statewide lines of cover in the absence of an express qualification or limitation to the contrary effect. No such express qualification or limitation was necessary having regard to the general purpose nature of

the Financial Services Guides as referred to at [581] above. There is nothing in the Financial Services Guide that supports all of the statements relating to JLT's "insurance broking" services (being one of many categories of services addressed in the document) being read as applicable to JLT's services in "Arranging of Mutual Risk Products" (another category of services referred to in the document), particularly in the context of the provisions of the Deed governing Statewide.

584 In support of its submission referred to immediately above (which I have rejected), RVC submitted that JLT represented in the March 2014 Financial Services Guide that it would "specifically advise" clients "if it did not act for them". That submission misstates the substance of the relevant section of the Financial Services Guide. That part of the document refers to JLT being authorised in some instances by an insurer to arrange an insurance policy binding on the insurer "which means we can enter into the contract on the insurer's behalf. **When we do this, we will specifically advise you**" (emphasis added).<sup>[556]</sup> There is no suggestion that JLT entered into any of the Primary Insurances on behalf of the insurer.

585 Neither the Summary of Insurances documents nor the Statewide Contribution invoices that JLT forwarded to RVC support RVC's contentions that JLT provided the alleged Broking Services in respect of property and liability insurance and made the alleged Recommendations. As discussed in Section V above, the Summary of Insurances documents clearly differentiated between RVC's Statewide and non-Statewide lines of cover. In the context of the Insurance Declarations, the Renewal Reports and the circumstances referred to above, the introductory statements in each Summary of Insurances document that it provided "an outline of the insurance policies we have arranged on your behalf" cannot reasonably be understood as meaning that JLT had arranged the liability and property cover summarised in the document on behalf of RVC and after exploring non-Statewide alternatives for those lines of cover. Those introductory statements, in their application to property and liability insurance, can only reasonably be understood as referring to JLT's placement of the Primary Insurances for the Statewide Liability Scheme and Property Scheme risk pools, including RVC's risks, on behalf of RVC and each other Member of those Schemes on the instructions of the Board.

586 RVC relied on the statement in the 2014-2015 Summary of Insurances that is set out in full at [447] above. RVC submitted that the statement described the services that JLT provided to all of its clients as their broker and trusted advisor. I reject that submission. In my opinion, the plain meaning of the language is a description of the full range of JLT's clients ("operational boards ... for several state-based local government schemes as well as a robust portfolio of corporate clients") and the range of services that JLT was capable of providing to those clients according to their requirements and instructions. JLT was informing RVC, as the reader of the document, of the range of its capabilities. I do not consider that the statement can reasonably be read in any other way. If JLT's object had been to list all of the services that it was providing to RVC (as RVC's submissions suggested), then it would have had no need to refer to services

provided to other clients. For the reasons already explained above, the statement does not describe services that JLT had in fact provided to RVC in respect of its property and liability lines of cover.

587 RVC also relied on the preamble to the Statewide Code of Ethics as “*powerful evidence that supports RVC’s case that JLT’s role in this case is not limited to its role as scheme manager under the Deed*”.<sup>[557]</sup> The preamble to the Code is set out at [69] above. RVC submitted that the references in that preamble to potential conflicts that may arise if JLT was representing two councils “that may be in conflict with each other” or if JLT was “representing a council when the Board has denied indemnity” were references to JLT acting for a council or councils individually in respect of their Statewide lines of cover. However, the fact that the Board recognised the potential for JLT act for an individual council in some unspecified capacity at the same time as performing its functions under the Deed, and had recognised that potential situation as giving rise to a conflict that would need to be managed, has no bearing on whether JLT’s conduct during the annual renewal processes constituted the provision of the alleged Broking Services to RVC in respect of its property and liability cover and involved the making of the alleged Recommendations to RVC.<sup>[558]</sup>

588 I reject the submission that RVC understood that JLT was acting “*as its broker*” in respect of property and liability insurance. For the reasons explained at [219] above, the use of the word “*broker*” in the internal RVC documents on which RVC relied.<sup>[559]</sup> does not support RVC’s contention that RVC provided the alleged Broking Services in respect of property and liability insurance and made the alleged Recommendations. I have rejected the evidence of Mr Wilkinson, Mr Walker and Mr Macdonald on which RVC relied in support of the submission. Indeed, their evidence given in cross-examination demonstrates that they did not understand JLT to be making the alleged Recommendations during the annual renewal processes.<sup>[560]</sup>

589 Finally, RVC relied on Mr Demer’s letter dated 19 June 2017, which stated that it was “*incumbent*” on JLT as RVC’s “*current insurance broker*” to provide renewal terms for the 2017-2018 period.<sup>[561]</sup> RVC relied on Mr Demer’s failure to qualify his description of JLT as the “*current insurance broker*” as applicable to non-Statewide lines of cover only.<sup>[562]</sup> As JLT submitted, that letter was sent after RVC had given notice of its retirement from the Statewide Property and Liability Schemes but that notice had not yet taken effect, and at a time when JLT remained RVC’s broker in respect of its non-Statewide lines of cover pending the commencement of Aon’s contract.<sup>[563]</sup> The letter, read in the context of all of the other evidence discussed above, does not establish that JLT had provided the alleged Broking Services to RVC in respect of its property and liability insurances during previous annual renewal processes.

590 For all of the reasons above, I find that JLT did not provide the alleged Broking Services to RVC in respect of property insurance and liability insurance during the Relevant Period and did not make the alleged Recommendations to RVC during the Relevant Period. My finding is based on JLT’s conduct vis-a-vis RVC, as evidenced by the

annual renewal documentation, Financial Services Guides and other documents referred to above, viewed in the context of the reality of RVC's ongoing membership of the Statewide Property Scheme and Liability Scheme at all relevant times and the provisions of the Deed that therefore applied to the placement of Primary Insurance in respect of RVC's property and liability risks.

591 Contrary to RVC's submissions, that finding does not involve accepting that JLT uniformly misunderstood and misrepresented its role. The finding rejects RVC's preferred interpretation of selected extracts of documents divorced from their documentary and broader context.

592 Contrary to RVC's submissions, that finding does not involve accepting that Statewide Members, being local councils with responsibility to manage their limited funds carefully and prudently, received no advice concerning the placement of their property and liability insurance. Each Member made a decision when joining Statewide to offer their property and liability risks to the insurance market as part of a pool rather than as an individual insured. The Deed that each Member became a party to upon joining the Scheme provided for the Board, representing the Members, to receive advice from JLT about the placement of those Primary Insurances for the pooled risks. As I have noted earlier in these reasons, no allegation is made in these proceedings that JLT did not provide that advice to the Board or that it did so in a manner contrary to its contractual or other obligations.<sup>[564]</sup>

593 RVC's submissions sought to characterise "*JLT's case*" as requiring the Court to accept that "*councils intended to abandon their pre-existing relationship with their insurance broker upon entry into the Deed*".<sup>[565]</sup> RVC submitted that the purposes set out in the Recitals to the Deed were directed at creating a mechanism to solve "*the insurance crisis of the time*" and that "[n]one of those purposes reflect an objective intention that JLT would cease being the broker or trusted advisor to councils on Statewide lines of cover".<sup>[566]</sup>

594 There is no evidence of a relevant pre-existing insurance broking relationship between RVC and JLT.<sup>[567]</sup> and those submissions bear no resemblance to RVC's pleaded case that JLT is defending. That pleaded case is that contracts were entered into and duties of care and fiduciary duties arose during each annual renewal process.<sup>[568]</sup> RVC's causes of action do not rely on any alleged continuation of a relationship that may have existed between RVC and JLT prior to RVC acceding to the Deed on 30 June 2000, some thirteen years prior to the commencement of the Relevant Period.

595 RVC's submissions directed much criticism to a wide range of alleged conduct on the part of JLT that fell outside the scope of the alleged Broking Services, the alleged Recommendations and the alleged impugned conduct referred to at [550]-[551] above.



[569]-Those criticisms are not relevant to the questions whether JLT provided the alleged Broking Services in respect of RVC's property and liability insurances and made the alleged Recommendations.

596 That is illustrated by the following example. RVC's most strident criticism was directed to alleged conduct of JLT in late 2012 and early 2013 in relation to members of the South-East Regional Organisation of Councils (**SEREOC**). Taken at their highest, RVC's criticisms may be summarised as follows. United Independent Pools (**UIP**) was discussing with members of SEREOC (**SEREOC**) a proposal for those councils to form their own new mutual risk pool to be operated by UIP. Queanbeyan City Council was a member of SEREOC and also a Statewide Member at the time. Mr Warne, who was a member of the Executive Team of Queanbeyan City Council, was appointed to the working group established by SEREOC to consider the UIP proposal. Mr Warne was also a member of the Statewide Board. Mr Warne provided to JLT information that he received from UIP in relation to the proposed new mutual risk pool, including indicative pricing for the pool. JLT made use of that information in preparing a competing Statewide presentation for the SEREOC working group. In particular, JLT complained to the proposed underwriter for the proposed SEREOC pool that it should not be quoting or writing policies for that new pool given that it was also an underwriter for Statewide. The expert witnesses referred to this conduct as "*reserving*", whereby the terms that an insurer makes available through one broker for an individual or group of insurance risks will not be made available through other brokers. They described this as a common practice in the insurance market in Australia.<sup>[570]</sup>JLT extracted an assurance from the underwriter that it had "*no intention to provide terms to any intermediary for lines of business that we already participate on*". By including that assurance in the Statewide presentation to SEREOC, JLT represented to the members of SEREOC that the proposed new pool had no underwriter without disclosing that JLT had sought that assurance from the underwriter. As I have said, those were RVC's criticisms, taken at their highest.<sup>[571]</sup>I make no findings about the factual allegations underlying those criticisms. Contrary to RVC's submissions, the criticisms are irrelevant to the question whether JLT made the alleged Recommendations in the course of allegedly providing Broking Services in respect of property and liability insurance to RVC. RVC was not even a member of SEREOC.

597 By way of further example, I refer to RVC's criticism of JLT's advice to the Statewide Board to increase the retirement notice period under clause 10.3 of the Deed from 3 to 12 months. RVC submitted that "*[t]he obvious intention of the change was to make it harder for councils to leave and thereby influence councils to stay*".<sup>[572]</sup>The change was a decision of the Board. The Board minutes recording the reasons for that change refer to the difficulty in preparing annual budgets and negotiating Primary Insurance renewal terms in a state of uncertainty about the composition of the Statewide membership for the forthcoming insurance year.<sup>[573]</sup>Those reasons are inherently plausible, even if the problems were not new. It will be recalled that the budgeting process typically occurred in January and February of each year leading into the

renewals process that commenced in late March or early April.<sup>[574]</sup>RVC's submissions cavil with the reasons that Board recorded for its decision to change the notice period and effectively ask the Court to find that the Board minutes recorded false reasons or withheld all of the true reasons. The evidence does not support any such finding. Even assuming that the Board was in fact motivated to increase the prospects of retaining Members from one Fund Year to the next (as RVC submitted), that does not assist RVC's pleaded case against JLT. Nor does it have any rational bearing on whether JLT provided the alleged Broking Services in respect of property and liability insurance and made the alleged Recommendations.

598 RVC also criticised JLT for allegedly representing to councils that "Aon, Marsh and Willis lacked experience, did not understand the needs of councils and that their offerings were unrealistic and unsupported by underwriters".<sup>[575]</sup>The quotation is from RVC's submissions, which did not identify any particular document containing these alleged representations in relation to Willis or Marsh. No such criticisms were contained in the annual renewal documentation on which RVC relies as evidencing the alleged Broking Services. It will be recalled that Willis' approach made to NOROC in 2013 did not involve any "*offering*" but sought to meet with NOROC members and to "*benchmark*" their existing coverage and premiums against what Willis said was available in the commercial insurance market.<sup>[576]</sup>The evidence concerning Aon's 2015 indicative pricing model and its 2016-2017 indicative pricing submitted for the IPG tender, compared with the property and liability insurance that it subsequently procured for RVC in the period after 1 July 2017, demonstrates that its 2015 and 2016-2017 "*offerings*" were indeed unrealistic and unsupported by underwriters. Aon's "*offerings*" did not in fact contain any offers or quotations. These criticisms do not support RVC's contentions that JLT provided the alleged Broking Services in respect of property and liability insurance and made the alleged Recommendations.

599 RVC relied on the criticised conduct referred to above as "*contextual evidence for the annual renewal documentation*" in submitting that "*JLT's conduct throughout the year had the ultimate purpose of ensuring that when RVC received its annual renewal documentation, it would accept JLT's recommendations without querying them or giving notice to explore its options elsewhere the following year*".<sup>[577]</sup>I reject that submission for two reasons. First, for all of the reasons explained above, JLT did not make the alleged Recommendations in the annual renewal documentation, the meaning and purpose of which is clear for all of the reasons I have explained above. The criticised conduct does not warrant any different reading of the annual renewal documentation. That is so, irrespective of whether the criticised conduct is characterised as JLT promoting Statewide (as RVC submits). Second, the submission strays beyond RVC's pleaded case by drawing on the unpleaded causation theory referred to at [126]-[134] above.

600 RVC also relied on JLT's descriptions of itself as an insurance broker to RVC in certain correspondence with RVC outside the annual renewal process.<sup>[578]</sup>I repeat my observations at [219] above. RVC did not articulate the reasons why the

correspondence identified in its submissions was said to warrant a reading of the annual renewal documentation as evidencing JLT providing the alleged Broking Services in respect of property and liability insurance and making the alleged Recommendations to RVC. No such reason emerges from a review of the correspondence. For example, the correspondence included an email from JLT dated 9 October 2014 requesting that RVC provide a letter confirming its appointment of JLT as RVC's broker for workers compensation insurance and all other StateCover lines of business. StateCover is not to be confused with Statewide. Workers compensation was one of RVC's non-Statewide lines of cover in 2014-2015.<sup>[579]</sup>

601 RVC also relied on selected extracts from JLT's IPG tender response, taken out of context.<sup>[580]</sup> For the reasons already explained at [535]-[540] above, I reject RVC's submissions that those selected extracts describe JLT's relationship with RVC during the Relevant Period as RVC's individual insurance broker in relation to Statewide lines of cover. Those selected extracts do not provide evidence of JLT providing the alleged Broking Services in respect of property and liability insurance or making the alleged Recommendations to RVC.

602 RVC also relied on certain communications between JLT and other councils. RVC submitted that JLT held itself out as a broker and trusted advisor in communications with those other councils.<sup>[581]</sup> As JLT submitted, its dealings with different councils in different contexts (all of which were extraneous to the annual renewal processes) and at different times are irrelevant to the proper characterisation of its dealings with RVC.<sup>[582]</sup> For example, when responding to correspondence from Bankstown City Council in 2014 to clarify aspects of its response to that council's request for tender for the provision of insurance and insurance brokerage services and the provision of advice to that council individually in respect of its entire insurance portfolio, JLT described a range of services that it was capable of providing, subject to the instructions of Bankstown City Council, and the manner in which those services would be provided if the tender were awarded to JLT.<sup>[583]</sup> Contrary to RVC's submissions,<sup>[584]</sup> JLT's clarifications were specific to the relationship that JLT would have with Bankstown City Council if JLT were appointed as the individual broker and adviser to that council in respect of all of its insurances. This has no bearing on JLT's relationship with RVC that is in issue in these proceedings. That relationship is alleged to have arisen by reason of JLT's conduct during the annual renewal processes.<sup>[585]</sup>

603 My finding that JLT did not provide the alleged Broking Services to RVC in respect of property insurance and liability insurance during the Relevant Period and did not make the alleged Recommendations to RVC during the Relevant Period means that RVC has failed to establish the key premise underlying each its three causes of action. RVC's claims in these proceedings must therefore be dismissed. However, for completeness and in deference to the parties' detailed submissions, I will briefly address the other reasons why those causes of action fail. As will be seen, many of those reasons

substantially overlap with or flow inevitably from my findings that JLT did not provide the alleged Broking Services in respect of property and liability insurance and did not make the alleged Recommendations.

## VII The CAUSES OF ACTION IN CONTRACT AND TORT

### JLT and RVC did not enter into the alleged Broking Services Contracts

- 604 As I have explained in Section IV above, RVC has pleaded that the alleged Broking Services Contracts were entered into annually. RVC contends that JLT's preparation of the Insurance Declaration and Renewal Report and its provision of those documents to RVC during each annual renewal process constituted an offer to obtain or renew contracts of insurance on behalf of RVC, including but not limited to liability insurance contracts and property insurance contracts. RVC contends that its acceptance of each offer is evidenced by or to be inferred from its conduct in signing and returning the accompanying authorisation form and/or by acceding to JLT placing property and liability insurance on its behalf and by paying the invoices that JLT sent to RVC in respect of those lines of cover.<sup>[586]</sup>
- 605 Courts are not constrained by mechanical notions of offer and acceptance when determining objectively whether a contract can be inferred from the conduct of the parties in all the circumstances: *Branir Pty Ltd v Owiston Nominees (No. 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833 at [369] (Allsop J, as his Honour then was, with Drummond and Mansfield JJ agreeing); see also *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [50] (Leeming JA, Bathurst CJ and White JA agreeing). As RVC submitted, the essential question is whether the parties' conduct in all of the surrounding circumstances, bearing in mind the commercial realities of their relationships, reveals "an understanding or agreement ... which bespeaks an intention to be legally bound to the essential elements of a contract": *Branir Pty Ltd v Owiston Nominees (No. 2) Pty Ltd, supra*, at [369]. That question is to be judged objectively according to whether a reasonable bystander would regard the parties' conduct as giving rise to contractual rights and obligations: *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 at [93] (McColl, Macfarlan and Simpson JJA). As RVC submitted, the question is not approached on the basis that such contracts are rare: *Branir Pty Ltd*

*v Owiston Nominees (No. 2) Pty Ltd, supra*, at [370]. However, the parties' conduct must indicate unambiguously that they intended to contract on the terms alleged: *CSR Ltd v Adecco (Australia) Pty Ltd, supra*, at [93]-[95].

606 The notions of offer and acceptance are relevant to determining the essential question in the present case because that is how RVC has pleaded and particularised the alleged Broking Services Contracts.

607 For the following reasons, a reasonable bystander would not regard the parties' conduct as giving rise to the alleged Broking Services Contracts on the terms pleaded (that is, on terms that extended to RVC's property and liability lines of insurance cover).

608 First, insofar as the Insurance Declaration and Renewal Report issued during each annual renewal process related to liability and property insurance and RVC's other Statewide lines of cover, a reasonable bystander would understand JLT's conduct in preparing and issuing those documents as having been undertaken in the performance of its existing obligations under the Deed to place the Primary Insurance for those lines of cover on behalf of Members of the relevant Statewide Schemes collectively on the instructions of the Board. That is for the reasons explained in Section VI above. It follows that the reasonable bystander would not regard JLT's conduct in preparing and issuing those documents as constituting the alleged offer or as otherwise giving rise to the alleged Broking Services Contracts. For the reasons explained in Section VI, the reasonable bystander would understand that RVC's conduct in completing the authorisation forms and in paying the invoices received from JLT for the Statewide Property Scheme and Liability Scheme Contributions was necessary for the performance of RVC's existing obligations under the Deed to notify JLT of the deductibles that it required to be applied to it and to pay the Contributions determined by the Board. The reasonable bystander would therefore not regard RVC's conduct as an acceptance of any offer by JLT or as otherwise giving rise to the alleged Broking Services Contracts.

609 Second, RVC alleges that each Broking Services Contract was entered into on about 30 June in each relevant year.<sup>[587]</sup> By that time, it was too late for JLT to perform the "Broking Services" that RVC claims were required by the alleged contract (namely, designing RVC's annual insurance program and placing its liability and property insurance for the forthcoming year commencing on 30 June). JLT had already issued to RVC the Insurance Declaration and Renewal Report containing the alleged Recommendations that RVC claims JLT made in performing the alleged Broking Services Contracts. That is a further reason why the parties' conduct does not indicate objectively and unambiguously that the parties intended to contract on the terms of the alleged Broking Services Contracts.

610 Third, as JLT submitted, the alleged Broking Services Contracts would have resulted in JLT holding simultaneous inconsistent appointments from RVC. Under the Deed, RVC contracted with JLT for JLT to perform its functions under clause 5.1, including effecting Primary Insurance for the Property Scheme and Liability Scheme Members on the

- instructions of the Board.<sup>[588]</sup> Under the alleged Broking Services Contracts, JLT would have been appointed to effect property and liability insurance for RVC's individual property and liability risks, removed from the risk pools for which JLT negotiated and placed Primary Insurance under the Deed. A reasonable bystander would not have understood the parties' conduct as intending to create obligations to effect those insurances that were inconsistent with JLT's existing obligations under the Deed.
- 611 Fourth, RVC could not have taken up any non-Statewide liability or property cover that might have been identified or procured by JLT for RVC in the performance of any of the alleged Broking Services Contracts. At the time when each alleged Broking Services Contract is said to have been entered into and any such non-Statewide cover might have been identified or procured in performance of that contract, RVC was bound by the Deed to pay Statewide Liability Scheme and Property Scheme Contributions for the forthcoming insurance year. That has been explained in Section VI above. Thus, at the time each alleged annual Broking Services Contract is alleged to have been entered into, RVC had no requirement for the services that it claims were required to be provided under the alleged contract (because RVC had no need for double insurance of its property and liability risks) and it was too late for JLT to provide those services in respect of the relevant insurance year in any event as referred to at [609] above. In my opinion, those are compelling reasons why the alleged Broking Services Contracts are not to be inferred from the parties' conduct.
- 612 RVC submitted that the problem referred to at [610] above does not preclude the existence of the alleged annual Broking Services Contracts because RVC's commitment to Statewide for the forthcoming year at any point in time "*is not logically incompatible with JLT having a contractual obligation to provide the Broking Services*" which include "*designing the council's overall insurance programme*".<sup>[589]</sup> That submission misstates RVC's own pleading of the alleged contractual obligation, which is an obligation to design and advise with respect to RVC's annual insurance program and to place or arrange RVC's liability and property insurance cover.<sup>[590]</sup> This and related pleading issues have been addressed in detail in Section IV of these reasons above and I reject RVC's submission for the reasons there stated.
- 613 Fifth, RVC contends that the alleged Broking Services Contracts obliged JLT to negotiate or obtain lower Statewide Contributions on behalf of RVC.<sup>[591]</sup> As JLT submitted, that alleged obligation is fundamentally inconsistent with JLT's obligations under the Deed to advise the Board in respect of the overall Contributions, to determine individual Member Contributions under delegated authority from the Board, to issue Calls for the Contributions so determined and to take such action as the Board may require to recover unpaid Contributions from Members. The alleged obligation to negotiate or obtain lower Statewide Contributions on behalf of RVC under the Broking Services Contracts would require JLT to use for RVC's benefit the discretionary power delegated to it by the Board for the purpose of the administration of the Scheme. In my opinion, it would also be inconsistent with RVC's express obligation of good faith and fairness under clause 2.2 of the Deed.<sup>[592]</sup> to enter into a contract imposing the alleged

obligation on JLT or to require JLT to perform the alleged obligation for RVC's benefit. Those inconsistencies are further reasons why the alleged Broking Services Contracts are not to be inferred from the parties' conduct in all the circumstances, in my opinion.

614 In circumstances where I have found that JLT did not provide the alleged Broking Services or make the alleged Recommendations in any event, I do not consider that it would be productive to expand on the five additional reasons set out above why JLT and RVC did not enter into the alleged Broking Services Contracts.

615 I find that JLT did not enter into the alleged Broking Services Contracts and was not under the contractual obligation to exercise reasonable skill and care that is pleaded in paragraph 15 of the Third Further Amended Commercial List Statement.

### **JLT did not owe RVC the alleged general law duties of care**

616 RVC did not owe the duties of care pleaded in paragraph 13 of the Third Further Amended Commercial List Statement for the following reasons.

617 First, as explained in Section IV above, the pleaded duties are duties to exercise reasonable care and skill "*in providing the Broking Services and making the Recommendations*" during each annual renewal process. JLT did not owe those duties because, as I have found in Section VI above, JLT did not provide the alleged Broking Services in respect of property and liability insurance and did not make the alleged Recommendations.

618 Second, RVC's general law claim is a claim for pure economic loss. In order to establish each alleged duty of care, it would not have been sufficient for RVC to establish that the alleged Recommendations and failures<sup>[593]</sup> occurred during the relevant annual renewal process and caused alleged reasonably foreseeable loss of opportunity in respect of the immediately forthcoming insurance year. In the present case, RVC would also need establish that JLT knew that RVC intended to rely on each Recommendation "*in connexion with some matter of business or serious consequence*" and that it was reasonable for RVC to do so: *Mutual Life & Citizens Assurance Company Limited v Evatt* (1968) 122 CLR 556 at 571 (Barwick CJ); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36 at [127]-[128] (Crennan, Bell and Keane JJ); *Dansar Pty Ltd v Byron Shire Council* (2014)

89 NSWLR 1; [2014] NSWCA 364 at [171] (Meagher JA, Leeming JA agreeing); *RinRim Pty Ltd v Deutsche Bank AG* [2017] NSWCA 169 at [133] (Sackville AJA, Beazley P and Payne JA agreeing).

619 As JLT submitted, constructive knowledge of RVC's alleged reliance would not suffice to establish the duties of care pleaded by RVC. The pleaded case is one of actual knowledge and intention on the part of JLT that RVC would act upon the alleged Recommendation in each annual renewal process by authorising JLT to place or arrange its property and liability insurances "with Statewide Mutual".<sup>[594]</sup>

620 Contrary to RVC's submissions, I do not regard *Norwest Refrigeration Services Pty Ltd v Bain Daws (WA) Pty Ltd* (1984) 157 CLR 149 as an alternative route to the alleged duties of care without establishing known reliance. In that case, a co-operative offered to arrange insurance as a service to its members, who were able to request that service by completing a proposal form. Gibbs CJ, Mason, Wilson and Dawson JJ agreed with the trial judge's conclusion that, because the co-operative had held itself out as being prepared to arrange insurance for such of its members who requested it, the co-operative was under a duty to exercise "proper care" to ensure that it either arranged the insurance as requested or warned members of the limitations that would be contained in cover that it arranged.<sup>[595]</sup> It seems to me that the co-operative's offer and the member's request for the insurance are indicative of known reliance in the circumstances of that particular case.

621 As JLT submitted, RVC has not established the matters identified at [618] above, which I have referred to using the shorthand expression "known reliance".

622 RVC's evidence does not establish that it intended to rely or that it did rely on any particular statements within the Insurance Declaration or Renewal Report issued during each annual renewal process in making any decision concerning its property and liability insurance cover for the immediately forthcoming year. On the contrary, RVC's evidence is entirely consistent with the admitted and objective circumstances that RVC was bound by the provisions of the Deed to continue its membership of the Statewide Property and Liability Schemes for the forthcoming year, irrespective of any advice or recommendation that JLT might have given.<sup>[596]</sup> Contrary to RVC's submissions, there was no need for JLT to call Mr Demer or any other witness from JLT to give evidence about whether JLT knew and intended that RVC would rely on the alleged Recommendations. No *Jones v Dunkel* inference arises.

623 There is no evidence that RVC sought advice or recommendations from JLT during any annual renewal process about whether RVC's Statewide property and liability lines of cover should be continued in the forthcoming year. Nor is there any evidence that RVC expected JLT to provide such advice or make such recommendations.<sup>[597]</sup> Any such expectation would have been irreconcilable with the provisions of the Deed that required RVC to pay the Contributions determined by the Board for the Statewide Property and Liability Schemes, unless and until it gave the required period of notice of its retirement from those Schemes, and the provisions that required JLT to issue a Call



to RVC for payment of those Contributions. RVC and JLT were parties to the Deed and there is no dispute that they were aware of those provisions. At the time of each annual renewal process, they both knew that exploration or contemplation of any potential non-Statewide property or liability insurance for RVC for the forthcoming year would lead to the prospect of double insurance for those risks for RVC. RVC had no requirement for double insurance.

624 In those circumstances, the notion that RVC would have relied on the Recommendations (if they had been found to have been made) in making any decision about the placement of its property and liability cover for the immediately forthcoming year is highly unlikely and contrary to commercial reality. There was, in reality, no decision to be made except in relation to the details of deductibles and sub-limits.

625 Contrary to RVC's submissions, it is not to the point that JLT responded from time to time to requests for tender issued by other councils for the provision of insurance and insurance broking services to those councils, independently of Statewide, for a period of several future years.<sup>[598]</sup> That is an entirely different exercise. RVC did not invite any such tender from JLT until after it had given notice of retirement from Statewide.<sup>[599]</sup>

626 For those reasons, RVC has failed to demonstrate that it relied on the alleged Recommendations during each annual renewal process. For the same reasons, any such reliance could not be said to have been reasonable and could not have been known to JLT in the circumstances.

627 In light of my findings that JLT did not provide the alleged Broking Services in respect of property and liability insurance and did not make the alleged Recommendations, and having regard to the views I have expressed above, I do not consider that it is necessary to engage with the parties' submissions about whether it would have been necessary in the circumstances of this case for RVC to demonstrate vulnerability in addition to known reliance on each of the alleged Recommendations: see *Dansar Pty Ltd v Byron Shire Council*, *supra*, at [172], [177]; *Ku-ring-gai Council v Chan* [2017] NSWCA 226 at [71] (Meagher JA, McColl JA and Sackville AJA agreeing) and the authorities there referred to.

628 The statements of principle in concerning the obligations of insurance brokers *PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq)* (2020) 379 ALR 732; (2020) 142 ACSR 561; [2020] FCA 137 at [101]-[110] do not assist RVC in the present case. Those statements were directed to circumstances in which the insurance broker was placing insurances on the instructions of the insured. Anderson J described the duty of the broker in those circumstances as being to "*provide the client with advice and assistance to enable it to make an informed decision about its insurance requirements, and to instruct the broker about what insurance cover to procure on its behalf*". In the present case, for the reasons explained above, the relationship between JLT and RVC at the time each duty of care is alleged to have arisen during the annual renewal process did not extend to JLT acting on instructions from RVC about whether or not to include its property and liability risks in the Property Fund and Liability Fund pools for

which JLT was negotiating and placing Primary Insurance on instructions from the Statewide Board. RVC was bound by the Deed to have its cover for the immediately forthcoming insurance year negotiated and placed by JLT as part of those pools. RVC had no decision to make about that course of action and no requirement for advice from JLT about that course.

629 All of the matters referred to above demonstrate that the alleged duties of care are fundamentally inconsistent with the parties' rights and obligations under the Deed. For the reasons explained at [613] above, that inconsistency extends to any obligation under the alleged duties of care for JLT to request, negotiate or obtain lower Statewide Contributions for RVC. The inconsistencies are a fundamental reason why RVC could not have demonstrated known reliance in the circumstances of this case even if the alleged Recommendations had been made. Contrary to the parties' submissions, I do not regard this case as turning on any higher issue of principle about coherence between the law of contract and the law of tort.

### **The breach allegations**

630 RVC's allegations of breach principally concern the Recommendation that JLT is alleged to have been made during each annual renewal process and JLT's alleged failures during that same annual renewal process to recommend, identify or procure quotations, offers or terms for "*suitable*" non-Statewide property and liability cover that was allegedly available in the market at that time at a lower premium cost than RVC's Statewide Contributions.<sup>[600]</sup> It is convenient to refer to these alleged breaches as the **alternative insurance breaches**.

631 The allegations of breach also concern JLT's alleged failure to request, negotiate or obtain lower Statewide Contributions for RVC during each annual renewal process. It is convenient to refer to these alleged breaches as the **Contributions breaches**.

632 I have found that JLT did not provide the alleged Broking Services in respect of RVC's property and liability insurance and did not make the alleged Recommendations to RVC and did not owe the alleged contractual and general law duties of care. It is neither necessary nor productive to address questions of breach in detail in those circumstances. It suffices to make the following observations.

633 In relation to the alleged alternative insurance breaches, I accept JLT's submission that the exercise of reasonable care and skill during each annual renewal process in which a duty of care is alleged to have been owed would not have required JLT to recommend, identify or procure quotations, offers or terms for "*suitable*" non-Statewide property and liability cover that would have been surplus to RVC's requirements for the reasons discussed at [623]-[624] above. Indeed, this was conceded in RVC's closing submissions.<sup>[601]</sup>

634 The alleged Contributions breaches are founded on the curious notion that JLT (on behalf of RVC) could have "*negotiated*" with itself (as the delegate of the Statewide Board). I accept JLT's submission that the exercise of reasonable care and skill would

not have required JLT to conduct a negotiation that would have been inconsistent with its obligations under the Deed for the reasons explained at [613] above.

635 In addition to the alternative insurance breaches and the Contributions breaches, RVC pleaded that JLT breached the alleged Broking Services Contracts and duties of care by failing to advise RVC during each annual renewal process that its Statewide Contributions (allegedly) exceeded the premium rates for the alleged alternative insurance and/or exceeded the Contribution rates that could allegedly be negotiated by JLT and that JLT had neither sought alternative insurance quotations nor requested or negotiated lower Contributions on RVC's behalf.<sup>[602]</sup> As stated at [97] above, I accept JLT's submission that this pleaded allegation is irrelevant because it is not, in truth, a breach of any pleaded contractual or general law duty.

### Causation and loss

636 In view of my findings and conclusions above, it is not necessary to determine questions of causation and loss in relation to RVC's contract and tort claims. However, I will address those questions briefly in case they should become relevant in any future appeal.

637 RVC's pleading of causation and loss is found in paragraph 18 of its Third Further Amended Commercial List Statement, which has been set out in full at [98] above and has been the subject of detailed consideration in Section IV of these reasons.

638 The losses of opportunity that RVC claims to have suffered by reason of JLT's alleged breaches of contract and duties of care fall into two categories:

- (1) loss of an alleged opportunity to obtain suitable property and/or liability insurance from an insurer, underwriter or mutual risk pool other than Statewide at the best premium rates that were reasonably available to RVC in the market (the **alternative insurance opportunity**); and
- (2) loss of an alleged opportunity to pay lower Statewide Property Scheme and Liability Scheme Contributions that could allegedly have been requested, negotiated or obtained by JLT on behalf of RVC (the **Contributions opportunity**).

639 RVC's submissions in support of its claim to have suffered losses of alternative insurance opportunities as a result of JLT's alleged breaches raised a plethora of counterfactual scenarios, all of which were referable to opportunities said to have been available to RVC in the insurance market in future years, not in the year that was the subject of the annual renewal process in which relevant breach allegedly occurred. It is not open to RVC to advance those counterfactual scenarios, which are outside the scope of its pleaded case for the reasons explained in Section IV above. RVC correctly accepted that the alleged breaches of duty had not caused the loss of any opportunity of commercial value to obtain alternative insurance in the insurance year to which the relevant annual renewal process was directed.<sup>[603]</sup> For that reason, RVC's alternative insurance opportunity claims would have failed, even if I had found that JLT provided

the alleged Broking Services and made the alleged Recommendations and even if RVC had established the alleged Broking Services Contracts, the alleged duties of care and the alleged breaches of contract and duty.

640 Even if RVC's counterfactual scenarios referred to above had been within the scope of its pleaded case, the evidence adduced by RVC would not have established on the balance of probabilities that:

- (1) suitable alternative property and/or liability insurance was available to RVC in the insurance market at any time during the Relevant Period;
- (2) but for JLT's alleged breaches of contract and duty, JLT would have negotiated or procured such alternative insurance for RVC at a lower cost than RVC's Statewide Contributions for the corresponding year; and
- (3) RVC could have taken up such alternative insurance.

641 RVC would have needed to prove each of those three matters on the balance of probabilities in accordance with established principles: *Badenach v Calvert* (2016) 257 CLR 440; [2016] HCA 18 at [38]-[41] (French CJ, Kiefel and Keane JJ); *Miles v Luneburger Franchising Pty Ltd* [2021] NSWCA 248 at [69] (Gleeson JA, Macfarlan JA and Simpson AJA agreeing).

642 In relation to the second matter, the alleged breaches in this case would not give rise to questions at the causation stage about whether any alternative insurance available to RVC in the market might have been procured by RVC without using the services of JLT. RVC relied on paragraph 17(f) of its Third Further Amended Commercial List Statement as giving rise to causation counterfactuals in which alternative insurance might have been procured without the assistance of JLT. For reasons that I have already explained, paragraph 17(f) is not an allegation of breach of any pleaded duty and is therefore irrelevant to questions of causation.<sup>[604]</sup>

643 As JLT properly conceded, the established principles referred to above would not have required RVC to identify the particular insurer or insurers who would have offered such insurance to RVC in the counterfactual scenario, the precise terms on which that insurance would have been offered to RVC or the amount of any cost differential between that alternative insurance and the Statewide Contributions. Such matters relate to the quantification of the value of the alleged opportunity rather than proof of the loss of an opportunity of some value. Quantification may take into account hypotheses and possibilities that are speculative. However, the existence of the

opportunity said to have been lost, and the fact that the opportunity had some value (in the sense that it was “*suitable*” for RVC and less costly than its Statewide Contributions) would have to be proved on the balance of probabilities.  
644 Contrary to RVC’s submissions,<sup>[605]</sup> it would not have been sufficient for it to demonstrate that:

- (1) there was competition in the insurance market;
- (2) that insurers were writing policies for other councils at various times on a “*patchy*” and inconsistent basis during the Relevant Period; and
- (3) that RVC had a non-theoretical, non-negligible chance of being offered suitable alternative insurance that was less costly than its Statewide Contributions, which offer RVC may or may not have accepted.

645 RVC’s evidence and its cross-examination of JLT’s witnesses was directed to:

- (1) establishing competition in the market generally, including RVC’s allegations that JLT had engaged in certain anti-competitive conduct that had reduced competition in some way that RVC contended ought to count in its favour in the

causation analysis or in quantifying the allegedly lost opportunities. I note that RVC did not seek to elicit evidence about the substance of those allegations from any of the expert witnesses;

- (2) proving specific instances of insurers writing property and liability policies for other councils at various times;
- (3) the IPG tender responses, which were indicative pricing prepared retrospectively and on the basis of fictitious and anonymised data as explained at [528]-[530] above;
- (4) the premiums paid by RVC under the property and liability insurance policies brokered by Aon for the 2017-2018 year, from which RVC sought to extrapolate backwards for at least two or three years to demonstrate a non-negligible prospect of insurance being available to RVC in the market on similar terms in those earlier years; and
- (5) the evidence of Mr Armitstead and Mr Minty to the effect that RVC could have obtained property and liability cover through CivicRisk and the contributions that Mr Minty estimated would have been payable by RVC as a member of CivicRisk.

646 The existence of competition in the insurance market generally (including competition for local government business) does not provide a proper basis for any finding to be made on the balance of probabilities about the availability of suitable insurance in that market for a particular insured at any given time. In addition to this fundamental problem, RVC's approach flies in the face of:

- (1) Mr Saunders' expert evidence that what an insurer did for an insured in one year does not provide a basis for inferring what would have been done by that insurer in other years or inferring what that insurer would have done for any other prospective insured at any time;-[606]
- (2) the expert evidence of Mr Ellison characterising the outcome of the IPG tender as "*general results based on a fictitious situation*" and the expert evidence of Mr Saunders, who did not consider that the IPG tender provided anything more than a general indication of how the brokers responding to the tender saw the market at that time (in late 2016) based on the fictionalised data;-[607]
- (3) the fact Aon first brokered premiums for RVC after it ceased to be a member of Statewide and the insurance brokered by Aon does not appear to have been comparable with RVC's earlier Statewide cover for the reasons identified at [541]-[544] above; and
- (4) the evidence of Mr Armitstead that he would not have authorised CivicRisk to engage with JLT acting as a broker on behalf of a council,-[608]-underscored by Mr Fagen's assessment of the evidence that terms available through CivicRisk appear to have been "*reserved against JLT*" and that JLT would therefore not

have been able to access those terms during the Relevant Period. Similarly, Mr Saunders gave evidence that CivicRisk would have been very unlikely to quote terms to JLT because CivicRisk was a competitor to Statewide.<sup>[609]</sup>

647 As JLT submitted, RVC did not adduce evidence of all of the matters that an insurer would have needed to know in order to decide whether to underwrite RVC's property and liability risks at any time during the Relevant Period. Mr Fagen gave evidence that an insurer would need to assess the risk profile of the prospective insured council, and would require information concerning matters such as the nature and scope of services provided by the council, potential exposure to perils such as bushfire, flood and cyber risk, potential exposure to large individual or catastrophic losses and potential exposure to attritional (smaller but potentially more frequent) losses.<sup>[610]</sup> In the absence of evidence about any of these matters, RVC did not even establish the starting point for determining on the balance of probabilities whether there were alternative insurance opportunities available to RVC in the market at relevant times that were lost by reason of JLT's alleged breaches of contract and duty.

648 For those reasons, RVC's evidence would not have established a relevant loss of a valuable alternative insurance opportunity on the balance of probabilities even if it had been entitled to run its unpleaded causation case. It is not necessary to address RVC's approach to the quantification of the value of that unproven opportunity, which essentially involved efforts to recreate in the form of submissions the evidence of a tender consultant who RVC elected not to call after he had participated in a joint conference and produced a joint report with the expert witnesses called by JLT.

649 It remains to consider the Contributions opportunity that RVC claims to have lost in each insurance year as a result of JLT's alleged breaches of contract and duty of care during the annual renewal process undertaken for that year.

650 RVC has failed to establish the existence of this alleged opportunity at the time of any of the alleged breaches. The opportunity did not exist at any relevant time because, as JLT submitted, RVC was bound by the regime provided for in the Deed whereby the total Contributions for each Annual Fund were determined by the Board and the Contributions payable by RVC and each other Member were determined by JLT on delegated authority from the Board.<sup>[611]</sup> There is no pleaded allegation that the Board or JLT failed to perform those functions in accordance with the Deed. In the course of discharging its functions under the Deed, JLT did in fact review RVC's Contributions to the Liability Fund and the Property Fund. Those reviews reduced RVC's Property Fund Contributions but did not result in any reduction to its Liability Fund Contributions.<sup>[612]</sup> As explained at <sup>[613]</sup> above, JLT could not have acted on behalf of RVC to negotiate or obtain a reduction in its Contributions without misusing the delegated discretionary authority conferred on it by the Board.

651 Finally, I note that RVC made no submissions in response to JLT's limitation defence in respect of the tort and contract claims. Had it been necessary to consider those defences, I would have accepted JLT's submissions that those cause of action in

contract accrued no later than 30 June in each year during the Relevant Period (being the date shortly after the making of the alleged Recommendation relied on as a breach of contract) and the cause of action in tort accrued on 30 June in each year (being the date on which the alleged loss of opportunity is said to have been incurred by reason of RVC's property and liability cover being renewed within the Statewide Property and Liability Schemes). These proceedings were commenced on 3 December 2018 and I would have accepted JLT's submission that any cause of action that accrued prior to 3 December 2012 is barred by s 14(1)(a) and (b) of the *Limitation Act 1969* (NSW). Accordingly, I would have held that RVC's claims were not maintainable to the extent that they related to any insurance year prior to the 2013-2014 year that commenced on 30 June 2013.

## VIII THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTIES

652 As I have explained in Section IV above, RVC alleges that JLT owed the alleged fiduciary duties "*as an insurance broker providing the Broking Services and making the Recommendations*".<sup>[613]</sup> This cause of action fails in light of my findings that JLT did not provide or undertake to provide the alleged Broking Services and did not make the alleged Recommendations.

653 Moreover, as JLT submitted, the pleaded claim for breach of fiduciary duties depends on a conflict between the interests of JLT on the one hand in receiving the fees to which it was entitled under the Deed for the services that it provided under the Deed and the interest of RVC on the other hand in obtaining suitable property and liability insurance at the best premium rates that were reasonably available to RVC in the market.<sup>[614]</sup> In truth, no such conflict existed. RVC had made the choice to take itself out of the market as an individual insured and to have its property and liability risks pooled with other group members on the express basis that JLT would place insurance for those pooled risks on the instructions of the Board. RVC was aware of the terms of the Deed that it had acceded to when it made that choice and by which it remained bound unless and until it gave the requisite period of notice under clause 10.3 of the Deed. During each annual renewal process when the breaches of fiduciary duty allegedly occurred (i.e. when the alleged Recommendations were made and RVC's property and liability cover were renewed under the Scheme), RVC did not have an interest in alternative insurance because it was contractually obliged to renew its Statewide membership for the immediately forthcoming year. Any alternative insurance would have been surplus to RVC's requirements. RVC did not rely on JLT to make recommendations during an annual renewal process as to whether or not RVC should continue its membership of the Statewide Property and Liability Schemes in the immediately forthcoming year.<sup>[615]</sup> By clause 11.1.1 of the Deed, RVC had expressly agreed to pay JLT such fees as may



be agreed by the Board from time to time for JLT's services under the Deed. The amounts of the fees were published in the Scheme's annual reports, as pleaded in the Third Further Amended Commercial List Statement.

654 The matters referred to above are further reasons why JLT did not owe the alleged fiduciary duties that cannot be accommodated to the relationship between JLT and RVC (and each group member) established by the Deed: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 99; [1994] HCA 64; *Taheri v Vitek* (2014) 87 NSWLR 403; [2014] NSWCA 209 at [115] (Leeming JA, Bathurst CJ agreeing). At the same time, those matters are reasons why the alleged conflict did not exist and further reasons why the alleged breaches did not occur.

655 If the fiduciary duties and the alleged breaches had been established, RVC would have failed to prove the alleged lost opportunities that formed the basis of its equitable compensation claim for the reasons I have explained in Section VII above. There will be no occasion for the potential separate hearing accommodated by orders made 4 November 2021 concerning the claim for an account of profits if RVC were to succeed in establishing breach of fiduciary duties and if it then elected to pursue an account of profits rather than equitable compensation.

656 For completeness, I reiterate that RVC is not entitled to run the unpleaded alternative case alluded to in its closing submissions that JLT owed fiduciary duties to RVC and group members because it held itself out as an advisor and assumed an advisory role, thereby creating an expectation on the part of RVC and group members that it would act in their interests in advising them.<sup>[616]</sup> In any event, it is difficult to see how such an expectation could be reconciled with the provisions of the Deed.

657 Again, RVC made no submissions in response to JLT's limitation defence in respect of the claims for breach of fiduciary duty. Had it been necessary to consider that defence, I would have accepted JLT's submissions that the claims were not maintainable in respect of any insurance year prior to the 2013-2014 insurance year. In circumstances where RVC's common law claims for damages and its equitable claims for compensation or an account rely on the same key premises that JLT provided the alleged Broking Services and made the alleged Recommendations and the loss in respect of which RVC claims equitable compensation is the same loss in respect of which it claims damages for the alleged breaches of contract and general law duty of care, equity would apply the statutory bars under ss 14(1)(a) and (b) and s 15 of the *Limitation Act* by analogy in the absence of circumstances rendering JLT's reliance on the statute unconscionable: *Gerace v Auzhair Supplies Pty Ltd* (2014) 87 NSWLR 435; [2014] NSWCA 181 at [70] (Meagher JA, Beazley P and Emmett JA agreeing).

## IX COMMON QUESTIONS

658 The common questions are set out at [209] above. Those questions are to be answered on the basis that the form and contents of the documents that JLT issued to RVC during annual renewal processes in the Relevant Period were the same as the documents that

JLT issued to group members, save for matters that were specific to each local council (such as deductibles, property values and sub-limits for certain components of the property cover). That is common ground between the parties.<sup>[617]</sup>

659 The Renewal Report for the 2012-2013 contained statements to the effect set out in question 1: see [357] above. Other Renewal Reports did not contain statements in those terms, although they contained other statements to similar effect. RVC submitted that question 1 should be answered “yes” and JLT submitted that it should be answered “no”. In my opinion, the appropriate answer that reflects the substance of the Renewal Reports and the purpose for which and context in which they were issued as described in Sections V and VI above is: *“Yes, in the context of performing services for the renewal of the Primary Insurance for the Statewide Funds operated pursuant to the Deed dated 22 March 1994 establishing the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme, on the instructions of the Statewide Board and in circumstances where the group members were parties to that Deed and members of one or more of those Funds and were required by the Deed to pay contributions to those Funds as determined by the Board for the forthcoming insurance year.”*

660 JLT submitted that question 2 should be answered with a qualified “yes”. In my opinion, question 2 should be answered in the same terms to reflect the purpose for which and context in which the Renewal Reports and Financial Services Guides were issued as described in Sections V and VI above.

661 The answer to question 3 is “no” for all of the reasons explained in Sections VI and VII above.

662 The answer to question 4 is “no” for all of the reasons explained in Sections VI and VIII above.

663 The answer to question 5 is “no” for the reasons explained in Section VIII above.

664 The answer to question 6 is “no” for the reasons explained in Section VI and VIII above. JLT did not owe the alleged fiduciary duties to RVC or group members (subject to any fact relevant to that issue that is peculiar to a particular group member).

## **X CONCLUSION AND ORDERS**

665 The orders of the Court are as follows:

- (1) Order that the plaintiff’s claims for relief in the Third Further Amended Commercial List Statement are dismissed.
- (2) Direct the parties to bring in by 24 February 2023 an agreed minute of the orders to be made concerning the costs of the proceedings or, in the absence of agreement, each party’s minute of the costs order for which it contends and written submissions of no more than four pages in support of that costs order.
- (3) Reserve the question of costs for determination on the papers.
- (4) Order that the common questions are answered as follows:

**(1) During the Relevant Period, did JLT hold itself out in the Renewal Reports that it issued to Richmond group members as:**

- (a) being one of the largest insurance brokers in Australia and the world;**
- (b) possessed of the expertise to deliver the most comprehensive range of insurance and risk solution products and services available to local government authorities across Australia; and/or**
- (c) capable of ensuring that local councils receive a well-designed insurance programme at a competitive premium cost?**

**A:** Yes, in the context of performing services for the renewal of the Primary Insurance for the Statewide Funds operated pursuant to the Deed dated 22 March 1994 establishing the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme, on the instructions of the Statewide Board and in circumstances where the group members were parties to that Deed and members of one or more of those Funds and were required by the Deed to pay contributions to those Funds as determined by the Board for the forthcoming insurance year.

**(2) Did JLT hold itself out in the Renewal Reports and Financial Services Guides that it issued to Richmond and each group member as being a subscriber to the Code of Practice of the National Insurance Brokers Association at all material times during the Relevant Period?**

**A:** Yes, in the context of performing services for the renewal of the Primary Insurance for the Statewide Funds operated pursuant to the Deed dated 22 March 1994 establishing the NSW Local Government (Jardine Lloyd Thompson) Mutual Liability Scheme, on the instructions of the Statewide Board and in circumstances where the group members were parties to that Deed and members of one or more of those Funds and were required by the Deed to pay contributions to those Funds as determined by the Board for the forthcoming insurance year.

**(3) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, during the Relevant Period, did JLT's conduct by:**

**(a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for Property and/or Public Liability and Professional Indemnity insurance to Richmond and each group member; and**

**(b) accepting authorisation forms and payment of those invoices from Richmond and each group member;**

**give rise in each case to a contract between JLT on the one hand, and the relevant local council on the other, an implied term of which was that JLT would exercise reasonable care and skill in:**

**(c) designing and providing advice with respect to its annual insurance programme and placing or arranging its property and/or public liability and professional indemnity insurance through Statewide; and**

**(d) advising or recommending that it obtain or renew their property and/or public liability and professional indemnity insurance through Statewide?**

**A:** No.

**(4) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, during the Relevant Period, did JLT by reason of the course of conduct in doing one or more or all of:**

- (a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for Property and/or Public Liability and Professional Indemnity insurance to Richmond and each group member;
- (b) accepting authorisation forms and payment of those invoices from Richmond and each group member;
- (c) providing such assistance as it did, to Richmond and each group member to obtain protection for their property and/or public liability and professional indemnity exposure,

owe Richmond and each group member a fiduciary duty:

- (d) to refrain from pursuing or advancing its own interests in circumstances where there existed a conflict, or significant possibility of conflict, between its own interests and those of Richmond or each group member;
- (e) to refrain from using its position or knowledge resulting from its position as an insurance broker so as to obtain a benefit for itself or a third party or to cause detriment to Richmond or a group member (as the case may be)?

A: No.

(5) Did a conflict exist between JLT's own financial interests in earning and continuing to earn fees and commissions, for or in connection with, services it provided to Statewide Mutual and the interests of Richmond and each group member in obtaining suitable property cover and/or liability and professional indemnity cover at the best premium rates that were reasonably available to each of them in the market?

A: No.

(6) Leaving aside any fact relevant to the issues which are peculiar to Richmond or a particular group member, in doing one or more or all of:

- (a) issuing insurance declarations, renewal reports, summaries of insurances, financial services guides and invoices for property and/or public liability and professional indemnity cover to Richmond and each group member;
- (b) accepting authorisation forms and payment of those invoices from Richmond and each group member;
- (c) providing such assistance as it did, to Richmond and each group member to obtain protection for their property and/or public liability and professional indemnity exposure,

did JLT breach any fiduciary duties by:

- (d) pursuing or advancing its own interests in earning or continuing to earn fees or commissions; or
- (e) using its position or knowledge resulting from its position for its own financial benefit and to the detriment of Richmond and each group member?

A: No.

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## Endnotes

1. Report of Professor Joseph Drew dated 16 July 2020 (the Drew report) (EXP.JLT.002.0001\_OBJ).
2. Affidavit of Nicholas Ashley Tobin affirmed 17 June 2020 (the Tobin affidavit) (LAY.JLT.003.0001\_OBJ).
3. Affidavit of Gary Michael Murphy sworn 16 June 2020 (the Murphy affidavit) (LAY.JLT.001.0001\_OBJ).
4. Report of Professor Pamela Hanrahan dated 16 July 2020 (EXP.JLT.003.0001) (the Hanrahan Report).

5. Reports of Mr Neil Donlevy dated 17 July 2020 (EXP.JLT.004.0001\_tr) (the First Donlevy Report), 30 July 2020 (EXP.JLT.007.0001) (the Second Donlevy Report) and 24 August 2021 (EXP.JLT.008.0001\_tr) (the Third Donlevy Report).
6. Affidavit of Leo Demer sworn 18 June 2020, paragraphs 209-211 (tendered as LAY.JLT.017.0001 and LAY.RVC.009.0001).
7. Affidavits of Naamon-Israel Eurell affirmed on 18 June 2020 (LAY.JLT.005.0001\_OBJ) (the First Eurell affidavit), 2 July 2020 (LAY.JLT.008.0001) (the Second Eurell affidavit), 20 April 2021 (LAY.JLT.012.0001\_OBJ) (the Third Eurell affidavit) and 16 September 2021 (LAY.JLT.013.0001) (the Fourth Eurell affidavit).
8. Affidavits of Adrian Christopher Jones sworn 17 June 2020 (LAY.JLT.002.0001\_OBJ) (First Jones affidavit), 9 June 2021 (LAY.JLT.009.0001\_OBJ) (Second Jones affidavit), 18 June 2021 (LAY.JLT.010.0001) (Third Jones affidavit) and 24 October 2021 (LAY.JLT.015.0001\_OBJ).
9. Affidavit of Mr William Warne sworn 18 June 2020 (LAY.JLT.006.0001\_OBJ) (the Warne affidavit), paragraphs 10-11.
10. Affidavit of Brian Arthur Wilkinson sworn 20 December 2019 (LAY.RVC.008.0001\_OBJ) (Wilkinson affidavit), paragraph 1.
11. Affidavit of John Harold Walker affirmed 19 December 2019 (LAY.RVC.002.0001\_OBJ) (Walker affidavit), paragraph 1.
12. Affidavit of Vaughan Macdonald affirmed 20 December 2019 (LAY.RVC.007.0001\_OBJ) (Macdonald affidavit), paragraphs 1 and 5.
13. Reports of John Saunders dated 20 December 2019 (EXP.RVC.002.0001\_tr\_OBJ) (First Saunders Report), 5 June 2020 (EXP.RVC.003.0001\_tr\_OBJ) (Second Saunders Report), 21 October 2020 (EXP.RVC.006.0001\_tr\_OBJ) (Third Saunders Report) and 27 September 2021 (EXP.RVC.010.0001\_tr\_OBJ) (Fourth Saunders Report).
14. T1237-1470.
15. Reports of Colin Fagen dated 17 July 2020 (EXP.JLT.006.0001\_OBJ) (First Fagen report) and 27 August 2021 (EXP.JLT.010.001\_tr\_OBJ).
16. Affidavit of Andrew Armitstead sworn 19 October 2020 (LAY.RVC.006.0001\_OBJ) (the Armitstead affidavit).
17. Affidavits of David Minty sworn 16 December 2019 (LAY.RVC.001.0001\_OBJ) and 16 October 2020 (LAY.RVC.004.0001).
18. Drew report, paragraph 15; Murphy affidavit, paragraphs 11-12.
19. Drew report, paragraph 55.
20. Drew report, paragraphs 56-61.
21. Drew report, paragraphs 62-68; Tobin affidavit, paragraph 43.
22. Drew report, paragraphs 65-73.
23. Murphy affidavit, paragraph 25; Tobin affidavit, paragraph 44.
24. Hanrahan Report.
25. It was common ground between the parties that amendments made to the Deed from time to time during the Relevant Period are not relevant to the issues to be determined in these proceedings, save for an amendment to clause 10.3 which is referred to at [51] below. This summary of the salient provisions of the Deed has been prepared from the September 2018 version of the Deed that was tendered as exhibit JLT.026.026.5385. In these reasons, exhibits are referred to simply by their identifying number.
26. Clauses 2.4.1 and 3.1 of the Deed.
27. Tobin affidavit, paragraph 17; Murphy affidavit, paragraph 68; First Eurell affidavit, paragraph 24 (limited to evidence in respect of the period from January 2014 onwards).
28. Clauses 14-15 of the Deed.
29. Clauses 2.4.1(b), 7.1, 14-15 of the Deed; see also the definitions of Annual Fund and Fund Year.
30. Clauses 2.4.1(a), 3.3.1(a), 6.1, 14.1 and 15.1 of the Deed; see also the definition of Primary Insurance; Tobin affidavit, paragraphs 51-59; Tobin cross-examination at T676.7-676.22; Murphy affidavit, paragraphs 72-80; Warne affidavit, paragraphs 55-70; Warne cross-examination at T734.4-736.13.
31. First Eurell affidavit, paragraphs 44-46; Murphy affidavit, paragraph 72.

32. Clauses 7 and 14-15 of the Deed; First Eurell affidavit, paragraphs 85, 88 and 90; Third Eurell affidavit, paragraph 21.
33. Clause 7.2.2 of the Deed.
34. First Eurell affidavit, paragraph 88; Third Eurell affidavit, paragraphs 21-22; Eurell cross-examination at T898.30-899.37.
35. First Eurell affidavit, paragraph 92; Eurell cross-examination at T895.45-898.28.
36. First Eurell affidavit, paragraphs 101-109, 115-117; Eurell cross-examination at T899.39-906.1, 971.34-972.2, 1001.6-1001.21.
37. Clauses 7.3-7.4 of the Deed.
38. Murphy affidavit, paragraph 81; Tobin affidavit, paragraphs 38-50.
39. Clauses 7.7-7.8 of the Deed.
40. Clause 4.1.1 of the Deed.
41. Clause 8.1.1 of the Deed.
42. Clauses 8.1.2 and 8.2.1 of the Deed.
43. Clause 8.2.1 of the Deed.
44. First Eurell affidavit, paragraphs 45-46.
45. Clauses 8.2 – 8.3 of the Deed.
46. Clauses 2.4.4, 7.1, 9.1, 14.2, 15.2 of the Deed.
47. Clause 8.4.2 of the Deed.
48. Clause 8.5 of the Deed.
49. Clause 9.9 of the Deed.
50. First Jones affidavit, paragraphs 19-23.
51. First Jones affidavit, paragraph 24.
52. First Jones affidavit, paragraphs 25-26.
53. Third Eurell affidavit, paragraphs 14-16.
54. RVC closing submissions at T1508.35-1508.45, 1594.11-1596.39.
55. RVC relied on an internal memorandum recording the “underwriters” proposed by JLT for RVC’s 2001-2002 insurances: RIC.010.023.5060. RVC had become a Member of Statewide approximately one year earlier.
56. See Mr Eurell’s unchallenged evidence set out at [55] above.
57. The notice period was 12 months expiring on 6 June 2017, but RVC’s cover under the Statewide Liability Scheme and Property Scheme remained in place until the end of that Fund Year on 30 June 2017.
58. Macdonald affidavit, paragraph 9.
59. First Donlevy Report, paragraph 56.
60. First Donlevy Report, paragraph 59.
61. First Donlevy Report, paragraph 73.
62. Third Donlevy Report, paragraphs 54(e) and 58(c).
63. Third Donlevy Report, paragraphs 24-26.
64. Second Eurell affidavit, paragraph 10.
65. Second Eurell affidavit, paragraph 10.
66. JLT.008.005.1514.
67. Third Further Amended Commercial List Statement (CLS), paragraphs 9, 10 and 14.
68. Affidavit of Leo Demer sworn 18 June 2020, paragraphs 209-211 (tendered as LAY.JLT.017.0001 and LAY.RVC.009.0001).
69. T1612.1-1612.45.

70. CLS, paragraph 7.
71. Second Further Amended Commercial List Response (CLR), paragraph 7.
72. See [71] above.
73. CLS, paragraph 9.
74. CLS, paragraph 10.
75. As RVC acknowledged: T1518.18-1518.38.
76. CLS, paragraph 11.
77. CLR, paragraphs 9, 11.
78. CLR, paragraph 10.
79. CLR, paragraph 9(m).
80. CLS, paragraph 12(a).
81. CLS, paragraphs 12-13.
82. CLR, paragraphs 12-13.
83. T1541.46-1542.38.
84. CLS, paragraph 14.
85. CLS, paragraph 15.
86. CLR, paragraphs 14-15.
87. CLS, paragraph 16.
88. CLR, paragraph 16.
89. Paragraphs 17(b)(iii) and 17(f)(iii) refer to the circumstances pleaded in paragraph 16 of the Third Further Amended Commercial List Statement, which are summarised at [91]-[93] above.
90. CLR, paragraph 17.
91. RVC submissions at T1579.12-1579.24, 1617.24-1618.1, 1887.37-1887.47.
92. JLT submissions at T1660.6-1660.34, 1798.38-1799.29, 1802.33-1803.9.
93. CLR, paragraph 18.
94. CLS, paragraph 19.
95. CLS, paragraphs 20-22.
96. CLR, paragraph 19.
97. CLR, paragraph 19(e).
98. CLR, Annexure A, paragraph (xvi).
99. CLR, paragraph 20-22.
100. CLR, paragraphs 23-24.
101. CLS, paragraph 25.
102. CLS, paragraph 26.
103. CLR, paragraph 25.
104. CLR, paragraphs 25-26.
105. T367.32-368.1.
106. T123.1-123.12; T144.23-144.29; T1103.5-1103.6.
107. T363.20-363.32.
108. See [74]-[77] and [85] above.
109. Evidence of Mr Saunders, Mr Ellison and Mr Fagen in answering question 1(a) in the Joint Expert Report (EXP.JNT.001.0001\_OBJ\_2).
110. RVC opening submissions (29/9/21), paragraph 6.

111. RVC opening submissions (29/9/21), paragraphs 51-77.
112. RVC opening submissions (29/9/21), paragraph 101.
113. RVC opening submissions (29/9/21), paragraph 109.
114. RVC opening submissions (29/9/21), paragraphs 103, 116-121.
115. T255.31-255.34.
116. See [87] above.
117. See [95] and [101]-[102] above.
118. CLS, paragraphs 10, 13, 15 and 17(a), (c), (d) and (e).
119. CLS, paragraphs 10, 13, 15 and 17(b).
120. CLS, paragraphs 10, 13, 15, 17(b) and 22.
121. CLS, paragraphs 10, 13, 15 and 17(d).
122. See [98] and [108] above.
123. CLS, paragraph 11; see [78]-[79] above.
124. RVC closing submissions (6/11/21), paragraphs 395-397.
125. See [78]-[79] above.
126. The term used by senior counsel for RVC.
127. RVC closing submissions (6/11/21), paragraphs 395-397.
128. See [78]-[79] above.
129. Wilkinson affidavit, paragraphs 35-36; Walker affidavit, paragraphs 48-49; Macdonald affidavit, paragraphs 85-86. That evidence of those witnesses was read subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to RVC's claim to have suffered a loss of opportunity by reason of JLT's alleged breaches of fiduciary duty.
130. The question is recorded at T1101.7-1101.16: "In that context, [that is, where the prospective insured is a member of a mutual scheme and there is a notice requirement that must be satisfied before they can exist the mutual scheme] do you agree that the broker who is assessing and advising the individual on its insurance needs would need to take account of the 12 month notice requirement in considering the position of the individual?" The objection and the pleading issue arising out of it was the subject of oral submissions made on 27 October 2021 (T1101.27-1110.25), written submissions made by both parties on 28 October 2021, further written submissions made by JLT in reply on 29 October 2021 (RVC did not take up the opportunity to make written submissions in reply) and further oral submissions by both parties on 29 October 2021 (T1189.1-1221.21).
131. See [546]-[547] below.
132. I refer in particular to item (B) of the particulars to paragraph 10 of the Third Further Amended Commercial List Statement and paragraph 9(c) of the Second Further Amended Commercial List Response.
133. RVC outline of submissions in relation to notice requirement pleading (28/10/21), paragraph 5.
134. RVC outline of submissions in relation to notice requirement pleading (28/10/21), paragraphs 15-19.
135. JLT submissions (29/10/21), paragraph 30; T1210.42-1211.12.
136. T1228.42-1228.47.
137. RVC closing submissions (6/11/21), paragraph 353.
138. T806.20-808.34.
139. Paragraph 23 is set out in full at [103] above.
140. T820.30-820.38.
141. Paragraph 12 is referred to at [85] above.
142. T821.30-821.44, 825.16-827.9.
143. Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36 at 154 CLR 199 (Deane J).



144. Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd [2018] HCA 43; (2018) 265 CLR 1 at [67]-[69] (Gageler J), citing Chan v Zacharia [1984] HCA 36; (1984) 154 CLR 178 at 198-199 (Deane J).
145. J D Heydon, M J Leeming, P G Turner, Meagher, Gummow & Lehane's Equity Doctrines and Remedies (5th ed, 2015) at [5-125].
146. T824.41-825.7.
147. Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 99; [1994] HCA 64; Taheri v Vitek (2014) 87 NSWLR 403; [2014] NSWCA 209 at [115] (Leeming JA, Bathurst CJ agreeing).
148. Civil Procedure Act 2005 (NSW), ss 56-58.
149. Civil Procedure Act 2005 (NSW), s 64(2).
150. Transcript (16/9/21) 33.46-34.11.
151. Wilkinson affidavit, paragraphs 9-10; Walker affidavit, paragraph 9; T501.29-501.31; Macdonald affidavit, paragraphs 9-10.
152. Wilkinson affidavit, paragraph 1.
153. Walker affidavit, paragraph 1.
154. Macdonald affidavit, paragraphs 1 and 5.
155. Wilkinson affidavit, paragraphs 1-16; Walker affidavit, paragraphs 1-28; Macdonald affidavit, paragraphs 9-13.
156. Wilkinson affidavit, paragraphs 4-5 and 15.
157. Walker affidavit, paragraphs 1-6 and 12; Macdonald affidavit, paragraphs 6-7 and 11-13.
158. T462.19-462.40, 465.1-465.8.
159. See also Wilkinson affidavit, paragraph 16; Walker affidavit, paragraphs 14-28.
160. Norwich Fire Insurance Society Ltd v Brennans (Horsham) Pty Ltd [1981] VR 981; Caldwell v J A Neilson Investments Pty Ltd (2007) 69 NSWLR 120; [2007] NSWCA 3; PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (2020) 379 ALR 732; [2020] FCA 137 at [14]-[29] and [101].
161. CLR, paragraph 8; JLT's answer to common question 2 in paragraph 538 of its closing submissions dated 7/11/21.
162. RIC.015.001.0193.
163. RIC.015.001.0201.
164. T91.13.
165. Wilkinson affidavit, paragraph 20.
166. Wilkinson affidavit, paragraph 26(c).
167. Wilkinson affidavit, paragraphs 17-20; Walker affidavit, paragraphs 14-18; Macdonald affidavit, paragraphs 18-20.
168. RIC.005.001.1239; RIC.005.001.1240; RIC.005.001.1241; JLT.008.001.0511.
169. RIC.005.001.1241\_0004.
170. RIC.005.001.1241\_0036-0039.
171. Exhibit RIC.005.001.1241\_0040-0050.
172. Exhibit RIC.005.001.1241\_0054-0055.
173. Exhibit RIC.005.001.1241\_0056.
174. RIC.003.001.2156\_0003.
175. RIC.003.001.2156\_0003.
176. RIC.005.001.1241\_0061.
177. RIC.005.001.1241\_0062-0063.
178. RIC.015.001.0275; RIC.003.001.0719.
179. Wilkinson affidavit, paragraph 21.

180. JLT.008.0001.0509, JLT.008.0001.0510, JLT.008.0001.0513.

181. RIC.003.001.2156; RIC.003.001.2156\_003.

182. Wilkinson affidavit, paragraph 22; Walker affidavit, paragraphs 21-24; Macdonald affidavit, paragraphs 22-32.

183. RIC.003.001.0609; RIC.003.001.0611.

184. RIC.003.001.0611 at 0613.

185. RIC.003.001.0611 at 0614.

186. RIC.003.001.0611 at 0615.

187. RIC.003.001.0611 at 0616.

188. RIC.003.001.0611 at 0619-0621.

189. RIC.003.001.0611 at 0619-0620.

190. RIC.003.001.0611 at 0622-0644.

191. RIC.003.001.0611 at 0639-0644.

192. RIC.003.001.0611 at 0645.

193. RIC.003.001.0610.

194. Wilkinson affidavit, paragraph 22.

195. Wilkinson affidavit, paragraph 27.

196. JLT.008.001.2122; JLT.008.001.2123.

197. Wilkinson affidavit, paragraph 23.

198. See [243]-[254] above.

199. See [277]-[282], [324]-[326], [347]-[350] and [380]-[381] below.

200. See [60]-[65] above.

201. RIC.003.001.0649; RIC.003.001.0650.

202. Wilkinson affidavit, paragraph 24; Walker affidavit, paragraphs 27-28; Macdonald affidavit, paragraphs 33-35.

203. RIC.003.001.0457.

204. RIC.003.001.0457 at 0458.

205. RIC.003.001.0457 at 0461.

206. RIC.003.001.0457 at 0462-0478.

207. For Property – “Statewide Property Mutual”; for Casual Hirer’s Liability – “Statewide – Casual Hirers Scheme”; for Public Liability and Professional Indemnity – “Statewide Mutual and London Underwriters through Statewide”; for Fidelity Guarantee – “Statewide – Fidelity Guarantee Scheme”.

208. RIC.003.001.0457 at 0479-0490.

209. RIC.003.001.0457 at 0484, 0486, 0488, 0490.

210. Wilkinson affidavit, paragraph 23.

211. Wilkinson affidavit, paragraph 11.

212. Wilkinson affidavit, paragraph 28.

213. Wilkinson affidavit, paragraphs 29-32.

214. T477.10-478.22, 482.5-483.77.

215. T465.32-483.77.

216. Wilkinson affidavit, paragraph 33.

217. RIC.015.001.0275; RIC.003.001.0719.

218. See [66] above.

219. See [60] above.

220. Wilkinson affidavit, paragraphs 35 and 37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.
221. T479.22-479.33.
222. Wilkinson affidavit, paragraph 34.
223. RIC.003.001.0649; RIC.003.001.0650; see [67] above and [431] below.
224. See [62] above.
225. Wilkinson affidavit, paragraphs 36-37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.
226. T479.22-479.33.
227. Wilkinson affidavit, paragraph 31.
228. T464.5-465.12, 475.8-475.40.
229. RIC.010.047.0187\_0002.
230. RIC.003.001.2837.
231. RIC.003.001.2838.
232. RIC.003.001.2838 at 2839.
233. See [239]-[240] above.
234. RIC.003.001.2840.
235. RIC.005.001.0690; RIC.005.001.0691.
236. RIC.005.001.0692; RIC.005.001.2475.
237. See [232] above.
238. RIC.005.001.0692\_0032-0046; RIC.005.001.2475\_0033-0047.
239. See [241] above.
240. RIC.003.001.0103.
241. RIC.005.001.2474; RIC.005.001.2475.
242. RIC.002.001.0243.
243. RIC.003.001.0103.
244. JLT.008.002.4480; RIC.005.001.4829.
245. JLT.008.002.4480\_0008.
246. JLT.008.002.4480\_0010-0011.
247. JLT.008.002.4480\_0010.
248. Wilkinson affidavit, paragraph 22; RIC.015.001.0274; RIC.005.001.4829\_0002.
249. Wilkinson affidavit, paragraph 27.
250. See [294]-[296] above; Wilkinson affidavit, paragraph 23.
251. See [60]-[65] above
252. RIC.015.001.0276.
253. JLT.005.002.0107.
254. For Property – "Statewide Property Mutual"; for Casual Hirer's Liability – "Statewide – Casual Hirers Scheme"; for Public Liability and Professional Indemnity – "Statewide Mutual and London Underwriters through Statewide"; for Fidelity Guarantee – "Statewide – Fidelity Guarantee Scheme".
255. RIC.003.001.0457 at 0484, 0486, 0488, 0490.
256. Wilkinson affidavit, paragraph 23.
257. See [274] above.

258. RIC.010.047.0186; RIC.010.047.0187.
259. Wilkinson affidavit, paragraph 33.
260. RIC.003.001.0103.
261. See [66] above.
262. See [60] above.
263. Wilkinson affidavit, paragraphs 35 and 37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.
264. Wilkinson affidavit, paragraph 34.
265. See [67] above.
266. See [60]-[65] above.
267. Wilkinson affidavit, paragraphs 36-37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.
268. RIC.010.027.3482, including at page 0011; T480.1-480.35.
269. RIC.010.027.3482; JLT.001.001.0524; T481.44-482.38.
270. T482.40-483.37.
271. JLT.009.034.0466; JLT.009.034.0467.
272. See [239]-[240] and [282] above.
273. JLT.009.034.0469.
274. JLT.008.003.3736; JLT.008.003.3738; JLT.008.003.3739.
275. See [284] above.
276. See [241] above.
277. See [241] and [292] above.
278. RIC.003.001.1600; RIC.003.001.1601.
279. RIC.005.002.2916; RIC.005.002.2917; RIC.005.002.2918.
280. RIC.005.002.3147; RIC.005.002.3148; RIC.005.002.3149.
281. See [327] and [284] above.
282. RIC.005.002.3149 at \_0004.
283. See [249] and [301] above.
284. RIC.005.002.3149\_0005 and \_0033. (The slight difference in the declared values figures on these two pages is of no consequence to the issues in these proceedings.)
285. See [241], [292] and [327] above.
286. Wilkinson affidavit, paragraph 27.
287. JLT.008.004.0973.
288. RIC.001.001.0501.
289. Wilkinson affidavit, paragraph 23.
290. See [274] above.
291. Wilkinson affidavit, paragraph 33.
292. RIC.003.001.1600; RIC.003.001.1601.
293. See [66] above.
294. See [60]-[65] above.
295. Wilkinson affidavit, paragraphs 35 and 37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.

296. Wilkinson affidavit, paragraph 34.

297. See [67] above.

298. See [60]-[65] above.

299. Wilkinson affidavit, paragraphs 36-37. This evidence was admitted subject to an order under s 136 of the Evidence Act 1995 (NSW) limiting its use to evidence of loss and damage allegedly suffered by RVC by reason of JLT's alleged breaches of fiduciary duty.

300. RIC.001.001.0383.

301. RIC.005.002.2053; RIC.001.001.0383 at \_0002; see [239]-[240], [282] and [326] above.

302. RIC.005.002.2055; JLT.009.039.0139; JLT.008.005.3048.

303. RIC.005.002.2056.

304. RIC.005.002.2056 at \_0033.

305. RIC.005.002.2056 at \_0036.

306. See [284] and [327] above.

307. See [241] above.

308. See [241], [239], [292] and [327] above.

309. RIC.001.001.0367.

310. Walker affidavit, paragraphs 14 and 19.

311. JLT.009.039.0139; RIC.001.001.0363.

312. RIC.005.002.0182; RIC.015.001.0231.

313. See [284], [298], [310], [327] and [330] above.

314. RIC.005.002.0182\_0004-0005.

315. RIC.005.002.0182\_0005.

316. See [249], [301] and [331] above

317. RIC.005.002.0182\_0008.

318. RIC.005.002.0182\_0008 , \_0011and \_0037.

319. RIC.005.002.0182\_0036-0040.

320. See [241239], [292], [327] and [351] above

321. Walker affidavit, paragraph 24; RIC.001.001.0343.

322. RIC.001.001.0315; RIC.001.001.0311; RIC.001.001.0313; the "Important Information" is referred to at [242], [292], [327], [351] and [362] above.

323. JLT.008.005.8216; JLT.008.005.8223.

324. Walker affidavit, paragraphs 30-35.

325. T502.6-507.23.

326. T506.31-506.40.

327. T504.15-504.39.

328. T504.44-506.9.

329. T501.18-501.42.

330. Walker affidavit, paragraph 47.

331. RIC.001.001.0367.

332. See [66] above.

333. See [60]-[65] above.

334. Walker affidavit, paragraph 46.

335. RIC.001.001.0311; see [67] above.

336. See [60]-[65] above.

337. Walker affidavit, paragraphs 48-50.

338. T499.23-499.26, 493.22-493.36, 501.18-501.42.

339. T501.18-501.42.

340. JLT.004.012.1217.

341. JLT.004.012.1225.

342. JLT.004.012.1225 at 1226; compare the earlier version of the statement at [260] above.

343. See [241] above.

344. See [241], [239], [292], [327] and [351] above.

345. RIC.015.001.0288.

346. RIC.005.001.7111; RIC.005.001.7112.

347. JLT.004.011.6481.

348. JLT.004.011.6481 at 6482 and 6484.

349. JLT.004.011.6481 at 6484-6485.

350. JLT.004.011.6481 at 6485.

351. JLT.004.011.6481 at 6486-6487.

352. JLT.004.011.6481 at 6488-6489.

353. JLT.004.011.6481 at 6494 and 6528-6529; see [241], [239], [292], [327], [351] and [383] above.

354. JLT.004.011.6481 at 6495.

355. See [380]-[381] above.

356. See [384] above.

357. JLT.004.011.6481 at 6495.

358. JLT.004.011.6481 at 6509-6513.

359. JLT.004.011.6481 at 6528.

360. Walker affidavit, paragraph 23.

361. RIC.001.001.0384.

362. JLT.004.011.5903; JLT.004.011.5904; JLT.004.011.5905.

363. See [388] above.

364. JLT.004.011.5905 at 5906, 5908.

365. Walker affidavit, paragraph 47.

366. RIC.015.001.0288.

367. See [66] above.

368. See [60]-[65] above.

369. Walker affidavit, paragraph 46.

370. RIC.001.001.0384; see [67] above.

371. See [46] above; JLT.007.019.2788 at 2794-2795.

372. RIC.005.001.9162\_0002-0003.

373. RIC.005.001.9162.

374. T491.24-492.2.

375. RIC.005.001.3677; RIC.005.001.3680; JLT.004.010.4505.

376. See [241], [239], [292], [327], [351] and [383] above.

377. RIC.005.001.3680 at \_0005.

378. See [241] above.

379. JLT.004.010.4500.

380. JLT.008.009.0144.

381. JLT.008.009.4291; JLT.008.009.4292.

382. See [241], [239], [292], [327], [351], [383] and [413] above.

383. RIC.005.001.6008.

384. RIC.005.001.6009.

385. See [241], [239], [292], [327], [351], [383] and [413] above.

386. RIC.005.001.6005.

387. Walker affidavit, paragraphs 21-24; RIC.003.001.0018\_0006.

388. JLT.008.009.5608; JLT.008.009.5610.

389. See [241], [239], [292], [327], [351], [383], [413] and [428] above.

390. JLT.004.010.1725; JLT.004.010.1768; JLT.004.010.1726.

391. JLT.004.010.1726 at 1760.

392. JLT.004.010.1726 at 1760-1761.

393. Walker affidavit, paragraph 47.

394. JLT.008.009.4291; JLT.008.009.4292.

395. See [66] above.

396. See [60]-[65] above.

397. Walker affidavit, paragraph 46.

398. JLT.008.009.5610; see [67] above.

399. See [60]-[65] above.

400. T492.3-493.8.

401. Macdonald affidavit, paragraph 38 and T520.44-523.24.

402. RIC.005.001.4534; RIC.005.001.4535; RIC.005.001.4536; RIC.005.001.4537; RIC.005.001.4538;  
RIC.005.001.4539.

403. See [411]-[412] above.

404. See [241] above.

405. See [241], [239], [292], [327], [351], [383] and [413] above.

406. RIC.010.042.7678; T496.6-498.35.

407. T498.20-499.26.

408. RIC.010.042.7677.

409. RIC.008.001.0007.

410. T492.10-496.5.

411. JLT.007.048.2048.

412. Warne affidavit, paragraphs 10-11.

413. JLT.007.048.2047.

414. JLT.007.048.7495.

415. Warne affidavit, paragraph 127; JLT.002.002.0234 at 0236-0237.

416. RIC.003.001.3121; RIC.003.001.3122.

417. Walker affidavit, paragraph 36; RIC.005.001.5279.

418. See the 2015-2016 Insurance Declaration at RIC.003.001.3121\_0018 and the 2015-2016 Renewal Report at JLT. 004.009.3928 at 3953.

419. RIC.003.001.3121\_010; JLT.004.009.3928 at 3947.

420. Walker affidavit, paragraph 37; RIC.005.001.6127.

421. T500.18-501.42.

422. Walker affidavit, paragraph 38.

423. Macdonald affidavit, paragraphs 39-40.

424. Walker affidavit, paragraphs 39-40.

425. JLT.004.009.3898; JLT.004.009.3928; JLT.004.009.3916.

426. See [433] above.

427. See [434] above.

428. See [241], [239], [292], [327], [351], [383], [413] and [455] above.

429. JLT.004.009.3916.

430. See [438]-[441] above.

431. RIC.005.001.9052.

432. RIC.003.001.3113.

433. JLT.008.012.9555.

434. Walker affidavit, paragraph 47.

435. RIC.003.001.3113.

436. See [66] above.

437. See [60]-[65] above.

438. Walker affidavit, paragraph 46.

439. RIC.003.001.3113.

440. See [517] below.

441. First Eurell affidavit, paragraphs 211-212.

442. T985.4-987.36.

443. T986.32-986.37 and 987.20-987.24.

444. First Eurell affidavit, paragraphs 215-223; T987.38-997.35; JLT.008.012.8421.

445. First Eurell affidavit, paragraph 219.

446. T996.20-997.34.

447. First Eurell affidavit, paragraphs 101-102.

448. First Eurell affidavit, paragraphs 105-108; JLT.007.056.2506; JLT.007.056.2507; JLT.007.056.4678.

449. RIC.005.001.6127

450. Macdonald affidavit, paragraphs 9, 26, 29, 39-42; T527.3-531.37.

451. RIC.005.001.3774; RIC.005.001.3775.

452. T536.17-539.44, especially 538.1-538.16.

453. Macdonald affidavit, paragraph 18; JLT.008.013.1390; JLT.008.013.1391

454. See [411]-[412] and [455] above.

455. See [241] above.

456. See [241], [239], [292], [327], [351], [383], [413] and [455] above.

457. JLT.008.013.1392.

458. Macdonald affidavit, paragraph 21; JLT.008.013.4882; JLT.008.013.4883; JLT.008.013.4884; JLT.008.013.4885; JLT.008.013.4886.

459. Macdonald affidavit, paragraph 22; JLT.004.008.5178; JLT.004.008.5179



460. See [433] and [479] above.

461. See [434] and [481] above.

462. See [480] above.

463. See [241], [239], [292], [327], [351], [383], [413] and [455] above.

464. Macdonald affidavit, paragraph 26; RIC.005.001.9047.

465. Macdonald affidavit, paragraphs 27-28.

466. Macdonald affidavit, paragraph 32.

467. Macdonald affidavit, paragraphs 33-35; JLT.008.014.0964; JLT.008.014.0965.

468. JLT.004.002.5596.

469. Macdonald affidavit, paragraph 44.

470. LGP.001.001.0035.

471. LGP.001.001.0035 at 0005-0006.

472. LGP.001.001.0035 at 0018-0020.

473. Saunders at T1291.34-1292.45; LGP.001.001.0035 at \_0036.

474. Saunders at T1293.20-1293.24.

475. Ellison at T1298.34-1298.41.

476. Saunders at T1293.35-1298.10.

477. Macdonald affidavit, paragraph 47.

478. RIC.003.001.2874 at \_0010; Macdonald affidavit, paragraph 53; First Eurell affidavit, paragraph 255.

479. T1004.20-1013.28.

480. RIC.005.001.7806 at \_0003-0004.

481. RIC.005.001.4045 at 0027.

482. RIC.005.001.4045 at 0027-0028.

483. RIC.005.001.4045 at 0028.

484. RIC.005.001.4045 at 0029.

485. Macdonald affidavit, paragraph 65.

486. AON.001.001.4798; RIC.003.001.2874 at \_0004; Macdonald cross-examination at T541.37-550.16.

487. RIC.015.001.0045 at \_0079 and \_0153.

488. Macdonald affidavit, paragraphs 77-79.

489. Macdonald affidavit, paragraphs 72-74.

490. Macdonald affidavit, paragraphs 76-79.

491. RVC closing submissions (6/11/21), paragraph 218.

492. JLT closing submissions (7/11/21), paragraph 444.

493. RIC.005.002.3538.

494. RIC.003.001.2842.

495. RVC closing submissions (6/11/21), paragraphs 241-242.

496. Armitstead affidavit, paragraph 29.

497. See Section IV above.

498. See [125] above.

499. CLS, paragraphs 10, 13, 15 and 17(a), (c), (d) and (e).

500. CLS, paragraphs 10, 13, 15 and 17(b).

501. CLS, paragraphs 10, 13, 15, 17(b) and 22.

502. CLS, paragraphs 10, 13, 15 and 17(d).
503. See [234]-[235], [288]-[291], [327], [353], [383], [416], [417], [454]-[456] and [505]-[507] above.
504. See [237], [327], [353], [383], [454]-[456] and [505]-[507] above.
505. See [237], [290], [327], [353], [383], [416], [454]-[456] and [505]-[507] above.
506. See [237], [327], [353], [383], [416], [454]-[456] and [505]-[507] above.
507. See [291], [327], [353], [383], [417], [454]-[456] and [505]-[507] above.
508. See [235], [237], [238], [327], [353], [383], [416], [454]-[456] and [505]-[507] above.
509. See [237], [290], [327], [353], [383], [416], [454]-[456] and [505]-[507] above.
510. See [238]-[240], [176], [327], [353], [383], [417], [454]-[456] and [505]-[507] above.
511. See [417], [454]-[456] and [505]-[507] above.
512. See [33]-[39] and [51] above.
513. The Insurance Declarations issued during the renewal processes for the 2012-2013 and 2013-2014 years were issued 1 day and 3 days (respectively) before the last day on which RVC was entitled to give notice of retirement in respect of the forthcoming year: see [356] and [380] above. For each other annual renewal process during the Relevant Period, the Insurance Declarations were issued after the last date on which RVC could have given notice under clause 10.3 of the Deed to take effect at the commencement of the forthcoming year.
514. See [250], [302], [332], [360], [394], [425], [476] and [514] above.
515. See [55] above.
516. See [228], [277]-[280], [324]-[325], [347]-[349], [380]-[381] and [420]-[421] above.
517. See [243], [294], [327], [354] and [384] above.
518. See [251], [253(6)], [255]-[257], [277]-[280], [308], [324]-[325], [336], [347]-[349], [364] and [398] above.
519. See [424] above.
520. See [404] above.
521. See [426] above.
522. See [443], [476], [485], [514] and [524] above.
523. See, for example, RIC.005.001.6009 at 0032-0036.
524. See [263]-[274], [314]-[320], [339]-[345], [366]-[378], [400]-[403], [448]-[451], [500]-[504] and [527] above.
525. RVC closing submissions (6/11/21), paragraph 264.
526. RVC closing submissions (6/11/21), paragraph 288.
527. With the exception of a period of 1 to 3 days in the case of the Insurance Declarations for the 2012-2013 and 2013-2014 renewal processes, as referred to above.
528. See [232], [285], [327], [353], [383], [414], [454]-[456] and [505]-[507] above.
529. See [241], [292], [327], [353], [383], [412], [418], [454]-[456] and [505]-[507] above.
530. See [232], [285], [327], [353], [383] and [515] above.
531. See [435] above.
532. See [43] above.
533. See [475] above.
534. See [475] above.
535. See [475] above.
536. See [513] above.
537. See [424] above.
538. See [426] above. See also [515] above in relation to the 2016-2017 year.
539. See [552]-[554] above.

540. See [425] above.

541. See [435] above.

542. See, for example, [260], [284] and [356] above.

543. See [435] above.

544. JLT.004.011.6481 at 6498; RVC closing submissions (6/11/21), paragraph 277.

545. Particularly the provisions highlighted above in this Section VI and the provisions of the “Important Information” referred to below.

546. See [394] above.

547. JLT.004.011.6481 at 6529.

548. RIC.005.002.2055; JLT.009.039.0139; JLT.008.005.3048.

549. See [351]-[352] above.

550. See, for example, [426] above.

551. See [43] above.

552. For example, minutes of the Board’s marketing sub-committee dated 15 February 2013 at JLT.007.019.0520. See also the First Eurell affidavit, paragraph 40.

553. JLT’s March 2014 Financial Services Guide was issued to RVC together with the Renewal Report for the 2014-2015 year. JLT’s January 2015 Financial Services Guide was issued to RVC together with the Renewal Report for the 2015-2016 year. JLT’s December 2015 Financial Services Guide was issued to RVC together with the Insurance Declaration for the 2016-2017 year.

554. See [436] above.

555. See [438] above.

556. See [438] above.

557. RVC closing submissions (6/11/21), paragraphs 40-44.

558. CLS, paragraphs 9, 10 and 14.

559. RVC closing submissions (6/11/21), paragraph 302.

560. In relation to Mr Wilkinson, see [263]-[274], [314]-[320] and [339]-[345] above; in relation to Mr Walker, see [366]-[378], [400], [403], [448]-[451] and [488]-[491] above; in relation to Mr Macdonald, see [500]-[504] and [527] above.

561. See [546] above.

562. RVC closing submissions (6/11/21), paragraphs 239-240.

563. JLT closing submissions (7/11/21), paragraph 68.

564. See [116] above.

565. RVC closing submissions (6/11/21), paragraph 36.

566. RVC closing submissions (6/11/21), paragraph 37.

567. See [56]-[57] above.

568. See the detailed discussion of the scope of the pleaded case in Section IV of these reasons.

569. For example, paragraphs 26-39 and 289-298 of RVC’s closing submissions (6/11/21).

570. Evidence of Mr Fagen and Mr Ellison in the Joint Expert Report, pp 21-22 (Mr Saunders expressing no opinion).

571. RVC closing submissions (6/11/21), paragraphs 86-109, 292.

572. RVC closing submissions (6/11/21), paragraphs 110-115, 291.

573. See [404] above.

574. See [71] above.

575. RVC’s closing submissions (6/11/21), paragraph 290.

576. See [406] above.

577. RVC closing submissions (6/11/21), paragraphs 289-296.

578. RVC closing submissions (6/11/21), paragraph 297.

579. See [425] above.

580. RVC closing submissions (6/11/21), paragraphs 214-217, 297.

581. RVC closing submissions (6/11/21), paragraph 298.

582. JLT closing submissions (7/11/21), paragraphs 124-126.

583. CCB.001.001.0195 at 0211-0212; JLT.035.031.4397; JLT.035.031.4423.

584. RVC closing submissions (6/11/21), paragraphs 137-148, 298.

585. CLS, paragraphs 9, 10, and 14.

586. CLS, paragraph 14.

587. The dates on which RVC signed the authorisation form in the Renewal Report are not always apparent from the evidence. The known dates are identified in Section V of these reasons and range from 23 June to 30 June. The dates on which RVC paid the Contributions invoices are unclear, but those invoices were sometimes sent to RVC after 30 June.

588. See [42] above.

589. RVC closing submissions (6/11/21), paragraph 332.

590. CLS paragraph 14, read with the definition of “Broking Services” in paragraph 9.

591. CLS, paragraph 17(d).

592. See [53] above.

593. The failures are summarised at [551] above.

594. CLS, paragraph 12(b).

595. (1984) 157 CLR 149 at 158.

596. See [263]-[274], [314]-[320], [339]-[345], [336]-[378], [400]-[403], [448]-[451], [488]-[491], [500]-[504] and [527] above.

597. Ibid.

598. For example, Bankstown City Council in 2014: see [602] above.

599. See [528]-[541] above.

600. See [551] above.

601. RVC closing submissions (6/11/21), paragraph 409 (third sentence).

602. CLS, paragraph 17(f).

603. RVC closing submissions (6/11/21), paragraph 395.

604. T1641.24-1642.37; see [97] above.

605. T1610.16-1610.34, 1614.11-1614.21, 1616.14-1616.25, 1619.15-1619.21, 1622.40-1626.47, 1630.4-1630.8, 1634.23-1634.25, 1637.23-1637.29.

606. T1374.25-1375.10.

607. See [530] above.

608. Armitstead affidavit, paragraphs 39 and 42.

609. Joint Expert Report, p 42.

610. First Fagen report, paragraphs 20-22 and 50-51.

611. See [33]-[39] above.

612. See [492]-[499] above.

613. CLS, paragraph 19.

614. CLS, paragraphs 20-22.

615. See [623] above.

616. See [162]-[164] above.

617. See [73] above.

## **Amendments**

20 December 2022 - Coversheet amendment

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