FEDERAL COURT OF AUSTRALIA

McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd [2023] FCA 1628

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| File number(s): |  |
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| Judgment of: | **ANDERSON J** |
|  |  |
| Date of judgment: | 20 December 2023 |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – shareholder class action – where share price of respondent fell following publication of various media articles and testimony of Managing Director to Senate Economic References Committee – where media articles contained various allegations of misconduct and unlawful conduct – where applicant has pleaded that respondent was aware of information corresponding with what was revealed in the media articles and Senate testimony – where applicant has not established the truth of all information revealed in media articles and Senate testimony – where there is no evidence as to separate components of inflation of respondent’s share price attributable to individual allegations in the media articles – where applicant has not established materiality of information established to be true either individually or cumulatively – where applicant has not established causation, loss or quantified damages – application dismissed  |
|  |  |
| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB, 12DA, 12GF*Competition and Consumer Act 2010* (Cth) s 131A, Sch 2, s 18*Corporations Act 2001* (Cth) ss 9, 674, 677, 764A 1041E, 1041H*Evidence Act 2008* (Cth) s 79*Parliamentary Privileges Act 1987* (Cth) s 16 |
|  |  |
| Cases cited: | *Addenbrooke Pty Ltd v Duncan (No 2)* (2017) 348 ALR 1*Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)* (2007) 157 FCR 564*Australian Competition and Consumer Commission v Cabcharge Australia Ltd (No 2)* [2010] FCA 837*Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 4)* (2017) 353 ALR 460*Australian Competition and Consumer Commission v Craftmatic Australia Pty Ltd* [2009] FCA 972*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450*Australian Securities and Investments Commission v Australian Lending Centre (No 3)* (2012) 213 FCR 380*Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* (2020) 389 ALR 17*Australian Securities and Investments Commission v* *Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201*Australian Securities and Investments Commission v GetSwift Limited* [2021] FCA 1384*Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345*Australian Securities and Investments Commission v Vocation Ltd (in liq)* (2019) 371 ALR 155*Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969*Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335*CIMIC Group Ltd v AIG Group Ltd* [2022] NSWSC 999*Claremont Petroleum NL v Cummings* (1992) 110 ALR 239*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64*Commonwealth v Fernando* (2012) 200 FCR 1*Coshott v Prentice* (2014) 221 FCR 450*Crowley v Worley Ltd* (2022) 293 FCR 438*Cruickshank v ASIC* (2022) 292 FCR 627*Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469*Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486*Grant-Taylor v Babcock & Brown Limited (in liq)* (2015) 322 ALR 723*Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402*Honeysett v R* (2014) 253 CLR 122*Ho v Powell* (2001) 51 NSWLR 572*Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (in liq)* [2013] FCAFC 48*Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2023] FCA 395*James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85*Jones v Dunkel* (1959) 101 CLR 298*Jubilee Mines NL v Riley* (2009) 40 WAR 299*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361*Leyonhjelm v Hanson-Young* (2021) 282 FCR 341*Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10*TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361*TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* (2019) 293 FCR 29*Warner v Sampson* [1959] 1 QB 297  |
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| Division: | General Division |
|  |  |
| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 684 |
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| Date of hearing: | 5-7, 13-15, 26-27 June 2023 |
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| Counsel for the Applicant: | Mr M R Hodge KC and Mr C Conde |
|  |  |
| Solicitor for the Applicant: | Shine Lawyers |
|  |  |
| Counsel for the Respondent: | Mr N Owens SC, Mr B Holmes, Mr K Raghavan and Dr E Dunlop |
|  |  |
| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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| --- | --- |
|  | NSD 206 of 2020 |
|   |
| BETWEEN: | JOHN DOUGLAS MCFARLANE ATF THE S MCFARLANE SUPERANNUATION FUNDApplicant |
| AND: | INSIGNIA FINANCIAL LTDRespondent |

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| --- | --- |
| order made by: | ANDERSON J |
| DATE OF ORDER: | 20 December 2023 |

THE COURT ORDERS THAT:

1. The originating application be dismissed.

2. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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ANDERSON J

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# INTRODUCTION

1 The applicant (**Mr McFarlane**) claims that during the period from 1 March 2014 to 7 July 2015 (**Relevant Period**), the respondent contravened its obligation of continuous disclosure pursuant to s 674 of the *Corporations Act 2001* (Cth) (***Corporations Act***) and, or alternatively, engaged in misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act* and analogous provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) and *Australian Consumer Law* (***ACL***) as identified in his originating application.

2 The respondent has now re-named itself as “Insignia”. During the Relevant Period it was known by its former name, “IOOF”.

3 Throughout the Relevant Period IOOF operated a substantial Australian financial services business. This business involved providing wealth management services and financial advice to clients. From 2008 and through the Relevant Period, IOOF was operating a “roll up” model, meaning it was acquiring other financial services businesses to build scale and then use its existing infrastructure – including its Research team (referred to in these reasons as the **Research team**) – to service that increased scale. IOOF’s Research team provided advice and general recommendations to advisers across the IOOF network.

4 Mr McFarlane claims that IOOF failed to disclose to the market material information of which IOOF was or ought to have been aware during the Relevant Period about problems with that existing infrastructure, particularly the Research team, and therefore with the rolled-up businesses of IOOF. Mr McFarlane claims that the problems went to the heart of the adequacy of IOOF’s systems, processes and culture, including for governance and compliance.

5 Mr McFarlane claims that there were problems with IOOF’s Buy-model Portfolio. This purportedly measured the performance of a model investment portfolio put together by reference to the Research team’s “Buy” recommendations. The portfolio was marketed internally and externally to financial planners. Mr McFarlane claims that IOOF had materially overstated the Buy-model’s performance from 2010 to 2014. Mr McFarlane claims that in three of the four financial years during that period, IOOF had said the Buy-model Portfolio beat the relevant index, but the true position was that it had performed worse than the index. After an investigation, IOOF discovered that the Buy-model Portfolio had been incorrectly calculated since 2001.

6 The problem with the Buy-model Portfolio was one of a number of issues expressly brought to IOOF’s attention by a whistle blower on 4 March 2014 as part of the “**March 2014 complaint**” pleaded in paragraph 17 of Mr McFarlane’s Amended Statement of Claim filed on 23 November 2021 (**ASOC**).

7 Mr McFarlane claims that IOOF investigated the March 2014 complaint and was or ought to have been aware during the Relevant Period of the “**Historical Information**”, the “**March 2014 Information**” and the “**Compromised Model Information**” that Mr McFarlane pleads and particularises at ASOC paragraphs 20, 22 and 24. Taken together, that information is defined in the ASOC as the “**Alleged Material Information**”.

8 The Alleged Material Information was disclosed publicly to the market via a series of Fairfax media articles and statements by the Managing Director of IOOF, Chris Kelaher, to the Senate of the Federal Parliament between 20 June 2015 and 7 July 2015. The source of the revelations is identified by Mr McFarlane in Annexure B to the ASOC. Mr McFarlane alleges that this disclosure of the Alleged Material Information at the end of the Relevant Period, caused abnormal downward movements in IOOF’s share price.

9 Mr McFarlane brings this representative proceeding under Part IVA of *the Federal Court of Australia Act 1976* (Cth) on behalf of himself and group members who acquired an interest in ordinary shares in IOOF during the Relevant Period, or who acquired a long exposure to ordinary shares in IOOF by entering into an equity swap confirmation in respect of such shares during the Relevant Period.

10 By his originating application, Mr McFarlane seeks orders that Insignia pay compensation to Mr McFarlane and group members for the market-based losses suffered by them as a result of its share price being artificially inflated during the Relevant Period by reason of its breach of its continuous disclosure obligation and, or alternatively, its misleading or deceptive conduct (prayers 1 and 2). Mr McFarlane also seeks orders that Insignia pay interest and costs (prayers 3 and 4).

11 The trial of the common issues in this representative proceeding was conducted on the basis of the questions identified in the document styled “List of Common Issues and Questions” that was filed by consent of the parties on 28 April 2023, which provides as follows:

**I.** **Continuous disclosure case**

1 During the Relevant Period, was Insignia “aware” (within the meaning of ASX Listing Rule 19.12) of any of the following information:

1.1 the Historical Information;

1.2 the March 2014 Information; and/or

1.3 Compromised Model Information?

(**Alleged Material Information**)

2 If the answer to any part of question 1 is “yes”, when during the Relevant Period was Insignia aware of the Alleged Material Information?

3 Was Insignia, at any time during the Relevant Period, obliged pursuant to ASX Listing Rule 3.1 to tell the ASX of the Alleged Material Information (or any part thereof)?

4 Did Insignia contravene section 674(2) of the Corporations Act during the Relevant Period?

**II Misleading or deceptive conduct case**

5 During the Relevant Period, did Insignia engage in misleading or deceptive conduct, in contravention of s 1041H of the Corporations Act, s 12DA of the ASIC Act and/or s 18 of the ACL by:

5.1 failing to disclose the:

5.1.1 Historical Information;

5.1.2 March 2014 Information; and/or

5.1.3 Compromised Model Information;

5.2 further or alternatively, making the statements that it did to the ASX as set out in Annexure A to the ASOC, unqualified by the:

5.2.1 Historical Information;

5.2.2 March 2014 Information; and/or

5.2.3 Compromised Model Information?

6 If the answer to question 5 is “yes”, when during the Relevant Period did Insignia engage in that misleading or deceptive conduct?

7 Did Insignia make statements to the ASX on:

7.1 22 June 2015; and/or

7.2 24 June 2015;

that were:

7.3 false; and/or

7.4 without reasonable basis;

in contravention of s 1041H of the Corporations Act, s 12DA of the ASIC Act and/or s 18 of the ACL, as pleaded in paragraph 41 of the ASOC?

**III Causation, loss and damage**

8. During the Relevant Period, did any of the alleged contravening conduct by Insignia cause the market price for ordinary shares in Insignia to be greater than:

8.1 their true value; and/or

8.2 the market price that would have prevailed but for the alleged contravening conduct (or any part of it)?

9 If the answer to question 8 is “yes”, by how much was the market price for ordinary shares in Insignia greater than their true value and/or the market price that would have prevailed during the Relevant Period?

# BACKGROUND FACTS

12 The following background facts were summarised by the parties in their chronologies and written submissions and from my review of the documents jointly tendered by the parties.

## IOOF’s history and structure

13 IOOF has been listed on the ASX since 5 December 2003. In May 2009, Australian Wealth Management (**AWM**) merged with, and became a wholly owned subsidiary of, IOOF. At the time, both AWM and IOOF were listed financial service entities which provided a wide range of wealth management services. At the time of the merger:

(1) AWM operated through five divisions, including “Wealth Management” which provided financial advisory and stockbroking services through various subsidiary businesses. Those subsidiary businesses included Bridges Financial Services Pty Ltd (**Bridges**). Bridges provided financial advisory and stockbroking services through a network of financial planners. The Bridges business had a dedicated equities Research team which provided investment research services to its planner network. The head of the Bridges Research team was Mr Hilton;

(2) IOOF operated through four business units, one of which was Consultum, which provided financial advice through a network of authorised financial planners. Consultum’s business included its own equities research division that provided investment research services to its network of planners.

14 Following the AWM merger and until May 2013, Bridges and Consultum continued to operate independently within the merged group’s Financial Advice and Distribution division. That division was one of four divisions in the merged IOOF group structure, the others being: Platform Management and Administration; Investment Management; and Trustee Services.

15 In May 2013, the research functions of the group were combined to form a single IOOF Research team, which serviced both the Bridges and Consultum businesses. The Research team was headed by Mr Hilton, and continued to sit within the Financial Advice and Distribution division of the IOOF business.

16 The role of the Research team was set out in a document styled “IOOF Research Policy” dated June 2014. The document explained:

Research provides advice and general recommendations to advisers across the IOOF network (the network). The IOOF Advice Research objective is to disseminate well-articulated recommendations and opinions such that the network can provide a basis of opinion for client recommendations. Research recommendations are formulated through top down macro-economic analysis and bottom up investment selection in both direct assets and managed funds.

IOOF Advice provides services to four Dealer Groups within the IOOF Group. They are Bridges, Consultum, Plan B and My Adviser. Advice maintains APLs for Bridges, Consultum and Plan B. The APL’s are approved by the Dealer Group Investment Committees of which the Head of Research is a member.

Research is responsible for recommending approvals and removals from IOOF Platform Investment Menus. These recommendations are approved by the Product Investment Committee (PIC) of which the Head of Research is a member. The IOOF product offering also includes Australian Executor Trustees (AET) Small APRA Funds (SAFs). Research is tasked with providing risk ratings on these assets and with managing the Wholesale Access Fund menu which is the approved list for the SAF investors.

The Research Team comprises the Head of Research, six managed fund analysts, two equity analysts and an administration assistant.

17 The IOOF Research Policy went on to state that the Research team was delegated roles by the Boards of two entities – “Questor” and IOOF Investment Management Limited (**IIML**). The policy stated:

To ensure Questor and IIML perform duties in accordance with the obligations set out by law and regulation, the Board has established the Product Investment Committee (PIC) which delegates responsibilities to the Head of Research.

Specifically the role of Head of Research includes the following:

– Review and make recommendations to the Board on Investment Objectives and Strategies for all Products

– Report to the PIC on performance of appointed MIS funds to investment objectives and benchmarks and advise on any corrective actions

– Recommend to the PIC appointment and termination of MIS funds

– Review liquidity analysis of Products (data provided by Investment & Accounting Manager) and provide recommendations to the PIC

– Review stress testing analysis on Products (data provided by Investment & Accounting Manager) and provide recommendations to the PIC

18 In August 2014, IOOF acquired SFG Australia Ltd (**SFGA**), a financial advice and wealth management business. In February 2015, various changes were implemented across IOOF’s advice and shared services divisions. One of those changes was to appoint Matthew Drennan (who was formerly the Chief Investment Officer of SFGA) as the Group Head of Research and Portfolio Construction, reporting to the head of IOOF’s advice division, Michael Farrell. Mr Hilton’s title was changed to Head of Advice Research, reporting to Mr Drennan.

19 IOOF derives most of its earnings from fees and charges based on the level of funds under management, administration, advice and supervision (**FUMAS**). The level of FUMAS is impacted principally by net inflows (that is, the inflow of new client funds less withdrawals) and market performance (i.e., returns achieved on the investment of its FUMAS). Profits on IOOF’s FUMAS are generated principally from the Platform Management and Administration division and the Investment Management division.

## 2009 AWM Investigation

20 On 24 December 2008, Rob Urwin, who was at the time AWM’s Head of Investigations, was informed by a member of the Bridges stockbroking team, that Mr Hilton had placed an order seeking to sell stock held by his wife in the ING Office Fund (**IOF**) in circumstances where Bridges had issued a buy recommendation in relation to the stock. Mr Urwin interviewed the Research team analyst who prepared the Bridges report on IOF. The analyst reiterated to Mr Urwin that he still considered IOF to be a strong buy. Mr Urwin then authorised the execution of Mr Hilton’s requested trade.

21 The matter prompted Mr Urwin to investigate Mr Hilton and his wife’s share trading activity (**2009 AWM Investigation**). The investigation included the trades which are the subject of Mr McFarlane’s allegations in this proceeding, being the IOF trade in December 2008, a purchase of Macquarie Convertible Preference Shares in July 2008, a purchase of stock in Toll Holdings Limited in August 2008, and the allocation of shares in a Platinum Asset Management placement to Mr Hilton’s wife in May 2007. On 13 May 2009, Mr Urwin sent an email to Gary Riordan, IOOF’s General Counsel, setting out his conclusions from his investigation and recommendations in relation to, amongst others, Mr Hilton (**13 May 2009 Email**).

22 The 13 May 2009 Email recorded that Mr Urwin had found that “[i]t has not been proved that [Mr Hilton] was [front running] trades placed on behalf of his wife Shirlene, however, some of the execution was close or coincided with dissemination of Research”. The 13 May 2009 Email contained no finding that Mr Hilton had engaged in any illegal activity. However, Mr Urwin recommended that, going forward, Mr Hilton should provide AWM with a current register of interests for himself and his wife on a quarterly basis, and that he should obtain approval from his manager or the company secretary for all future share or investment transactions. Mr Hilton agreed to do so, and he was issued with a letter recording these outcomes (**2009 First and Final Warning Letter**).

23 At the time of the investigation, a separate report was received by Mr Urwin in relation to a possible insider trading incident involving an AWM fund accountant, Edward Youds, and a trade he placed in Electronic Media and Telecoms Company (**ETC**). Mr Urwin investigated the matter. The 13 May 2009 Email recorded that Mr Urwin found that it had not been proved that Mr Youds had price-sensitive information in relation to the ETC trade. The 13 May 2009 Email nonetheless noted that, due to his “position and involvement in the transaction”, Mr Youds “should have due regard to the risks and consequences of his actions”.

24 Notwithstanding the conclusions in the 13 May 2009 Email, during an interview with Mr Youds on 4 May 2009, Mr Urwin advised Mr Youds that, to make controls more rigorous and transparent, AWM was going to require Mr Youds to provide a register of interests including all his trusts, superannuation funds and individual holdings; require that all of his trades be approved by his immediate manager effective immediately; and require Mr Youds to attend further training.

25 In early May 2009, another employee in AWM’s fund accounting team, Amit Malguri approached Mr Urwin and disclosed that he had on previous occasions up until October 2008 made personal trades through a CommSec account. At the time, AWM had in place a staff trading policy which required that any staff trades must take place through Bridges stockbroking. Mr Malguri disclosed that he had not been aware of that policy and the requirement to only trade through Bridges stockbroking, and that since October 2008 he had traded only through Bridges stockbroking. Mr Urwin investigated the matter. The 13 May 2009 Email recorded that Mr Urwin had determined that the trades which he had reviewed were “outside embargo parameters”. Mr Urwin recommended that going forward all of Mr Malguri’s trades needed to be approved by his immediate manager and that Mr Malguri should be required to attend further training.

26 As a result of the 2009 investigation, Mr Urwin determined that none of the matters involving Mr Hilton, Mr Youds or Mr Malguri involved front running or insider trading, or were required to be reported to regulators. Mr Urwin considered but dismissed the notion that the matters indicated any “systemic” issue.

## March 2014 complaint

27 On 2 March 2014, Mr Hilton sent an email to Max Riaz, an analyst in the IOOF Research team, in which he raised concerns about some aspects of Max Riaz’s performance. He indicated to Max Riaz that he wished to discuss those matters with him that week.

28 The email prompted a response from Max Riaz on 3 March 2014 in which he noted his distress at having received such an email, and proceeded to make various criticisms about the IOOF Research team, including that IOOF plagiarised research reports from JP Morgan. The email relevantly stated:

I have produced 37 reports in the month of February. Every report I produce I give due consideration to what I am putting in the report even then the report are highly compromised in the areas of snatching material from other sources without mentioning proper sources. The financials are plagiarised from JP Morgan without sourcing mentioned. And you approve these. Furthermore, ASIC prescribes adequate time must be given to analysts to produce a report. You had one equities analyst in the office last week fielding planner calls and queries at the same time. Much of what we produce and distribute to the network and the lack of sufficient resourcing for equities directly contravenes ASIC’s requirements. The easy option for me will be to re-badge the JP Morgan report and there will be no delays but then please be informed that I will have very updated knowledge of what I am reporting on and it further compromises my professional integrity. Are you willing to simply re-badge and distribute JPM reports and send to the network. I have had planners calling me last week and appreciating my work that I have produced.

29 Mr Hilton forwarded Max Riaz’s 3 March 2014 email to IOOF’s head of human resources, Danielle Corcoran. He also sent her a draft proposed response to Max Riaz. The draft made clear that he did not agree with Max Riaz’s criticisms of the Research team, however, on Ms Corcoran’s recommendation, the draft was not sent.

30 On 4 March 2014, Ms Corcoran had a meeting with Max Riaz, in which Max Riaz made the March 2014 complaint orally. Ms Corcoran discussed the complaint with Mr Farrell on the same day. When making the March 2014 complaint, Max Riaz used as notes for his discussion with Ms Corcoran an email that he had sent to his brother, Zach Riaz, the day before on 3 March 2014. On 2 April 2014, Max Riaz forwarded the text of that email to Mr Urwin and wrote that the forwarded text “is what I communicated initially with Danielle”.

31 In his ASOC, Mr McFarlane alleges that, taken together, the March 2014 complaint comprised the following allegations:

(1) that Mr Hilton gave selective and preferential treatment to some of his particular planners and clients by providing them with price-sensitive information whilst leaving other planners and/or clients to face known risks (ASOC [17(a)]);

(2) that since at least the 2009-2010 financial year, IOOF had materially overstated the performance of its Buy-model Portfolio as compared with the ASX’s performance in both internal and external publications, with the material overstatement arising from IOOF’s under-provision in the model for the proper cost base and that the resulting overstated performance numbers were marketed to clients and planners (ASOC [17(b)]);

(3) that there had been breaches of password security to and within the Research team, including that Mr Hilton ordered Max Riaz to use the Head of Research’s network password to sign off on non-disclosure forms for capital transactions (ASOC [17(c)]);

(4) that IOOF plagiarised third party research reports and distributed that research without attribution or taking the time to verify that the research was accurate and/or had a reasonable basis (ASOC [17(d)]);

(5) that the Research team was inadequately resourced, leading to shortcuts being taken such as the alleged plagiarism, with only two analysts in the department:

(a) covering all of the ASX200 stocks plus other equities which might come onto that index; and

(b) during reporting season being expected to produce reports on approximately 300 companies over a three-week period, equating to approximately 14 stock reports per day (ASOC [17(e)]);

(6) that there had been bullying, intimidation and isolation of subordinate employees in the Research team by the Head of Research, Peter Hilton (ASOC [17(f)]);

(7) that Mr Hilton had since at least in or about 2010 instructed staff to complete his online Kaplan and eLearning modules for him (ASOC [17(g)]);

(8) that Mr Hilton imposed impractical deadlines for research reports during reporting seasons which placed client investments at risk by not giving due consideration to the results, a practice which the Australian Securities and Investment Commission (**ASIC**) explicitly warned against and then became a source of intimidation and harassment (ASOC [17(h)]); and

(9) that bonus payments had been withheld for improper / bullying reasons (ASOC [17(i)]).

32 Insignia admits that the March 2014 complaint comprised allegations at ASOC paragraphs 17(b)-(i) but says that the allegation in paragraph 17(a) was a more limited allegation made on 2 April 2014 by Max Riaz in relation to the Templeton Growth Fund.

## IOOF’s 2014 Investigation of Max Riaz’s complaints

33 Between March and April 2014, Ms Corcoran and Mr Urwin investigated the various complaints Max Riaz had raised against Mr Hilton.

34 By early April 2014, IOOF had concluded its investigation in relation to the matters arising from Max Riaz’s complaint, and a “Summary & Action Plan” was prepared by Ms Corcoran and Mr Urwin which recorded the findings and actions to be taken in relation to the matters which had been investigated (**Summary & Action Plan**). Although the date of the final form of the Summary & Action Plan is not disclosed on the face of the document, it is apparent that the document was last amended by Mr Urwin on 8 April 2014.

35 The Summary & Action Plan recorded the following findings and proposed actions:

(1) In relation to “Bullying, harassment and isolation”, that there was no evidence to support these allegations, but the Research team, including Mr Hilton, would be required to attend a training session on bullying, harassment and discrimination.

(2) In relation to “Breach of password access”, that Mr Hilton had shared his password with staff for the purposes of enabling them to use risk management software on his computer (“SWORD”) and that this matter had in fact previously been disclosed to the risk department (prior to Max Riaz’s complaint). It was decided that Mr Hilton was to receive a warning letter in relation to this matter; that he was to be required to assure that he had read and accepted IOOF’s password management policies; and that he was to complete online IT competency training. IOOF also determined that warnings should be given to the staff members with whom Mr Hilton had shared his password.

(3) In relation to “Instructing a direct report to complete Kaplan and eLearning training”, that Mr Hilton had allowed his direct reports to complete his training requirements. It was decided that the letter to be sent to Mr Hilton would also advise him of this finding; that he would be required to complete 12 hours of supervised training; that his responsible manager status would be removed immediately as he “no longer qualifies as fit and proper” and that he would be required to re-sit all his eLearning modules.

(4) In relation to “Plagiarism”, that the manner in which the Research team utilised JP Morgan research was not plagiarism in circumstances where a contract was in place with JP Morgan which permitted IOOF to utilise JP Morgan research on condition that IOOF did not refer to JP Morgan. However, it was found that there were a number of research presentations which were not correctly sourced or did not have a disclaimer attached. It was determined that various actions would be taken in response to these findings, including that a policy in relation to plagiarism would be established and rolled out to the Research team; that the IOOF marketing team would review all presentations to ensure they are adequately sourced; and that Mr Hilton would be required positively to assure that each presentation or research report had the appropriate disclaimer attached.

(5) In relation to “Misrepresented outperformance data”, that: the Buy-model data “ha[d] been wrong i.e. not usual practice since 2001”; the model ought to have been tested more regularly; Mr Hilton should have escalated the matter at the time he was made aware of it; and the matter “is not fraud rather inaccurate”.

(6) In relation to “Bonus payment”, that Max Riaz received a rating in his online performance review that would not ordinarily warrant a bonus under IOOF’s policy. IOOF determined that Mr Hilton should implement a structure for setting KPIs, reviewing these with his staff and communicating bonus decisions.

36 The Summary & Action Plan also relevantly recorded the following under the heading “Other comment”:

Favourable clients – Research must not have different recommendations for the same security throughout the network e.g. Goodman Plus Jan 2014.

37 On 1 May 2014, IOOF issued Mr Hilton the warning letter contemplated in the Summary & Action Plan (**2014 Final Warning Letter**). The letter stated as follows:

This letter confirms the numerous formal discussions with either Danielle Corcoran or myself that commenced on 10 March 2014 and have continued over the last few weeks regarding a number of allegations that had been brought to our attention Issues outlined during our last discussion are highlighted below

1 Claims of bullying harassment and isolation within the Research team

2 Sharing passwords for SWORD and the e-learning system

3 Instructing a direct report to complete Kaplan and e-learning training on your behalf

4 Plagiarising and incorrect sourcing of research data received from JP Morgan

5 Misrepresenting outperformance data

I have considered your responses to each of the matters above and have found that your actions warrant a final warning with respect to items 2 and 3

As discussed the expectation going forward is that you ensure completion of all items of the attached corrective action plan

All other items have been dismissed however there are some process improvements required for the division

Please be aware that failure to improve and maintain adequate improvement in the above areas may result in termination of your employment.

38 IOOF’s human resources team also prepared a spreadsheet, entitled “Research Corrective Action Plan” (**Research Corrective Action Plan**). The last dated version of the Research Corrective Action Plan was emailed by Mr Urwin to Ms Corcoran and Mr Farrell on 24 April 2014. The Research Corrective Action Plan set out action items, with corresponding estimated dates for completion, under the following headings:

(1) “Bullying, harassment and isolation”;

(2) “Breach of password access”;

(3) “Instructing a direct report to complete Kaplan and eLearning training”;

(4) “Plagiarism”;

(5) “Misrepresentation of outperformance numbers”;

(6) “Bonus payment”; and

(7) “Research structure – question if adequate”.

39 Approximately a year later, a copy of the Research Corrective Action Plan was obtained by Fairfax, who described the spreadsheet in a newspaper article as an “explosive three-page IOOF document” which revealed a “scandal” at IOOF.

## December 2014 complaint

40 On 12 May 2014, IOOF hired a new analyst in the Research team, Chhai Ung.

41 On 26 November 2014, Mr Hilton informed Mr Ung that a new manager in the Research team had been hired. Mr Hilton advised Mr Ung that changes would be made to some of the titles and reporting structures within the team. On 27 November 2014, Mr Ung sent an email to Ms Abercromby which stated:

I believe this is the wrong path and structure to take–- I raise the following concerns:

…

In regards to myself,

Just as with Morgan Stanley, Aberdeen Asset Management, I am glad Peter has entrusted me with the equities function. I am extremely delighted to be part of the team and stress I do want a long term career within IOOF

I have long held in high regard yourself, Peter and Chris–- and I have seen a lot over my last 10 years. A lot as a fund manager with Aberdeen.

- When Peter Hilton notified me yesterday of the new hire, I did not initially contemplate why “Merrium” sounded so familiar. Overnight I recalled that she had applied for one of the junior fund manager roles at Aberdeen to report to myself – I recalled her CV on my desk. From memory, she had approximately 2 years equity analyst experience and more performance analyst-based experience, had been made redundant from Pengana and had moved from Henderson. Performance analysis is not relevant to equities or managed funds research. Performance analysts are well suited to conduct the daily rebalancing for a market neutral strategy – not the research.

At Aberdeen, we went for the younger candidate. We felt Merrium amongst others were talented but had changed jobs too often (5 or 6 (?) jobs in as many years in as many years) – should this not have been picked up by IOOF HR?

- What does this signal to myself, Zach, Robbie, Brad to report to someone who has less relevant experience than we do?

- This signals to myself that there is no progression within this firm and to look elsewhere.

- This new team structure casts me aside from what I was hired to do–- research managed funds. This area was my next level of development.

- With the managed funds component being outsourced, what will this new hire be doing?

We should look to promote and train internally. This new structure and new job description/shift in responsibilities is a morale killer.

I am keen to hear thoughts before considering my future elsewhere (emphasis original).

42 In around November 2014, Mr Ung obtained Mr Urwin’s hardcopy files in relation to the 2009 and 2014 investigations. In about December 2014, Mr Ung commenced using Mr Urwin’s files to prepare a dossier accusing Mr Hilton and IOOF of all manner of wrongdoing. Mr Ung’s allegations were set out in a letter from Mr Ung addressed to Fair Work Commissioner Hampton, copied to Ms Corcoran and Mr Urwin dated 22 December 2014 (**December 2014 complaint**). The most serious allegation made by Mr Ung in the December 2014 complaint was that Mr Hilton had engaged in “repeated, systemic and ongoing insider trading/front running of research which demonstrates a culture of constant breaches of fiduciary duty and market manipulation designed to profit at client’s expense”. Mr Ung further alleged that IOOF had known about but had not acted upon Mr Hilton’s insider trading. Mr Ung also purported to describe a conversation he had with Mr Urwin. Mr Ung alleged Mr Urwin told him that he had “a stack of files” on Mr Hilton; that IOOF had known about Mr Hilton’s trading behaviour; that Mr Urwin said to him “next time [Hilton] tells you to do front running, just tell him its insider trading and illegal, he’ll stop”; and that Mr Urwin asked Mr Ung not to discuss the matter with IOOF’s human resources team.

## Mr Ung provides his insider trading dossier to IOOF

43 On 29 January 2015, Mr Ung commenced an anti-bullying application before the Fair Work Commission. Mr Ung repeated allegations of insider trading against Mr Hilton, although on this occasion it was said that Mr Hilton had, on multiple occasions, asked Mr Ung to commit “insider trading (front running of research)”.

44 On 2 March 2015, Mr Ung sent to Ms Corcoran, Mr Urwin and Mr Hilton, as well as the Fair Work Commission, a copy of the December 2014 complaint.

45 On 4 March 2015, Ms Corcoran sent an email to Mr Ung. She indicated that IOOF intended to investigate the matters he had raised. Ms Corcoran noted that, in relation to Mr Hilton’s alleged insider trading, Mr Ung had indicated in his March 2015 document that “I have yet to go through 2010, 2011, 2012, 2013, 2014 and 2015 YTD”. Ms Corcoran asked that Mr Ung provide the further information he had foreshadowed. No further information was forthcoming.

## IOOF’s investigation of insider trading allegations post 2009

46 On 30 March 2015, PwC was engaged to investigate Mr Ung’s complaint. Its scope of work was defined as being to investigate and determine whether “there is any evidence from the past six years that Mr Hilton had engaged in insider trading or “front running” [or] plagiarised material with respect to research reports he has produced”.

47 On 11 May 2015, IOOF terminated Mr Ung’s employment.

48 On 15 May 2015, PwC issued its report to IOOF (**PwC Insider Trading Report**). PwC did not identify any evidence indicating Mr Hilton had engaged in front running from 22 December 2008 to March 2015 through research reports released by IOOF/Bridges. PwC noted that it had identified “no instances of Mr Hilton buying securities through either his or his wife’s accounts ahead of issuing a favourable research report in relation to the same security, or issuing a negative report and buying securities shortly after the price had moved”.

## Publication of Fairfax articles

49 By 15 June 2015, Fairfax had obtained a copy of Mr Urwin’s investigation files.

50 On Saturday, 20 June 2015, and over the course of that weekend, a series of articles about IOOF appeared in Fairfax print and online publications variously under the headlines “Boiler room throws customers to the wolves”, “Insider trading – wrongdoings uncovered – planner hid dodgy trades” and “Litany of wrongdoings at IOOF included insider trading by senior employee”.

51 Following these disclosures, on 22 June 2015, being the first trading day after the first of the revelations in the Fairfax articles, there was an abnormal downward price movement in IOOF’s shares of 13.6%.

52 Over the course of ensuing days and weeks, a number of further articles would be published about the “scandal” at IOOF.

## Senate hearing

53 On 24 June 2015, Senator John Williams made a speech in the Senate concerning IOOF. The speech set out details of the alleged incidents of misconduct at IOOF previously reported by Fairfax, and disclosed that IOOF’s research processes were not ASIC compliant, it had no conflict-of-interest policy for research reports and no share trading policy.

54 On 7 July 2015, Mr Kelaher appeared before the Senate Economic References Committee (**Senate** **Committee**). The Committee was chaired by Senator Dastyari. Senator Williams was also in attendance. During a hearing before the Committee, Mr Kelaher relevantly stated that:

[IOOF’s] acquisition strategy over the years … has opened up tremendous long-term opportunities to our customers and our shareholders, but – candidly – it has also thrown up many challenges in respect of: merging IT systems; internal policies and protocols; and, most importantly, creating a single culture among staff coming from often diverse and formerly competitive organisations.

55 On 7 July 2015, there was an abnormal downward price movement in IOOF’s shares of 5.2%.

## Subsequent investigations

56 In July 2015, IOOF also engaged PwC to review its regulatory breach reporting policy and procedures for all regulated entities within the IOOF Group, being IOOF Holdings Limited and its subsidiaries, excluding Ord Minnett and Perennial. PwC was also to consider the current control environment of the Research Advice division. On 28 August 2015, PwC issued to IOOF an interim report setting out findings and recommendations arising from its review of the design of systems, processes and controls (**PwC Interim Report**).

57 Between 20 July 2015 and January 2016, ASIC conducted an investigation in connection with the Fairfax allegations.

58 On 25 November 2015, ASIC informed IOOF of the outcome of its investigation. An email from Mr Riordan to, amongst others, Mr Kelaher on that day stated that ASIC had informed him that its market surveillance team had investigated Mr Hilton’s trading activities, had not found sufficient evidence to warrant any further investigation into Mr Hilton, that there would be no formal investigation and that the matter was considered closed. ASIC confirmed the outcome of its investigation in a letter to IOOF dated 25 January 2016.

59 A representative of ASIC attended a meeting of the Board of Directors of IOOF on 27 May 2016. Minutes of that meeting record him as having communicated that:

The insider trading and front running allegations were examined with priority and there was no action for ASIC to take. This was because there was no price sensitive information being misused, noting that some trading was in breach of IOOF policies.

## IOOF’s FY16 annual report

60 On 30 August 2016, IOOF issued its annual report for FY16. The report noted that ASIC had finalised its inquiries into allegations against IOOF, and that ASIC had announced that no further action would be taken. It stated that IOOF had “always maintained that the company had thoroughly investigated the concerns and, where appropriate, took decisive action”.

# EVIDENCE

61 Mr McFarlane’ lay evidence is limited to his affidavit affirmed on 27 January 2021 (**McFarlane Affidavit**). Mr McFarlane deposed to having bought shares in IOOF during the Relevant Period on 2 June 2015. Mr McFarlane recalled reading media articles about IOOF in late June 2015 or early July 2015, which referred to a range of alleged corporate misconduct within IOOF. Mr McFarlane was unaware of the alleged corporate misconduct concerning IOOF referred to in those articles before reading them, nor of any other information to similar effect. Mr McFarlane was not cross-examined on his affidavit.

62 Insignia’s lay evidence is limited to the affidavit of Norika Kalember, the Payroll and Governance Manager in the Payroll Team at Insignia, affirmed on 7 June 2023. Ms Kalember deposed to the start and finish date of 24 individuals who were former employees of Insignia or its subsidiaries. Ms Kalember was not cross-examined on the content of her affidavit (**Kalember Affidavit**).

63 Mr McFarlane relies upon the expert reports of Mr Houston dated 26 September 2022 (**Houston Report 1**) and a reply report of Mr Houston dated 3 May 2023 (**Houston Report 2**).

64 Insignia relies upon the expert report of Dr Prowse dated 23 March 2023 (**Prowse Report**).

65 The parties also tendered in evidence a joint report of Mr Houston and Dr Prowse, dated 2 June 2023, which was prepared following a series of conferences facilitated by a Registrar of the Court (**Joint Expert Report**).

66 In overview, Mr Houston opined that the Alleged Material Information was disclosed to the market by the end of the Relevant Period which caused abnormal movements in IOOF’s share price on 22 June 2015 and 7 July 2015. Mr Houston calculated this movement and used it, in turn, to estimate the amount of inflation in IOOF’s share price during the Relevant Period resulting from IOOF’s failure to disclose the Alleged Material Information to the market. Mr Houston’s conclusions were based on an event study. An event study is an empirical technique that seeks to measure the extent to which observed movements in the share price of a company can be attributed to the release of particular information of interest.

67 Dr Prowse and Mr Houston agreed on the appropriate framework for assessing the price effect of information, the use of an event study and the magnitude of the abnormal price movements on 22 June 2015 and 7 July 2015. The principal disagreement between Mr Houston and Dr Prowse was the extent, if any, to which the language of the various disclosures may itself have affected Mr Houston’s estimate of the price effect of the disclosure of the information of interest on these two “event days”. I summarise the expert evidence at [157]-[327] below.

68 The parties tendered in evidence a substantial number of documents to which I was taken in opening and closing addresses as well as documents referred to in the parties’ written submissions. These documents were tendered jointly by the parties and marked Exhibit AR-3. In circumstances where the majority of documents sought to be tendered were IOOF’s internal business records, Insignia only objected to the tender of eight documents, as set out below:

(1) Insignia objected to the tender of a table titled “IOOF and ASIC Review Report dated 25 January 2016”. That table, which is referred to at [368] below, recorded concerns raised by ASIC in a letter to IOOF dated 25 January 2016, as well as IOOF’s responses to those concerns. During the trial, I ruled that I would receive the table into evidence together with an accompanying covering letter from IOOF to ASIC dated 5 February 2016: T 459.6-8. The covering letter confirmed that, although IOOF did not necessarily agree with some of ASIC’s observations in its letter of 25 January 2016, IOOF was keen to ensure that everything was done to satisfy ASIC that IOOF had responded to and dealt with the matter.

(2) Insignia objected to the tender of the correspondence comprising the December 2014 complaint. Ultimately, the parties agreed that the December 2014 complaint would be admitted subject to a limitation that it could not be used for a hearsay purpose other in relation to proof of asserted facts as to the timing and nature of the trades and research reports referred to in the complaint in items 1 to 57: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 1.

(3) Insignia objected to the tender of a memorandum titled “Insider Trading/Front Running of Research”. Ultimately, the parties agreed that the memorandum would be admitted subject to a limitation that the document could not be used for a hearsay purpose: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 2. In any case, Mr McFarlane’s closing submissions did not seek to rely on this document.

(4) Insignia objected to the tender of a memorandum titled “Unit Pricing Issues”. Ultimately, the parties agreed that the memorandum would be admitted subject to a limitation that the document could not be used for a hearsay purpose: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 3. In any case, Mr McFarlane’s closing submissions did not seek to rely on this document.

(5) Insignia objected to the tender of a memorandum titled “Non-ASIC RG79 Compliant Research Report”. Ultimately, the parties agreed that the memorandum would be admitted subject to a limitation that the document could not be used for a hearsay purpose: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 4. In any case, Mr McFarlane’s closing submissions did not seek to rely on this document.

(6) Insignia objected to the tender of the PwC Interim Report referred to at [56] above, and the final PwC report on the same matters dated 26 February 2016 (**PwC Final Report**). Insignia contended that neither document was admissible to prove opinions expressed by the author in relation to the adequacy of IOOF’s compliance arrangements. Further Insignia contended that the PwC Final Report could not be used to prove the content of IOOF’s register of interests. During the trial, I ruled that I would receive into evidence the PwC Interim Report and Final Report without limitation: T 459.8-12.

(7) Insignia objected to the tender of a newspaper article titled “Litany of wrongdoings at IOOF included insider trading by senior employee” dated 20 June 2015. Ultimately, the parties agreed that the article would be admitted subject to a limitation that the document could not be used for a hearsay purpose: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 5.

# OVERVIEW OF MR MCFARLANE’S CASE

69 The Alleged Material Information comprises the “Historical Information”, the “March 2014 Information” and the “Compromised Model Information”.

## Historical Information

70 The Historical Information is comprised of a number of allegations of “incidents” which are alleged to have occurred within AWM and IOOF over the period 1995 to 2014. IOOF is alleged to have been aware of these matters between 25 March 2014 and 16 April 2014, whilst investigating the March 2014 complaint. The allegations fall into the following five broad categories.

71 Firstly, the share trades by Mr Hilton and his wife, Shirlene Hilton, Mr Youds and Mr Malguri that was considered as part of the AWM 2009 Investigation discussed above: ASOC [20(a)], [20(b)], and [20(c2)]-[20(c9)]. Specifically, it is alleged that:

(1) Mr Hilton “had engaged in improper share trading before 19 May 2009 which resulted in him receiving a First and Final Warning Letter” from AWM: ASOC [20(a)] and [20(b)];

(2) Mrs Hilton bought and sold shares between 1995 and 2014 where purchases preceded positive research and sales followed, and sales preceded negative research released by AWM, in particular in Toll Holdings and IOF in 2009 and in a Platinum Asset Management float in 2008: ASOC [20(c2)];

(3) Mrs Hilton: (i) made a profit selling shares in Platinum Asset Management and the Challenger Infrastructure Fund, which shares were obtained from an allocation for AWM’s customers; and (ii) bought and sold Macquarie Convertible Preference Shares in circumstances where Mr Hilton had published two positive reports on those shares, in each case where Mr Hilton “did not disclose a conflict of interest”: ASOC [20(c3)];

(4) there was an “insider trading or market manipulation incident”, being a reference to the ETC trade by Mr Youds referred to at [23] above, which ASIC was not notified of in breach of ASIC Regulatory Guide 238 “which required the reporting of suspicious activity”: ASOC [20(c4)]-[20(c8)];

(5) AWM investigated Mr Malguri for insider trading in 2009, concluded that Mr Malguri’s trades were outside embargo parameters, and did not notify ASIC of the investigation or outcome: ASOC [20(c9)].

72 Secondly, it is alleged that, on 16 December 2013, a Bridges financial planner sent an email questioning recommendations made by the Research team and stating that “I can’t help but feel our Research team has finally been compromised!!”: ASOC [20(c10)].

73 Thirdly, it is alleged that, since 2009, IOOF financial planning subsidiary companies (including Consultum) had been the subject of regulatory action by ASIC, with a number of planners banned and at least one planner sentenced to prison: ASOC [20(c11)].

74 Fourthly, it is alleged that, in the period 2012-2013, IOOF had at least 16 breaches of its own risk policies: ASOC [20(d)].

75 Fifthly, it is alleged that:

in and since 2009, there had been multiple incidents within IOOF of impropriety or possible impropriety which arose from one of the following:

(b) information barrier breaches (or “Chinese wall” breaches);

(ii) non-compliance with IOOF’s staff trading policy;

(iii) IOOF staff taking placement allocations ahead clients;

(iv) failure to manage conflicts of interest;

(v) data integrity and cybersecurity failures;

(vi) failures of compliance oversight,

and are recorded in one or more of the IOOF breach registers; documents passing between IOOF and ASIC during the course of inquiries undertaken by ASIC that commenced in or about July 2015; documents passing between IOOF and PWC during the course of investigations undertaken by PWC that commenced in or about March 2015 and July 2015. (ASOC [20(c1)])

76 Insignia, in its Further Amended Defence filed on 22 December 2021 (**FAD**), largely denies the substance of these allegations and says that it was not aware of any misconduct or wrongdoing such as insider trading, improper share trading and failures of compliance oversight. Insignia admits some of the allegations, such as the fact that it received the email on 16 December 2013 and that it knew that two Bridges planners were banned by ASIC and that one of those two was also sentenced to a term of imprisonment but says that this information was generally available: FAD [20].

## March 2014 Information

77 The March 2014 Information comprises allegations of various unrelated matters that IOOF is alleged to have been aware of between 25 March 2014 and 16 April 2014.

78 Firstly, it is alleged that IOOF was aware that the allegations comprising the March 2014 complaint were true, namely, the allegations of preferential treatment; Buy-model errors; password sharing; inadequate resourcing of the Research team leading to plagiarism; impractical deadlines for research reports; that Mr Hilton had instructed staff to complete his online Kaplan and eLearning modules for him; bullying, intimidation and isolation; and that bonus payments had been withheld for improper/bullying reasons: ASOC [17] and [22(a)].

79 Insignia admits that as a result of the investigation of the March 2014 complaint IOOF concluded that some of the allegations were substantially true – namely, overstating the performance of the hypothetical Buy-model, breach of password access, failure to properly attribute third party research reports in research presentations and instructing direct reports to complete training: FAD [22(a)(i)].

80 Insignia pleads a number of additional factual matters relevant to those allegations which Insignia contends need to be considered in order to properly understand the “full picture” in relation to those matters: FAD [22(d)], [22(e)] and [22(g)]. Insignia otherwise denies that the allegations in the March 2014 complaint were true or substantially true: FAD [22(a)(ii)].

81 Secondly, a number of other allegations form part of the March 2014 Information including:

(1) that Mr Hilton had failed to comply with the 2009 First and Final Warning Letter, but had not been dismissed or disciplined (ASOC [20(b)]);

(2) that there was inadequate resourcing (technological and human) of the Research team (ASOC [20(c)]);

(3) that IOOF had failed to identify, record and control conflicts of interest [ASOC [20(h)];

(4) that IOOF had inadequate internal controls to monitor and mitigate compliance risks arising as a result within the Research team, having regard to the Research team’s role ([ASOC [20(i)]);

(5) IOOF employed manual or other work arounds or temporary patches to resolve incompatibility between legacy IT systems of its various businesses and IOOF’s IT infrastructure ([ASOC [20(j)]);

(6) that the Research team was the subject of a review and restructure by IOOF’s executive management team ([ASOC [20(k)]).

82 Insignia denies these allegations: FAD [22].

## Compromised Model Information

83 The Compromised Model Information is that the “implementation of the Roll Up Model was compromised in a material way”: ASOC [24].

84 The “Roll Up Model” is defined in the ASOC as IOOF’s strategy of seeking to grow in size and value by combining organic growth with acquisitions and using existing IOOF infrastructure (including IOOF’s Research team) to service both the pre-existing and newly acquired businesses: ASOC [9].

85 IOOF is alleged to have been aware of the Compromised Model Information “[b]ecause of its awareness of the Historical Information and the March 2014 Information”: ASOC [24].

86 The Compromised Model Information is premised on the existence and IOOF’s alleged awareness of the Historical Information and the March 2014 Information. Insignia denies these allegations.

## Insignia’s awareness of the Alleged Material Information

87 Mr McFarlane contends that Insignia was aware of the Alleged Material Information because:

(1) firstly, Insignia received and investigated the March 2014 complaint;

(2) secondly, during the Relevant Period, Insignia was aware of the facts comprising the Historical Information, March 2014 Information and Compromised Model Information; and

(3) thirdly, officers of Insignia either did, or should have, drawn those facts of which they were aware together for the purposes of ensuring that Insignia complied with its obligation of continuous disclosure and, or alternatively, did not engage in misleading or deceptive conduct.

88 McFarlane relies upon an email from Mr Urwin to Paul Vine, IOOF’s General Manager of Legal, Risk and Compliance, on 30 March 2015 in relation to the investigations conducted in 2014 and noted his and Ms Corcoran’s awareness in 2014, of issues from 2009. Mr Urwin wrote (emphasis added):

As per my file note in the email attached I raised the previous matters with Danielle Corcoran as *the behaviours of Peter Hilton were systemic* and Peter was not exercising skill or diligence in his role. I needed to point out he should have been on a first and final warning previous and these examples should be taken into account with previous matters. (emphasis added)

89 Mr McFarlane submits that the documentary evidence establishes that most of the matters constituting the Alleged Material Information are true. In addition, he submits that the Court can conclude that those matters that are true, at least in combination, had a material consequence for the market’s view about IOOF such that (a) they were material and (b) in the absence of their disclosure, IOOF was misleading the market having regard to other representations it had made to the market. Mr McFarlane contends that the most logical inference is that the Alleged Material Information that is true was material to IOOF’s share price because of three matters:

(1) IOOF’s value was dependent upon its reputation and important aspects of its reputation were its integrity (because it needed clients and planners to trust it with their money) and the effectiveness of its Roll Up Model;

(2) the matters constituting the Alleged Material Information were contrary to IOOF’s reputation, integrity, and the effectiveness of its Roll Up Model;

(3) when information that substantially corresponded to the Alleged Material Information was revealed to the public by Fairfax reports and Mr Kelaher’s senate testimony, IOOF’s share price fell substantially.

90 Insignia disputes that, even if the matters are true, they were material to the value of IOOF.

91 Mr McFarlane also invokes Insignia’s constructive awareness, citing *Crowley v Worley Ltd* (2022) 293 FCR 438 (***Crowley***) at [5] (Perram J) and [160(4)], [166] (Jagot and Murphy JJ).

92 Mr McFarlane submits that, on any view, IOOF must have known that it had an undisclosed cultural problem that affected the effectiveness of its systems, governance and compliance.

93 Mr McFarlane submits that during the Relevant Period, the market was unaware of the matters in the March 2014 complaint, the December 2014 complaint, and the other matters comprising the Alleged Material Information. From the market’s perspective, there was no reason to doubt IOOF’s statements concerning its value and growth based in each case upon its model, as pleaded and admitted (ASOC [10], [14] and Annexure A; FAD [10] and [14]).

94 Mr McFarlane submits that in the circumstances, during the Relevant Period, IOOF ought reasonably to have formed the opinion that:

(1) the Historical Information and the March 2014 Information, or a summary of that information, ought to have been disclosed to the market; and/or alternatively

(2) IOOF’s implementation of its business model was compromised in a material way (i.e., the Compromised Model Information), which ought to have been disclosed to the market.

95 Mr McFarlane submits that the expert evidence of Mr Houston establishes that the Alleged Material Information was disclosed in June and July 2015 and caused material abnormal price movements in IOOF’s share price.

96 Mr McFarlane submits that the documentary evidence tendered makes it clear that IOOF was aware of the Alleged Material Information but failed to disclose it.

97 Mr McFarlane submits that during the Relevant Period, s 674(2) of the *Corporations Act* and ASX Rule 3.1 required Insignia to make immediate disclosure of information of which it was aware which was not generally available and a reasonable person would expect, if the information were generally available, to have a material effect on the price or value of Insignia’s shares.

98 Mr McFarlane submits that the Alleged Material Information satisfied those criteria. IOOF was required to disclose the Alleged Material Information to the market during the Relevant Period. It did not. As a consequence, IOOF breached s 674 of the *Corporations Act*.

99 In the alternative, Mr McFarlane claims that IOOF engaged in misleading or deceptive conduct by silence or, alternatively, that IOOF made statements which were false or without a reasonable basis in response to the Fairfax articles.

## Causation, loss and damage

100 Mr McFarlane relies on indirect market-based causation. If an applicant shareholder can prove that a company’s conduct contravened a statutory norm such that its share price was inflated, then provided that the shareholder was not otherwise aware of the true position, the shareholder has established both loss and a causative link between the company’s conduct and the shareholder’s loss (*TPT Patrol Pty Ltd v Myer Holdings Ltd* (2019) 293 FCR 29 (***Myer***) at [1654], [1663].

101 Mr McFarlane deposes to not being aware of the true position: McFarlane Affidavit [11].

102 Mr McFarlane submits that the result of the Alleged Material Information being withheld from the market during the Relevant Period was that IOOF’s share price was inflated as compared with its true value.

103 Mr McFarlane alleges that the failure of IOOF to disclose the pleaded information caused the decline in IOOF’s share price between 19 June 2015 and 7 July 2015: ASOC [35]-[36]. Mr McFarlane alleges that the failure of IOOF to disclose the pleaded information caused loss and damage to Mr McFarlane and group members: ASOC [39].

## Quantum

104 Mr McFarlane’s case on quantum relies solely on Mr Houston’s expert reports and analysis. Mr Houston presented his opinion of the estimate of the inflation of IOOF’s share price during the Relevant Period, compared with the true value of those shares had IOOF made a corrective disclosure from 4 March 2014: Houston Report 1, pp 105-115.

## Mr McFarlane’s submissions on the List of Common Issues and Questions

105 Mr McFarlane submits that the “List of Common Issues and Questions” filed by consent of the parties on 28 April 2023, and set out at [11] above, hinge on the Court’s determination of six key questions:

(1) whether certain pleaded information about the operations, systems and culture of IOOF was substantively true;

(2) whether IOOF was aware of the pleaded information that was substantively true during the Relevant Period;

(3) if so, whether IOOF was required to disclose some or all of that information to the market in accordance with its obligation of continuous disclosure;

(4) whether in the absence of public disclosure by IOOF of the substantively true information about the operations, systems and culture of IOOF, IOOF engaged in misleading or deceptive conduct having regard to the public statements that it did make;

(5) whether the contraventions of either the obligation of continuous disclosure or the prohibition on misleading or deceptive conduct caused any loss to Mr McFarlane and other persons who acquired shares in IOOF during the Relevant Period; and

(6) if the contraventions did cause loss, what the quantum of that loss is or how it should be determined.

106 Mr McFarlane submits that in answering these questions the Court will need to consider the effect of information on IOOF’s reputation. Mr McFarlane has pleaded that during the Relevant Period, the market value of IOOF’s shares was based on and/or materially affected by its good standing and reputation: ASOC [16(a)].

## Allegations not pressed by Mr McFarlane

107 By letter dated 19 June 2023 (after the commencement of the trial on 5 June 2023), Mr McFarlane’s solicitors advised that there were three matters that were no longer pressed:

(1) firstly, in relation to ASOC paragraphs 17(f), 17(i) and 22(a) – Mr McFarlane maintains that the allegations in paragraphs 17(f) and 17(i) regarding bullying were made, but Mr McFarlane accepts for the purposes of ASOC paragraph 22(a) that they were not found to be true by IOOF at the time and cannot otherwise be substantiated on the evidence;

(2) secondly, in relation to ASOC paragraph 20(c2) – Mr McFarlane does not press sub-subparagraphs (iv) or (v) which relate to the IOF and Platinum allocations and are covered by other pleadings; and

(3) thirdly, in relation to ASOC paragraph 20(c4) – the only part of the allegation that Mr McFarlane presses is “that in or about 2009 there was an incident in relation to [ETC], involving IOOF staff” and thus does not press sub-subparagraphs (i)-(iv) or seek to establish that there was an “insider trading and/or market manipulation incident” (as referred to in the chapeau).

## IOOF’s Defence – No Positive Defence Pleaded

108 An initial issue that emerges is whether it is permissible for the Court to consider whether information in the Fairfax articles and Senate testimony of Mr Kelaher *other than* the pleaded Alleged Material Information may have caused the decline of IOOF’s share price on the relevant event days. Mr McFarlane’s contention is that Insignia is precluded from advancing such a contention by reason of its articulation of its case in the FAD.

109 In overview, Mr McFarlane pleads at ASOC paragraph 35 that the Historical Information, March 2014 Information and Compromised Model Information (that is, the Alleged Material Information) were disclosed, or discernible from public disclosures, referable to the Fairfax articles and the Senate testimony of Mr Kelaher. In response to this plea, Insignia relevantly pleads at FAD paragraph 35, as follows:

(1) subject to limited exceptions, Insignia says that the allegations said to comprise the Historical Information, the March 2014 Information, and the Compromised Model Information were not substantiated: FAD [35(a)];

(2) Insignia denies that the allegations in the Fairfax articles or the statements made by Mr Kelaher in his Senate testimony amounted to the disclosure of the Historical Information, the March 2014 Information, and the Compromised Model Information “for the reasons stated above in sub-paragraph (a)”: FAD [35(b)]-[35(c)];

(3) Insignia otherwise denies the allegations: FAD [35(d)].

110 At ASOC paragraph 36, Mr McFarlane pleads that the revelations pleaded in ASOC paragraph 35 (that is, the disclosure of the Alleged Material Information) caused a decline in IOOF’s share price between 19 June and 7 July 2015. Insignia pleads that it does not know, and therefore cannot admit this allegation: FAD [36].

111 Mr McFarlane submits that Insignia at no point expressly pleads that the fall in IOOF’s share price was due to information in the Fairfax articles and statements by Mr Kelaher other than the Alleged Material Information. On Mr McFarlane’s submissions, having made the choice not to plead a positive case that it was the disclosure of other information that caused the fall in IOOF’s share price, Insignia cannot now submit to the Court that this in fact occurred.

112 I reject Mr McFarlane’s submissions. Mr McFarlane has pleaded, at ASOC paragraph 36, a positive case that the disclosure of the Alleged Material Information in the Fairfax articles and Mr Kelaher’s Senate testimony caused IOOF’s share price decline. Insignia has, at FAD paragraph 36, not admitted that plea. The practical effect of an express non-admission is the same as that of an express denial – that is, the opposing party is put to proof on the issue that is not admitted: *Australian Competition and Consumer Commission v Craftmatic Australia Pty Ltd* [2009] FCA 972 at [31]; *Australian Competition and Consumer Commission v Cabcharge Australia Ltd (No 2)* [2010] FCA 837 at [7]; *Warner v Sampson* [1959] 1 QB 297 at 311 (Lord Denning), 319 (Hodson LJ), 324-5 (Ormerod LJ). Insignia has therefore put Mr McFarlane to proof on the causal link between the disclosure of the Alleged Material Information and the decline in IOOF’s share price.

113 In the present case, Mr McFarlane seeks to prove this causal link by relying on the expert evidence of Mr Houston: see Mr McFarlane’s closing written submissions at [21], [280], [388]. The substance of Mr Houston’s evidence was that, as a result of the Alleged Material Information being withheld from the market during the Relevant Period, Insignia’s share price was inflated as compared with its true value. That conclusion was based on his event study, which measured the extent to which the movement in IOOF’s share price on 22 June 2015 and 7 July 2015 could be attributed to the disclosure of the Alleged Material Information (or “information of interest”) As will be discussed further below, Mr Houston’s opinion was that a condition for the performance of any event study was the ability to isolate the effect of confounding news, defined as price-relevant information that becomes known at around the same time as the information of interest.

114 It follows from the above that the probative value of Mr Houston’s evidence will depend on an assessment of whether his event study properly accounts for any confounding news which became known at the time of the disclosure to the market of the Alleged Material Information. Such confounding news would encompass price-sensitive allegations in the Fairfax articles and Mr Kelaher’s Senate testimony other than, or different to, the pleaded information constituting the Alleged Material Information.

115 It cannot be said that Mr McFarlane was not on notice that Insignia’s case would rely in part on a contention that there were material differences between the Fairfax articles and the Alleged Material Information, notwithstanding that Insignia had not specifically pleaded as to these differences in the FAD. Dr Prowse’s opinion, as stated in the Prowse Report, was that the entire IOOF share price reaction on 22 June 2015 could not be attributed to the information of interest – that is, the Alleged Material Information – because the corrective disclosures in the Fairfax articles in June 2015 contained “value-relevant negative information that was not included in the information of interest”: see Prowse Report, Pt IV(B). The value-relevant negative information to which Dr Prowse was referring in the Prowse Report was, in overview, the sensationalist language of the Fairfax articles. That is, of course, different to the value-relevant negative information in the Fairfax articles on which Insignia now seeks to place emphasis, namely, substantive allegations in the Fairfax articles other than, or different to, the Alleged Material Information. However, in my opinion, having put Mr McFarlane to proof on the causal link between the disclosure of the Alleged Material Information and the decline in IOOF’s share price by FAD paragraph 36, it is open to Insignia to test, in cross-examination, Mr Houston’s evidence to determine if it adequately accounts for the effect of any confounding news. Such cross-examination can permissibly extend to testing if Mr Houston’s event study accounted for confounding news in the form of price-sensitive allegations in the Fairfax articles and Mr Kelaher’s Senate testimony other than, or different to, the Alleged Material Information as pleaded in the ASOC. Similarly, I consider that it is open to Insignia to submit to the Court that Mr McFarlane has failed to establish a causal link between the disclosure of the Alleged Material Information and IOOF’s share price decline, because the evidence of Mr Houston has failed to account for confounding news in the form of price-sensitive allegations in the Fairfax articles and Mr Kelaher’s Senate testimony other than, or different to, the Alleged Material Information.

## Mr McFarlane’s reliance upon the principle in Jones v Dunkel

116 As set out above, Insignia does not rely on any lay evidence in support of its case other than the Kalember Affidavit, which merely deposed to the start and finish date of numerous former employees. In these circumstances, Mr McFarlane makes, in substance, two submissions.

117 Firstly, Mr McFarlane submits that Insignia’s case relies on the Court impermissibly drawing a series of “reverse *Jones v Dunkel*” inferences, referring to *Jones v Dunkel* (1959) 101 CLR 298 (***Jones v Dunkel***) – that is, inferences *in favour* of Insignia in circumstances where Insignia has not called a witness to adduce evidence in support of its case. Mr McFarlane identifies the following examples of Insignia’s alleged invitation to the Court to draw a “reverse *Jones v Dunkel*” inference:

(1) Insignia’s attempts, according to Mr McFarlane, to downplay inferences arising from internal IOOF documents which refer to the important and centralised role of the Research team in the IOOF Group by referring to IOOF’s practical operations, the size of its business, its number of employees, and so on (Mr McFarlane’s closing written submissions at [38]);

(2) Insignia’s submission that any problems in its advice business had a *de minimus* effect on the value of IOOF’s business overall (Mr McFarlane’s closing written submissions at [39]);

(3) Insignia’s submission that the reason IOOF did not investigate the December 2014 complaint was because IOOF decided the allegations were nonsensical (Mr McFarlane’s closing written submission at [40]);

(4) Insignia’s submission that IOOF had properly investigated complaints (Mr Hodge KC, T 435.6-7);

(5) Insignia’s submission that there was another explanation for the problems with IOOF’s Buy-model apart from the issue identified by Max Riaz (Mr Hodge KC, T 435.7-8);

(6) Insignia’s submission that the unit pricing errors relied on by Mr McFarlane at ASOC paragraph 20(d) were insignificant (Mr Hodge KC, T 435.9);

(7) Insignia’s submission that the restructure of the Research team was due to the acquisition of SFGA (Mr Hodge KC, T 435.9-10);

(8) Insignia’s submission that the operation of the Research team was “in general okay” (Mr Hodge KC, T 435.10-11); and

(9) Insignia’s submission that there was not an under-resourcing issue at IOOF (Mr Hodge KC, T 435.11-12).

118 Secondly, Mr McFarlane also relies upon the principle expounded by Lord Mansfield CJ in *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 (***Blatch***) at 970:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

119 Mr McFarlane submits that consistently with the principle in *Blatch* and *Jones v Dunkel* at 308 (Kitto J), 321-2 (Menzies J), the Court can more comfortably draw inferences that are open on the contemporaneous documents against Insignia as a result of Insignia’s unexplained failure to adduce evidence from anyone other than Ms Kalember involved with Insignia. I understand the effect of Mr McFarlane’s submissions to be that the Court can more comfortably draw an inference in favour of Mr McFarlane in respect of each of the topics identified at [117] above: Mr Hodge KC, T 435.6-15. Mr McFarlane’s closing written submissions also identify two further inferences the Court may more comfortably reach given Insignia’s failure to call a witness:

(1) Mr McFarlane submits that the Court can infer that observations made by PwC in the PwC Interim Report about IOOF’s use of processes requiring manual data inputs, and multiple registers capturing different information, were matters that were observable more than a year earlier when IOOF received the March 2014 complaint (Mr McFarlane’s closing written submissions at [233]);

(2) Mr McFarlane submits that the Court can infer that the allegations contained in an email from a Bridges financial planner on 16 December 2013 alleging that the Research team had been “compromised” – an email which is identified at ASOC paragraph 20(c10) as forming part of the Historical Information – were regarded as serious given the email was forwarded to Mr Kelaher, the then Managing Director of IOOF, and Mr Mota, the current CEO of Insignia (Mr McFarlane’s closing written submissions at [168]).

120 It is convenient to address Mr McFarlane’s first and second submissions together.

121 The rule in *Jones v Dunkel* was summarised by Heydon, Crennan and Bell JJ in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [63]-[64] as follows:

The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party’s case. … The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn …

The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party.

122 In *Coshott v Prentice* (2014) 221 FCR 450 at [80], the Full Court (Siopis, Katzmann and Perry JJ) endorsed the following articulation of the relevant principles by Hodgson JA (with whom Beazley JA agreed) in *Ho v Powell* (2001) 51 NSWLR 572 at [14]-[15]:

[I]n deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision.

In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so.

123 It must be borne in mind that Mr McFarlane bears the onus of proof in this matter. That onus cannot be discharged by using a *Jones v Dunkel* inference to “fill evidentiary gaps or convert conjecture into inference”: *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335 (***Chetcuti***) at [91] (Murphy and Rangiah JJ). That is to say, the absence of a particular witness cannot be used to make up any deficiency of evidence – any inference must be founded in evidence: *Commonwealth v Fernando* (2012) 200 FCR 1 at [117] quoting *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 124. Further, the facts proved must give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture: *Chetcuti* at [95].

124 The principles set out at [123] above supply a sufficient basis for refusing to draw a *Jones v Dunkel* inference on many of the topics set out at [117] and [119] above. It also explains why Mr McFarlane’s characterisation of Insignia as inviting the Court to draw a “reverse *Jones v Dunkel*” inference is, in many cases, misconceived. Taking the relevant topics in turn:

(1) Mr McFarlane seeks to rely on IOOF documents to establish the importance of the role of the Research team in IOOF. Such evidence is relevant to an assessment of the materiality of the issues identified in the ASOC relating to IOOF’s Research team and, in particular, IOOF’s Head of Research, Mr Hilton. However, evidence disclosed in IOOF’s internal documents about IOOF’s practical operations and the size of its business is also relevant to an assessment of the materiality of the issues identified in the ASOC. Insignia is entitled to rely on such documentary records to contradict Mr McFarlane’s case on materiality. Doing so, without calling a witness from within Insignia, does not amount to an invitation to the Court to draw a “reverse *Jones v Dunkel* inference” in favour of Insignia. It is to be remembered that Mr McFarlane bears the onus of establishing, on the balance of probabilities, the materiality of the Alleged Material Information. Mr McFarlane has not called expert evidence in support of his case on this issue. In these circumstances, the Court must assess the materiality of the Alleged Material Information on the documentary record available to it. For the reasons set out below in this judgment, on the basis of my review of the documents, I am not satisfied that Mr McFarlane has discharged his onus of proof. Mr McFarlane submits that the Court should draw a *Jones v Dunkel* inference which, in substance, would result in the Court disregarding Insignia’s evidence of IOOF’s practical operations and its business on the basis that it has not called a witness to give oral evidence about those topics. I decline to do so. In circumstances where Mr McFarlane has not satisfied his onus of proof on the materiality of the Alleged Material Information, drawing the inference pressed by Mr McFarlane would be to impermissibly permit Mr McFarlane to fill evidentiary gaps in his case on this issue.

(2) Mr McFarlane contends that Insignia is not “entitled to make more specific submissions that any problems in its advice business would have had a *de minimus* effect on the value of IOOF’s business overall”: closing written submission at [39]. In truth, Insignia’s submission is no more than Mr McFarlane has failed to discharge his onus of proof on the issue of the materiality of any deficiencies identified in IOOF’s advice business. For reasons discussed further in this judgment, I agree with that submission. Mr McFarlane cannot avail himself of a *Jones v Dunkel* inference against Insignia to cure this deficiency in his case. In accepting Insignia’s submission that Mr McFarlane has failed to discharge his onus of proof on this issue, I do not draw any “reverse *Jones v Dunkel* inference” in favour of Insignia. My conclusion is simply that Mr McFarlane has not adduced sufficient evidence to ground an inference that any problems in IOOF’s advice business that did exist were material to its share price.

(3) I reject Insignia’s submission that IOOF failed to investigate the December 2014 complaint because IOOF decided the allegations were nonsensical. There is no documentary evidence which supports a conclusion that this was the reason that IOOF did not investigate the December 2014 complaint. It follows that no such conclusion is available to the Court, irrespective of whether a *Jones v Dunkel* inference arises against Insignia.

(4) Mr McFarlane seeks to rely on Insignia’s failure to call a witness as a basis for drawing an adverse inference against Insignia on the question of whether IOOF properly investigated complaints. Ultimately, the adequacy of IOOF’s investigation of complaints is a matter to be determined based on the IOOF internal documents tendered into evidence. Those documents do not disclose an inadequacy in IOOF’s internal investigations that is capable of supporting Mr McFarlane’s continuous disclosure case or misleading and deceptive conduct case. As discussed further at [644(3)] below, the principal deficiency identified by Mr McFarlane is the imposition of a six-year review period on the PwC Insider Trading Report, which was commissioned to investigate the allegations in the December 2014 complaint. However, as discussed at [651]-[652], the relevant PwC Insider Trading Report provided an adequate explanation for the review period that it adopted. It follows that I am not satisfied that Mr McFarlane has established, on the evidence, that there was a deficiency in IOOF’s investigation of the allegations the subject of this proceeding. Mr McFarlane cannot rely on *Jones v Dunkel* to draw an inference about the adequacy of IOOF’s investigations that is not reasonably available on the evidence.

(5) The issue relating to IOOF’s overstatement of the Buy-model performance figures is discussed further at [438]-[447]. IOOF internal documents clearly record that, while investigating Zach and Max Riaz’s allegations concerning the Buy-model, contrary views were expressed as to the correctness of Zach Riaz’s model for calculating the performance of the Buy-model. They also record that IOOF ultimately concluded that the Buy-model data had been wrong. I accept Mr McFarlane’s submission that, in these circumstances, and in the absence of any other evidence, it is not open to Insignia to contend that IOOF ultimately formed the view that there was some other explanation for the problems with IOOF’s Buy-model. That is the only reasonable conclusion available on the documents, irrespective of whether a *Jones v Dunkel* inference arises against Insignia.

(6) The materiality of the unit pricing errors relied on by Mr McFarlane at ASOC paragraph 20(d) is discussed at [600]-[602]. Mr McFarlane bears the onus of establishing the materiality of these errors, having regard to the decision-making of a rational investor. For reasons there discussed, I am not satisfied that he has discharged that onus. In fact, he has put no evidence before the Court to directly establish the materiality of any identified unit pricing errors. He cannot avail himself of a *Jones v Dunkel* inference to cure this deficiency in his case. In accepting Insignia’s submission that Mr McFarlane has failed to discharge his onus of proof on this issue, I do not draw any “reverse *Jones v Dunkel* inference” in favour of Insignia. My conclusion is simply that Mr McFarlane has not adduced sufficient evidence to ground an inference that the unit pricing errors were material to IOOF’s share price.

(7) The restructure of the Research team is discussed at [517]-[530]. IOOF’s internal documents establish that IOOF’s decision to restructure its Research team was directly connected to the decision to integrate the business of SFGA and IOOF. The documents also establish that the decision to restructure the Research team was taken and implemented after IOOF had concluded its investigation of the March 2014 complaint. Mr McFarlane is not entitled to rely on a *Jones v Dunkel* inference to submit that the Court should reach some alternative conclusions as to the rationale and timing of the restructure of the Research team when those conclusions are not supported by contemporaneous documents. My conclusion does not rely on the drawing of any “reverse *Jones v Dunkel* inference” in favour of Insignia, and instead is based on a review of the contemporaneous documents concerning the decision to restructure IOOF’s Research team.

(8) It is not entirely clear what submissions Mr McFarlane refers to when he states, as his senior counsel did in oral closing submissions, that Insignia had submitted that the operation of the Research team was “in general okay”. However, to the extent that Mr McFarlane alleges that there were systemic issues in IOOF’s Research team, or IOOF more broadly (as is alleged at ASOC paragraphs [22(h)], [22(i)], [22(j)] and [24]) Mr McFarlane bears the onus of establishing the existence of those issues. I have concluded that he has not, and a *Jones v Dunkel* inference cannot fill the gaps in his evidence. In accepting Insignia’s submission that Mr McFarlane has failed to discharge his onus of proof on this issue, I do not draw any “reverse *Jones v Dunkel* inference” in favour of Insignia. My conclusion is simply that Mr McFarlane has not adduced sufficient evidence to ground a reasonable and definite inference that there were systemic issues within IOOF of the kind pleaded at ASOC paragraphs [22(h)], [22(i)], [22(j)] and [24].

(9) As discussed further at [475]-[477], I am satisfied that there was an under-resourcing issue at IOOF. My conclusion is based on what is recorded in IOOF’s internal records of its investigations of the allegations concerning under-resourcing, and in particular, Mr Hilton’s acknowledgement in an interview that the Research team did not have sufficient resources. A *Jones v Dunkel* inference may provide further support for my conclusion. However, no such inference arises unless Mr McFarlane identifies a witness that IOOF would be expected to call on this issue, a matter which I return to at [125]-[138] below.

(10) I do not accept what I understand to be the substance of Mr McFarlane’s submission, namely that the Court can rely on PwC’s findings in the PwC Interim Report on 28 August 2015 to make a finding about the adequacy of IOOF’s systems and processes at the time that IOOF received the March 2014 complaint, because IOOF has not led evidence to establish a material change to IOOF’s processes between March 2014 and August 2015. Ultimately, the Court’s ability to rely on PwC’s findings in August 2015 to make a finding about the adequacy of IOOF’s systems and processes in March 2014 will depend on the precision with which those findings are expressed, and whether those findings align with the deficiencies of which, on Mr McFarlane’s pleaded case, IOOF is said to have been aware while investigating the March 2014 complaint. As discussed in my reasons, I have ultimately formed the view that PwC’s conclusions are not expressed with sufficient specificity to enable the Court to be satisfied that they identify, let alone prove, the existence of defects in IOOF’s systems and processes of the kind alleged by Mr McFarlane in his ASOC, in particular at paragraphs 22(h), (i) and (j), and which prevailed as at the time of the March 2014 complaint. In these circumstances, Mr McFarlane cannot rely on a *Jones v Dunkel* inference to fill the gaps in his evidence. In accepting Insignia’s submission that Mr McFarlane has failed to discharge his onus of proof on this issue, I do not draw any “reverse *Jones v Dunkel* inference” in favour of Insignia.

(11) The email from the Bridges financial planner alleging that the Research team had been “compromised”, and Mr Hilton’s response to that email, was forwarded by Mr Farrell on 16 December 2013 to Mr Kelaher and Mr Mota. The fact that the email was sent to Mr Kelaher as Managing Director of IOOF, and Mr Mota, the future CEO of Insignia, grounds a reasonable and definite inference that Mr Farrell considered the allegations to be serious at the time they were made. However, Mr McFarlane has the onus of establishing that the email was not just initially regarded as serious by Mr Farrell, but contained allegations which, upon investigation, were regarded by IOOF as material to IOOF’s future earnings or the price or value of IOOF shares. The fact that an email was initially emailed to Mr Kelaher and Mr Mota cannot, by itself, ground such a conclusion. No other evidence has been identified by Mr McFarlane in support of that contention. There is no evidence that Mr Mota or Mr Kelaher themselves regarded the allegations as serious. In these circumstances, a *Jones v Dunkel* inference cannot fill the gaps in Mr McFarlane’s evidence on this issue. My conclusion does not rely on drawing any “reverse *Jones v Dunkel* inference” in favour of Insignia. My conclusion is simply that Mr McFarlane has not adduced sufficient evidence to ground an inference that the allegations in the Bridges financial planner email were regarded by IOOF as material to IOOF’s share price.

125 A further difficulty for Mr McFarlane’s attempted reliance on the principles in *Jones v Dunkel* is the requirement that, as a condition of drawing an adverse inference on the basis of a party’s failure to call a witness, “the missing witness would be expected to be called by one party rather than the other”: *Hung v Warner, in the matter of Bellpac Pty Ltd (Receivers and Managers Appointed) (in liq)* [2013] FCAFC 48 at [55].

126 The Kalember Affidavit deposes to, amongst others, the following individuals having left Insignia’s employment:

(1) Mr Youds, who ceased employment on 11 March 2010;

(2) Mr Malguri, who ceased employment on 17 December 2010;

(3) Max Riaz, who ceased employment on 30 May 2014;

(4) Mr Ung, who ceased employment on 12 May 2015;

(5) Melinda Hofman, who ceased employment on 3 July 2015;

(6) Zach Riaz, who ceased employment on 5 August 2015;

(7) Ms Corcoran, who ceased employment on 4 December 2015;

(8) Mr Urwin, who ceased employment on 31 August 2017;

(9) Mr Vine, who ceased employment on 30 April 2020;

(10) Mr Kelaher, who ceased employment on 2 July 2019;

(11) Mr Riordan, who ceased employment on 22 May 2020.

(12) Mr Hilton, who ceased employment on 30 September 2015.

(collectively, **Former Employees**).

127 A complexity arises in the case of former personnel. In these cases, a party may be able to call such personnel as a witness by appealing to “ancient loyalties and the companionship of past struggles”: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at [254] (Heydon J). Nonetheless, in a number of cases, the courts have been unwilling to draw a *Jones v Dunkel* inference against a corporate party that does not call evidence from a former employee or officer.

128 In *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239 at 259, Wilcox J rejected the argument that a former director should be regarded as within the applicant’s camp, stating “[w]hatever his previous position, there is no reason to believe that he feels any allegiance or goodwill towards the company or its present management”. Wilcox J noted that the director had ceased to be a director in April 1990, and on the evidence, had no contact with members of the present board.

129 In *Australian Securities and Investments Commission v Australian Lending Centre (No 3)* (2012) 213 FCR 380 (***ALC***) at [153], Perram J refused to draw a *Jones v Dunkel* inference against a corporate defendant, Australian Lending Centre Pty Ltd, for failing to call a former employee to give evidence. Perram J reasoned that “a severance of the initial relationship may reduce or eliminate the availability of the *Jones v Dunkel* inference.” While this was “unlikely to be an absolute proposition”, Perram J was satisfied that “[i]n the absence of any suggested ongoing involvement on the [prospective witness’s] part with [the first defendant or the fourth defendant] it is not appropriate to apply the principle in *Jones v Dunkel* to the decision … not to call her”: at [153].

130 In *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 4)* (2017) 353 ALR 460, Wigney J also refused to draw an adverse inference against a corporate defendant, PZ Cussons Australia Pty Ltd, for failing to call evidence from its former managing director (Mr Fatouros) and two other managers (Ms Gill and Ms Baldwin). Mr Fatouos, Ms Gill and Ms Baldwin had left the company on December 2010, 12 March 2010, and 15 July 2011 respectively. Wigney J relevantly held at [579]:

The mere fact that a potential witness has left the employ of the party may not, in and of itself, mean that the witness is no longer in the party’s camp, or provide a reasonable explanation for the party not calling the witness. Where, however, the initial relationship between the party and the witness has been severed, and there is no apparent ongoing relationship, there may be no reason to conclude that the witness is in the party’s “camp”. … This is such a case. There is no reason to suppose that Mr Fatouros, Ms Baldwin or Ms Gill are more available to Cussons than they are to the Commission. Nor, given the effluxion of time, is there any reason to suppose that Cussons knows, or should be presumed to know, what the evidence of the witnesses would be …

131 In *CIMIC Group Ltd v AIG Group Ltd* [2022] NSWSC 999, Peden J held that a senior executive of Leighton, Mr Savage, “could not be said to have been in CIMIC’s camp, as may have been the case, had he remained employed”. Her Honour rejected the submission that CIMIC was “in a position to appeal to ancient loyalties”, albeit this was on the basis that Mr Savage was, at the time, facing related criminal charges: at [260]. Her Honour went on to note that while Mr Savage was not terminated but instead made redundant, there was evidence that he was not leaving Leighton of his own volition: at [261].

132 It was not contested by Mr McFarlane that, having regard to the above principles, Max Riaz and Mr Ung could no longer be said to be in Insignia’s camp: Mr Hodge KC, T 434.35-44.

133 I also accept Insignia’s submission that it cannot be said that Mr Hilton, who left IOOF in 2015, is in Insignia’s camp. There is no evidence to suggest that there is any ongoing relationship between Mr Hilton and Insignia. I accept that Insignia, in this case, is not in a position to appeal to “ancient loyalties” to call him as a witness.

134 The Kalember Affidavit establishes that the other Former Employees left IOOF at least three years prior to the commencement of the trial of this proceeding. Of those employees, it is only senior employees who could arguably be said to have the kinds of “ancient loyalties” to which Insignia may be able to appeal. Those employees were Ms Corcoran (who left in 2015) Mr Urwin (who left in 2017), Mr Vine (who left in 2020), Mr Kelaher (who left in 2019), and Mr Riordan (who left in 2020). As with Mr Hilton, there is no evidence to suggest that there is any ongoing relationship between any of the other Former Employees and Insignia. In these circumstances, consistently with the reasons of Perram J in *ALC* at [153], I do not consider that it is appropriate to apply the principle in *Blatch* or *Jones v Dunkel* to the decision of Insignia not to call any of the Former Employees.

135 In the above circumstances, it is not clear which witness Mr McFarlane contends Insignia has failed to call so as to ground a *Jones v Dunkel* inference against Insignia. The only witnesses identified by Mr McFarlane in his closing written submissions at [35] are Mr Renato Mota, the current CEO of Insignia, and Mr Allan Griffiths, the current Chairman of Insignia.

136 In the case of Mr Mota, it appears that, in 2013, Mr Farrell forwarded to him and Mr Kelaher an email chain containing an allegation that the Research team had been “compromised” and Mr Hilton’s response to that email. Similarly, Mr Farrell emailed Mr Kelaher and Mr Mota in January 2015 on the question of resourcing of the Research team. Mr Mota was also part of the leadership team involved in preparing IOOF’s response to the Fairfax articles. However, the documents to which I have been taken do not establish that, beyond being the mere recipient of emails, Mr Mota was substantively involved in investigating the allegations comprising the Historical Information, the March 2014 Information or the December 2014 complaint at the time those allegations were made. I am therefore not satisfied that Mr Mota would give relevant evidence even if he was called as a witness.

137 Mr McFarlane has not identified, let alone established, any relevant evidence which Mr Griffiths could give if called as a witness.

138 In these circumstances, I refuse to draw any adverse inference against Insignia, on the basis of the principles in *Blatch* or *Jones v Dunkel*, by reason of its decision not to call a lay witness in the proceeding.

# LEGAL PRINCIPLES

## Continuous disclosure

139 The relevant legal principles were largely not in dispute between the parties.

140 To establish a contravention of s 674 of the *Corporations Act* in this case, Mr McFarlane must prove that:

(1) IOOF was, during the Relevant Period, aware of the Alleged Material Information;

(2) the information was not generally available. With limited exceptions identified in these reasons, Insignia did not challenge at trial that the alleged information was not generally available;

(3) a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value of IOOF shares: *Australian Securities and Investments Commission v GetSwift Limited* [2021] FCA 1384 (***GetSwift***) at [1074].

141 At all times during the Relevant Period, IOOF was a listed disclosing entity for the purposes of s 674 of the *Corporations Act*. IOOF had an obligation of continuous disclosure in accordance with s 674(2) of the *Corporations Act* and ASX Listing Rule 3.1. Section 674 of the *Corporations Act* provided:

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

(d) a reasonable person would expect the information, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

142 Section 677 of the *Corporations Act* provided that for the purposes of s 674, “a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of ED securities”.

143 ASX Listing Rule 3.1 provided:

3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.

144 Listing Rule 19.12 defined the concept of “aware”:

aware an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

145 ASX Listing Rule 3.1A provided exceptions to the obligation in Listing Rule 3.1:

3.1A Listing Rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

– It would be a breach of a law to disclose the information;

– The information concerns an incomplete proposal or negotiation;

– The information comprises matters of supposition or is insufficiently definite to warrant disclosure;

– The information is generated for internal management purposes of the entity; or

– The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

146 The three conditions of Listing Rule 3.1A are cumulative, not alternatives. Thus, even if information is confidential and comprises a matter of supposition or is insufficiently definite to warrant disclosure, it can still be required to be disclosed if a reasonable person would expect the information to be disclosed.

147 The following general principles in relation to ss 674 and 677 of the *Corporations Act* emerge from the authorities:

(1) the test posed by the statute is an objective one, namely, whether there is information which a reasonable person “would expect” to have a material effect on the price or value of shares (s 674(2)), including because the information “would, or would be likely to influence” investors in deciding whether to acquire or dispose of shares (s 677). Accordingly, the question is to be determined *ex ante* the relevant event which requires disclosure. That a corporate respondent has convinced itself that information would not be expected to have a material effect on the price or value of its securities, does not answer the question whether the material was disclosable as required by s 674: *Australian Securities and Investments Commission v Vocation Ltd (in liq)* (2019) 371 ALR 155 (***Vocation***) at [515]; *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 (***James Hardie***) at [527], [546];

(2) while the question is determined *ex ante*, an *ex post* analysis of what happened in the market, in terms of movements in share price, is a relevant cross-check that assists the Court in applying the “would expect” and “likely influence” test: *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 (***Earglow***) at [84(d)]; *Australian Securities and Investments Commission v* *Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201 (***Fortescue***) at [474]-[629]; *James Hardie* at [531]-[540];

(3) it follows that, if on the day the information is disclosed to the market there is a statistically significant movement in the share price that can be attributed to the disclosed information, then this provides some evidence of materiality: *Earglow* at [84(d)];

(4) a company can be “aware” of an opinion which it ought reasonably to have formed on the facts known to it, regardless of whether it did or did not in fact form that opinion: *Crowley* at [5] (Perram J), [160(4)], [166] (Jagot and Murphy JJ);

(5) it is necessary to identify the relevant “information” said to be the subject of the disclosure obligation with some precision: *Myer* at [1121]; *Grant-Taylor v Babcock & Brown Limited (in liq)* (2015) 322 ALR 723 (***Grant-Taylor (Trial)***) at [73]; *GetSwift* at [86]-[89]; *Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* (2020) 389 ALR 17 (***Big Star***) at [258];

(6) identifying the relevant information, proving it existed, and also proving it was not generally available and material is fundamental: *GetSwift* at [89];

(7) it does not follow simply that the information an applicant alleges should have been disclosed is in fact the correct expression of the relevant information. Where it would be misleading to only disclose that part of the information for which an applicant contends, then the “whole situation” must be disclosed, and it is that information which must be assessed as material or not: *Grant-Taylor (Trial)* at [101]*; Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402 (***Grant-Taylor (Full Court)***) at [137]; *Vocation* at [566]; *Jubilee Mines NL v Riley* (2009) 40 WAR 299 (***Jubilee***) at [88] (Martin CJ); *Cruickshank v ASIC* (2022) 292 FCR 627 at [124];

(8) the continuous disclosure provisions should not be construed as countenancing the disclosure of incomplete or misleading information just because that information alone would influence persons who commonly invest to buy or sell shares: *Jubilee* at [162] (McLure JA).

(9) the disclosure of non-material information might in fact be misleading because the disclosure of information by a company itself is likely to convey an imputation that, in the company’s assessment, the information disclosed is likely to have a material effect on the share price: *Jubilee* at [162]; *Big Star* at [262];

(10) the information must be “non-trivial” and rise beyond information that merely “might” influence a decision by investors: “[i]t is insufficient that the information ‘may’ or ‘might’ influence a decision: it is ‘would’ or ‘would be likely’ that is required to be shown”: *Grant-Taylor (Full Court)* at [96];

(11) “materiality” is a question for the Court. Applying the statutory materiality test involves a matter of judgment informed by commercial common sense. Expert evidence from persons who have practical experience in buying and selling shares and in the workings of the stock market can assist but is not essential: *Fortescue* at [482] and [511]; *GetSwift* at [1144], [1153], [1259];

(12) the provisions seek to ensure that the price of securities reflects their underlying economic value: *GetSwift* at [1070]; *Crowley* at [157] (Jagot and Murphy JJ);

(13) the use of the word “invest” rather than “purchase” or “acquire” in s 677 suggests that the hypothetical reasonable person referred to in that section will be someone who makes an assessment as to whether to buy or sell securities on the basis of a company’s earnings or potential earnings and the potential return the investment offers after making an allowance for risk: *Vocation* at [552]-[553]. The Court excludes from consideration the anticipated reaction of “irrational” investors: *Grant-Taylor (Full Court)* at [115]. It also excludes the anticipated reaction of speculators and day traders who seek to profit on the back of rumour or momentum rather than company fundamentals: *Vocation* at [553];

(14) information that is inconsequential to a company’s future earning potential cannot be expected to change investors’ collective valuation of the company and accordingly is not information that a reasonable person would expect to have a material effect on the share price: *Myer* at [670].

## Misleading and deceptive conduct

148 The principles in relation to misleading or deceptive conduct are well-established and are not in dispute between the parties and were conveniently summarised in Mr McFarlane’s closing written submissions at [369]-[377], which I adopt as a correct statement of the relevant legal principles and set out below.

149 Section 1041H(1) of the *Corporations Act*, s 12DA(1) of the *ASIC Act* and s 18(1) of the *ACL* proscribe conduct that is misleading or deceptive or likely to mislead or deceive. Mr McFarlane only relies on the equivalent provisions in the *ASIC Act* and *ACL* in the alternative if s 1041H(1) of the *Corporations Act* does not apply.

150 Section 1041H(1) of the *Corporations Act* proscribes conduct “in relation to a financial product which is misleading or deceptive or likely to mislead or deceive”. “Financial product” is defined to include a security, which in turn includes a share (*Corporations Act*, ss 9 and 764A(1)(a)), and a person who suffers loss or damage “by” conduct in contravention of s 1041H may recover the amount of that loss or damage (s 1041I(1)).

151 Section 12DA of the *ASIC Act* proscribes conduct in relation to financial services which is misleading or deceptive or likely to mislead or deceive. “Financial service” includes “financial product advice” (s 12BAB(1)(a), which means making or reporting a recommendation or statement of opinion that is or could reasonably be regarded as intending to influence persons in making a decision in relation to a financial product (s 12BAB(5)). A “financial product” includes securities (s 12GF).

152 I note that s 131A of the *Competition and Consumer Act 2010* (Cth) provides that s 18 of the *ACL* does not apply to the supply or possible supply of financial services or financial products. Given this, I do not consider that s 18 of the *ACL* is applicable to the present case, which concerns the price of IOOF securities.

153 The question is “whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter)”: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450 at [22].

154 In *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2023] FCA 395, I stated the principles relevant to misleading and deceptive conduct as follows at [703]-[706]:

703 The Full Court in *TPG2020* set out five subsidiary principles at 459 [22] as follows:

(a) first, conduct is likely to mislead or deceive if there is a real and not remote chance or possibility of it doing so;

(b) second, it is not necessary to prove an intention to mislead or deceive;

(c) third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself;

(d) fourth, it is not sufficient if the conduct merely causes confusion; and

(e) fifth, where the impugned conduct is directed to the public generally, or a section of the public, the question is whether the conduct is likely to mislead or deceive has to be approached at a level of abstraction where the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful.

704 When considering a claim of false, misleading or deceptive conduct by representations, the initial question is whether the misconceptions alleged to arise are properly to be attributed to the ordinary and reasonable members of the class of prospective purchasers. Advertisements must be judged by their effect, or likely effect, on the ordinary and reasonable members of the relevant class of recipients of the advertising. Extreme or fanciful reactions should not be attributed to ordinary or reasonable members of the relevant class: *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; 202 CLR 45 per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ) at [105].

705 The question is not whether the conduct causes confusion or wonderment, but whether it meets the statutory description of “misleading or deceptive”.

706 The central question is whether the impugned representations, viewed as a whole, have a sufficient tendency to lead a consumer to form an erroneous assumption or conclusion about some fact or matter. Only then does the Court consider whether the representations are false, misleading or deceptive, or likely to mislead or deceive: *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 1904; 244 ALR 470 (*ACCC v Telstra*) per Gordon J at [15].

155 Silence can constitute misleading or deceptive conduct if the circumstances give rise to a reasonable expectation that, if some relevant fact does exist, it will be disclosed.

156 Gilmour and White JJ summarised the principles for misleading or deceptive conduct by silence in *Addenbrooke Pty Ltd v Duncan (No 2)* (2017) 348 ALR 1 at [482]-[483] as follows:

482. On our understanding, the principles concerning misleading or deceptive conduct by non-disclosure or silence which emerge from the authorities and which are pertinent in the present appeal may be summarised as follows:

(a) conduct involving silence or non-disclosure may, in some circumstances, constitute misleading or deceptive conduct;

(b) in considering whether conduct is misleading or deceptive, silence or non-disclosure is to be assessed as a circumstance like any other;

(c) mere silence without more is unlikely to constitute misleading or deceptive conduct. However, remaining silent will constitute misleading or deceptive conduct if the circumstances are such as to give rise to a reasonable expectation that, if some relevant fact does exist, it will be disclosed;

(d) the existence or otherwise of such a reasonable expectation is to be determined objectively;

(e) it is not possible to categorise all of the circumstances in which a reasonable expectation of disclosure may arise. Such circumstances may exist when either the law or equity imposes a duty of disclosure, when a statement conveying a half-truth only is made (see *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97 at [75]), when the representor has undertaken a duty to advise, when a representation with continuing effect, although correct at the time it was made, has subsequently become incorrect, and when the representor has made an implied representation;

(f) in considering whether a party engaged in commercial dealing may have a reasonable expectation that a fact, if it exists, will be disclosed, it is to be remembered that it will often be the case that one party to a commercial dealing has more knowledge about a relevant matter than the other and yet will not, in accordance with ordinary commercial expectations, be guilty of misleading or deceptive conduct in failing to make that knowledge known to the other.

483. Ultimately, as indicated at the commencement of this reference to the principles, the determination of whether a failure to disclose a matter is misleading or deceptive requires an examination of all the circumstances. If in the circumstances, assessed objectively, a representee would have been entitled to expect or infer (have a reasonable expectation) that an undisclosed matter would be disclosed, that may well constitute misleading or deceptive conduct: *Clifford v Vegas Enterprises Pty Ltd* [2011] FCAFC 135 at [198].

# EXPERTS’ REPORTS AND EXPERT EVIDENCE CONCLAVE

157 As I have referred to above, Mr McFarlane tendered in evidence the expert reports of Mr Houston: Houston Report 1 and Houston Report 2. Insignia tendered in evidence the expert report of Dr Prowse: Prowse Report. The parties also tendered in evidence the Joint Expert Report, which was prepared by Mr Houston and Dr Prowse. Both Mr Houston and Dr Prowse participated in an expert witness conclave and were examined by senior counsel appearing for the parties.

158 Mr Houston is a founding partner at an economic consulting firm, HoustonKemp Economists. He has held this role since 2014. Immediately prior to this, he was a director of NERA Economic Consulting from 1998 to 2014.

159 Mr Houston has experience, acquired over a period of more than thirty years, in the economic analysis of markets and the provision of expert advice and in giving evidence in litigation, business strategy and policy contexts.

160 Mr Houston has given evidence before arbitrators, appeal panels, regulators, this Court, the Australian Competition Tribunal and other judicial and adjudicatory bodies. He has advised and prepared expert reports in a number of proceedings alleging breaches of listed entities’ disclosure obligations. Relevantly, Mr Houston has undertaken event study analyses, prepared expert reports, and given evidence before this Court in connection with those reports, in a number of proceedings relating to the materiality of information to the share price of a particular company.

161 I am satisfied that Mr Houston is an expert financial economist with extensive experience in economic analysis of markets.

162 Dr Prowse is a senior managing director in the Forensic and Litigation Services Practice at FTI Consulting Inc. Prior to this, he was a principal in the Dallas office of the Forensic Practice at KPMG LLP.

163 Dr Prowse has approximately 20 years’ experience providing economic valuation and finance consulting services to corporations, law firms, regulators, and national governments.

164 Dr Prowse has testified over one hundred times in proceedings in the US, Australia and in domestic and international arbitrations. He has provided expert consulting services, prepared expert reports, and given expert testimony on event studies and issues relating to damages in numerous maters. This work has included performing event studies to understand whether certain information is material to investors.

165 Dr Prowse identified two proceedings in this Court in which he has given oral evidence relevant to the issues in this proceeding – *Matthew Hall v Pitcher Partners and Ernst & Young LLP* (Proceeding No VID918/2018) and *TPT Patrol Party Ltd, as trustee for Amies Superannuation Fund v Myer Holdings Limited* (Proceeding No VID1494/2016).

166 I am also satisfied that Dr Prowse is an expert financial economist who has substantial experience in providing economic, financial and valuation analysis of both public and private securities.

167 I am satisfied that Mr Houston and Dr Prowse are both highly experienced in undertaking analysis and giving expert evidence with respect to events studies in securities class action litigation.

## Houston Report 1

168 Houston Report 1 responded to two questions:

(1) Firstly, Mr Houston was asked to opine, assuming that the substance of the Historical Information, the March 2014 Information and the Compromised Model Information should have been disclosed to the market by Insignia on 4 March 2014, as to what extent (if any) the price of Insignia securities was inflated during the Relevant Period due to Insignia’s failure to disclose that information (**Question 1**).

(2) Secondly, Mr Houston was asked if his answer to the above question would change if the substance of the Historical Information, the March 2014 Information and the Compromised Model Information were disclosed at any later date in the Relevant Period (**Question 2**).

169 In Houston Report 1, Mr Houston assumed that the allegations in the Amended Statement of Claim were true: at [4(a)].

170 Mr Houston described an “event study” as “an empirical technique that measures the effect of a particular ‘event’, such as the release of information to the ASX, on the price of a company’s securities”: at [78]. Mr Houston described the principles relevant to an event study in the following terms (at [58]):

The theoretical foundations that govern the valuation of financial assets and so the formation of security prices derive from two long standing principles of financial economics, both of which can generally be presumed to be valid for actively traded securities. These principles are that:

a. the price of an efficiently-traded security reflects the present discounted value of the future cash flows expected to be generated by the underlying asset; and

b. at any particular point in time, the price of an actively traded security reflects all publicly available information – a principle known as the semi-strong form of the efficient market hypothesis.

171 Mr Houston explained that four conditions needed to be present in order to conduct an event study, namely (at [88]):

(1) condition 1 – the event is a well-defined news item or series of items;

(2) condition 2 – the times that the news reaches the market are known;

(3) condition 3 – there is no reason to believe that the market anticipated the news; and

(4) condition 4 – it is possible to isolate the effect of the news from market, industry, and other firm-specific factors simultaneously affecting the firm’s security price.

172 Mr Houston stated that an event study can be described by reference to three distinct steps, namely (at [95]):

(1) step 1 – identifying the days of interest (that is, the **event days**), and predicting company share price returns on those days;

(2) step 2 – computing “abnormal returns” (i.e., the difference between the actual return and the predicted return) to remove the effect of general market and sector specific movements; and

(3) step 3 – determining whether the abnormal return on the days of interest was statistically significant.

173 Mr Houston relevantly opined (at [83]):

[I]f the abnormal return is statistically significant, this suggests that the observed price movement (after adjustment for market- and/or industry-wide factors) was more likely to have been due to the release of new information. Providing no other company specific news was released at the same or similar time, the abnormal return can be taken as a reliable and replicable estimate of the effect of the disclosure on the value of a company’s securities.

174 Mr Houston acknowledged that the Historical Information, the March 2014 Information and the Compromised Model Information (which he defined collectively as the **information of interest**) was not revealed to the market in a single corrective ASX disclosure. He stated that it was therefore necessary to establish when each item of the information of interest was made known to the market so as to determine the event days to which an event study could be applied: at [150].

175 For this purpose, Mr Houston provided a “detailed assessment of the information that was released to the market” to “establish a timeline by which each item of the information of interest was first revealed”: at [151]. That analysis was set out in Appendix A2 to his report. Mr Houston then identified two event days which satisfied conditions 1 and 2 (as set out above): namely 22 June 2015 and 7 July 2015: at [164].

176 In Appendix A2 at [355]-[359], Mr Houston identified the following articles as containing the relevant disclosures to the end of trading on 22 June 2015:

(1) an online article published on 20 June 2015 titled “Litany of wrongdoings at IOOF included insider trading by senior employee”;

(2) an online article published on 20 June 2015 titled “IOOF’s boiler room throws customers to the wolves”;

(3) similar print versions of the articles referred to above published in the Sydney Morning Herald;

(4) an online article published in the Australian Financial Review on 21 June 2015 titled “IOOF scandal puts spotlight on vertical integration”;

(5) an online article published in the Sydney Morning Herald on 22 June 2015 titled “IOOF scandal sparks calls for royal commission”.

177 Mr Houston stated that the above media releases “covered many of the items of the information of interest”: at [152].

178 Mr Houston also identified a further disclosure of relevance, namely Mr Kelaher’s testimony at the Senate Committee hearing on 7 July 2015. Mr Houston, at [157], extracted that testimony as follows:

Finally, in closing, I can speak a little bit about our acquisition strategy over the years. It has opened up tremendous long-term opportunities to our customers and our shareholders, but—candidly—it has also thrown up many challenges in respect of: merging IT systems; internal policies and protocols; and, most importantly, creating a single culture among staff coming from often diverse and formerly competitive organisations.

179 Mr Houston opined that this testimony represented new information in relation to IOOF’s Roll Up Model and that an event study applied to 7 July 2015 was capable of examining the price effect of this information: at [158].

180 In Appendix A2, Mr Houston also referred to an article titled “IOOF compensated clients for poor advice in the past two years”, which was published in the Sydney Morning Herald after the close of trading on 6 July 2015. According to Mr Houston, the article disclosed new details of compensation paid by IOOF to customers of financial planners working for a subsidiary of the company or AWM: at [376]. The allegations in this article were also discussed in Mr Kelaher’s 7 July 2015 Senate Committee hearing.

181 In Appendix A2 at [402], Mr Houston also referred to statements made by senators at the Senate Committee hearing on 7 July 2015 in relation to the evidence they had seen, which Mr Houston opined indicated that they considered there was a credible basis for the allegations made against IOOF: at [402]. The portions of the transcript relied upon by Mr Houston are set out below:

* CHAIR [Senator Dastyari]: This is a serious allegation, the allegation of frontrunning. The information that has been presented to us is quite compelling as to the activity that has been undertaken.
* CHAIR [Senator Dastyari]:… We have been given these allegations and I have to say that they appear to be very, very serious.
* Senator WILLIAMS: What if I said to you that we have seen a heap of documents—about of them—that certainly looked towards frontrunning?
* CHAIR [Senator Dastyari]: I am going to be very careful here. I have here 58 separate examples of allegations of frontrunning by IOOF. The last one relates to December 2014 and they go as far back as 2009. There are 58 allegations. I have detailed information about when your head of research appears to have purchased shares and when decisions had been made around selling them.
* Senator EDWARDS: I do not wish to fall off here. We are credibly investigating all of these issues. There has been a lot of evidence lobbed on my desk this morning. There are all these allegations from one particular person. In light of all of this, we are going to write to you and seek your comment on the allegations which have been made, rather than try to prosecute them here this morning. You are a company which employs 2,000 wonderful Australians, and we have a person saying these things. Can I tell you: the evidence we have received is lucid. It appears quite credible. A lot of the contentions which are made in rebuttal to the whistleblower seems somewhat hollow this morning. But I will just say that we are going to run a credible inquiry, and we will give you an opportunity to do this rather than try to provide a forum for which there are trapdoors for people. I want this properly prosecuted, and we will see what we do. There is a lot of new evidence here today. In actual fact, there are two folders; there is no third one. I do not have the third one but I am getting one—of emails, time frames and things like, which I have not got my head around, either.
* CHAIR [Senator Dastyari]: And Mr Kelaher, I know you may know this and your legal counsel may know this, but others who may be interested may not know this: regardless of how that evidence was obtained, once it is provided to us it is protected by parliamentary privilege. It is now a tabled document, in camera, of this committee, and the matters and content of it are now protected by the highest level of protection you can get, which is parliamentary privilege. Certainly I would say that with respect to the private conversation that Mr Urwin had with the whistleblower, the word “explosive” is probably an understatement and it really does call into question your culture, your firm, how it conducts business and how it deals with whistleblowers. But that will be a matter for another day. Thank you, Mr Kelaher.

182 Mr Houston opined that the above statements made by Senator Dastyari, Senator Edwards and Senator Williams would have increased the likelihood of the previously disclosed information being correct and relevant to the value of IOOF shares: at [403].

183 Appendix A2 contained three tables – Tables A2.1, A2.2 and A2.3. Table A2.1 identified the Alleged Material Information pleaded by Mr McFarlane in his ASOC and specified where that information corresponded or “matched” with information disclosed in the Fairfax articles identified at [176] above. Table A2.2 identified the correspondence between Mr Kelaher’s statements during the Senate Committee hearing and the Compromised Model Information (as pleaded at ASOC paragraph 24). Mr Houston ultimately opined, at [268], that:

Although the information of interest and the information disclosed to the market may differ in terms of wording or the level of detail, the nature of the information is the same. Specifically, the matched sets of information [that is the information identified in Tables A2.1 and A2.2] convey the same type of misconduct or risk.

184 Table A2.3 identified those elements of the pleaded Alleged Material Information which were not disclosed in the Fairfax media articles. That information was as follows

(1) the allegation in ASOC paragraph 17(a) that Mr Hilton gave “preferential treatment” to certain planners;

(2) the allegation in ASOC paragraph 17(h) that Mr Hilton set “impractical deadlines” for research reports;

(3) the allegation in ASOC paragraph 17(i) in relation to bonus payments allegedly being withheld for improper reasons;

(4) the allegation in ASOC paragraph 20(c9) in relation to the investigation of Mr Malguri;

(5) the allegation in ASOC paragraph 22(a) as to the fact of the allegations in the March 2014 complaint being true;

(6) the allegation in ASOC paragraph 22(h) that IOOF had failed to identify, record and control conflicts of interest; and

(7) the allegation in ASOC paragraph 22(k) that IOOF’s Research team was being reviewed and restructured

(together, the **Pleaded Information Without Event Days**).

185 Mr Houston opined that, of the above items constituting the Pleaded Information Without Event Days, items one, two, three, four and six would likely not have had a significant effect on the market’s valuation of IOOF’s shares. Mr Houston opined that it was not possible to use an event study to assess the effect of the information referred to in item five. Mr Houston opined that item seven was already publicly known by 22 July 2015, and would have been reflected in IOOF’s share price from early 2015: at [404]-[411].

186 An important aspect of Mr Houston’s report was his opinion as to the price effect of reputation. Mr Houston opined that financial economics literature recognised that a company’s reputation can amount to a highly valued asset that may provide the company with a competitive advantage: at [68]. He further stated that a decline in a company’s reputation may have various impacts which may ultimately result in a reduction in a company’s share price: at [71]. He opined that the allegations against IOOF in this proceeding “concern matters with the potential to cause a reduction in the company’s reputation and analyst commentary suggests that this reflects an increase in risk”: at [155]. He similarly opined (at [226]) that:

The information released to the market on the event days was qualitative in nature and affected the company’s reputation and so its future cash flows by indirect means. Analyst commentary suggests that the release of this information would likely have been incorporated into the market’s assessment of the risk that it attached to [IOOF’s] future cash flows.

187 Mr Houston estimated the abnormal price movement on 22 June 2015 to be approximately $1.45 or 13.6%: at [193]. Mr Houston estimated the abnormal price movement on 7 July 2015 to be approximately $0.46 or 5.2%: at [197].

188 In turn, in response to Question 1, Mr Houston estimated the amount that IOOF’s shares were inflated during the Relevant Period as:

(1) 18.1% of the trading price from 4 March 2014 to 19 June 2015, inclusive; and

(2) 5.2% of the trading price from 22 June 2015 to 6 July 2015, inclusive: at [316] and [327].

189 In response to Question 2, Mr Houston opined that his inflation estimates remained unchanged under different assumed hypothetical disclosure dates: at [318] and [328].

## Prowse Report

190 Dr Prowse was instructed to address two matters, in addition to any other matters he considered relevant, in response to Houston Report 1. Those two matters are summarised below:

(1) Firstly, Dr Prowse was asked to compare the information released on the event days with the “information of interest”, and to explain any implications for the validity of Mr Houston’s analysis.

(2) Secondly, Dr Prowse was asked to compare the information released on the event days with the information contained in the FAD and explain any implications for the validity of Mr Houston’s analysis.

191 Dr Prowse’s opinions in the Prowse Report can be summarised as follows:

(1) Dr Prowse opined that Mr Houston’s analysis of inflation attributable to the disclosures in June 2015 was flawed for two reasons:

(a) Firstly, the disclosures in June 2015 contained pessimistic and sensational language and other confounding information that was not included in the information of interest: at [62]-[77]. Dr Prowse’s opinion was based on his view that academic research demonstrated that language and tone incrementally contribute to abnormal returns observed following market announcements, and the vividness of the language chosen also affected investor beliefs when the language is inconsistent with existing views of a security: at [61]. Dr Prowse cited six academic articles in support of this opinion: P Tetlock, “Giving content to investor sentiment: The role of the media in the stock market” (2007) 61(3) *Journal of Finance* 1139 (**Tetlock Article**); S Heston and N Sinha, “News versus Sentiment: Predicting Stock Returns from News Stories” *Finance and Economics Discussion Series 2016-048*, Washington: Board of Governors of the Federal Reserve System (**Heston Article**); D Garcia, “Sentiment during recessions” (2013) 68(3) *Journal of Finance* 1267 (**Garcia Article**); S McKay Price et al, “Earnings conference calls and stock returns: The incremental informativeness of textual tone” (2012) 36(4) *Journal of Banking and Finance* 992 (**McKay Price Article**); H Chen et al, “Wisdom of crowds: The value of stock opinions transmitted through social media” (2014) 27(5) *Review of Financial Studies* 1367 (**Chen Article**); and J Hales, X Kuang and S Venkataraman, “Who believes the hype? An experimental examination of how language affects investor judgments” (2011) 49(1) *Journal of Accounting Research* 223 (**Hales Article**): at [58]-[60].

(b) Secondly, Dr Prowse opined that a review of analyst reports also demonstrated that the entire price reaction on 22 June 2015 could not be attributed to the information of interest because a majority of analysts commented that the observed price reaction was an overreaction, and there was no change in “median” analyst price targets following the 22 June 2015 disclosures: at [78]-[86].

(2) Dr Prowse opined that Mr Houston’s analysis of inflation attributable to the disclosures on 7 July 2015 was flawed and invalid for the following reasons:

(a) Firstly, the market was aware of the company’s integration risks prior to Mr Kelaher’s testimony in the Senate Committee hearing: at [92]-[104].

(b) Secondly, the price impact of purportedly new information in the Sydney Morning Herald article discussing historic settlements for poor advice was insignificant: at [105]-[115].

(c) Thirdly, Mr Houston’s opinion that the Senate Committee hearing would have altered the probability and/or credibility attached to the 22 June 2015 event day was flawed and was not supported by any evidence: at [117]-[121].

(d) Fourthly, Mr Houston’s analysis had failed to adjust for the negative abnormal return attributable to pessimistic and sensational language which accompanied the disclosure of the information of interest: at [122]-[125].

(e) Fifthly, Mr Houston had conflated “allegation related reputational risk” to IOOF with increased uncertainty (specifically relating to ASIC and PwC investigations) unrelated to the information of interest: at [126]-[135].

(3) Dr Prowse opined that the FAD contained corrections and clarifying details that rendered Mr Houston’s inflation analysis invalid and overstated: at [151]-[178].

192 Dr Prowse’s opinions in the Prowse Report were relevantly summarised, and refined, in the Joint Expert Report. His opinions are discussed in further detail in the summary of the Joint Expert Report.

## Houston Report 2

193 The Houston Report 2 addressed whether, having considered the Prowse Report, Mr Houston had changed any of his opinions or conclusions.

194 In Houston Report 2, Mr Houston opined that no aspect of the Prowse Report had caused him to alter his conclusions in Houston Report 1. Mr Houston addressed three contentions advanced in the Prowse Report, namely that:

(1) the entirety of the price reactions on the two event days could not be attributed to the information of interest because the disclosures in relation to IOOF contained “pessimistic and sensational language”;

(2) analyst commentary following the various disclosures in relation to IOOF confirmed Dr Prowse’s findings from the literature that “pessimistic and sensational language” contributed to an overreaction in the price of Insignia Financial on 22 June 2015; and

(3) information contained in the FAD rendered Mr Houston’s inflation analysis invalid and overstated.

195 Mr Houston’s response to each of these contentions were relevantly summarised in the Joint Expert Report, and are set out under the summary of that report.

## Joint Expert Report

196 As further explained below, in the Joint Expert Report, Mr Houston and Dr Prowse identified some limited areas of agreement, and then identified broadly five areas of disagreement. The areas of disagreement may be summarised as:

(1) the share price effect of language in disclosures to the market;

(2) matters in relation to the 22 June 2015 event day;

(3) matters in relation to the 7 July 2015 event day;

(4) the implications of the matters alleged in the FAD; and

(5) the extent of any share price inflation.

### Areas of agreement

197 The Joint Expert Report recorded that Mr Houston and Dr Prowse relevantly agreed on the following matters:

(1) An event study is a widely accepted methodology for estimating the effect on the price of a traded security of one or more items of news, provided that the four conditions identified in Houston Report 1 are satisfied: at [20].

(2) If those conditions are met, an event study can be used to estimate the extent to which new information has had an effect on the price of a security. More particularly, an event study can be used to estimate the share price effect of all new information disclosed on the day that the information was released to the market and measured on the day that the market has the opportunity to respond (that is, the event day): at [22]-[24].

(3) The event study methodology is founded upon two financial principles. Firstly, the semi-strong form of the efficient market hypothesis holds that all publicly available information is quickly and fully reflected in the price of an actively traded asset. Secondly, consequently, only new information can have an effect on a company’s share price (as all known information will already be reflected in the share price). A further relevant principle is that the fundamental or intrinsic value of a security is that given by the present discounted value of the future cash flows that the market expects the relevant asset to generate: at [18], [21].

(4) IOOF shares traded in a “semi-strong form” efficient market during the Relevant Period: at [19].

(5) Where “confounding information” is present, the share price effect of that confounding information needs to be removed from the total abnormal return to isolate the share price effect of the information of interest: at [24(b)].

(6) Once the share price effect of the information of interest is estimated, it can then be used to estimate the extent of “share price inflation” for each day of the Relevant Period: at [24(c)].

(7) Equity analyst forecasts of a company’s future cash flows and the rate at which they are discounted for risk (and/or of earnings and various indicators of the degree of risk associated with those earnings) are the best available proxy of the market’s expectations of cash flows and the degree of risk attached to them: at [26(c)].

(8) Equity analyst commentary can provide contemporaneous insight into the importance of information contained in an announcement and whether information was new or already known to the market: at [26(d)]-[26(e)].

(9) Three of six equity analysts reduced their price targets for IOOF following the 22 June 2015 event day, and three analysts did not change their price targets. A seventh analyst, Morningstar, did not change its fair value estimate: at [31].

198 The experts agreed on the magnitude of the abnormal price movements on 22 June 2015 and 7 July 2015 – that is, a reduction of $1.45 or 13.6% on 22 June 2015, and a reduction of $0.46 or 5.2% on 7 July 2015: at [28]-[29].

### Disagreement regarding the share price effect of language in disclosures to the market

199 Dr Prowse’s position was that pessimistic and sensational language can itself have a negative effect on a company’s stock price beyond the stock price effect of the underlying content of the information. Dr Prowse’s opinion was that the pessimistic and sensational language in the media disclosures on 20 June 2015 to 22 June 2015 and 7 July 2015 should be regarded as “confounding information”, and a “portion” of the abnormal price movement identified by Mr Houston should be deducted from Mr Houston’s estimate of the total abnormal price movement: at [36].

200 Mr Houston disagreed that part of the abnormal price reaction on 22 June 2015 and 7 July 2015 was attributable to pessimistic and sensational language for three reasons:

(1) Mr Houston opined that the academic literature that Dr Prowse relied on did not address whether disclosure of pessimistic and sensational language may cause an abnormal price movement exceeding the price effect of the substance of simultaneously disclosed information. According to Mr Houston, of the six academic articles relied on by Dr Prowse, five assessed the effect of the “tone” of information on share prices, but did not assess the incremental price effect of language on share prices. One article – the Hales Article – examined the incremental effect of pessimistic and sensational language. However, this article did not estimate the incremental effect of language on share prices: at [41]-[44].

(2) Mr Houston further opined that the “information of interest”, which was qualitative and conveyed allegations of misconduct by IOOF, had negative implications for IOOF’s reputation and was unlikely to be affected by the choice of language used to convey that information. That is to say, the allegations of IOOF’s misconduct could be expected to affect the market’s perception of IOOF’s reputation, irrespective of the language used to describe the conduct: at [45]-[47].

(3) Mr Houston opined that media commentary in relation to information of interest generally does not amount to confounding information. Instead, according to Mr Houston, media commentary was an intrinsic part of the process of information dissemination and absorption that informs security price formation. Mr Houston was of the opinion that, in a counterfactual disclosure in which IOOF itself (or a hypothetical third party) disclosed only the information of interest, there would, in any case, have been accompanying media commentary that discussed the information of interest in more colourful terms. Mr Houston stated that there was no analytical basis to describe such media commentary as confounding information. Mr Houston further stated that event study analyses typically do not attempt to measure any potential effect of media commentary on abnormal price movements: at [48]-[52].

201 In support of his opinion, Dr Prowse advanced three contentions:

(1) Dr Prowse opined that all of the academic articles on which he relied distinguished between the effect of language and the effect of the substance of the information on share prices. Dr Prowse cited various passages in the Tetlock, Garcia, Heston, Chen and McKay Price Articles, which he said “strongly supports the presumption that pessimistic and sensational language incrementally contribute to stock price returns over and above the substance of any new information relevant to fundamental value if expressed in neutral terms”: at [57]. In the case of the Hales Article, Dr Prowse accepted that this article did not contain a direct finding on the effect of vivid language on a company’s stock price. However, the article did find that investors who held long positions in a stock forecast significantly lower earnings growth for the company when negative news was presented vividly. According to Dr Prowse, as a matter of economic and financial logic, this would necessarily result in a decline in the company’s stock price: at [59].

(2) Dr Prowse’s opinion was that the language in the 20 June 2015 to 22 June 2015 and 7 July 2015 disclosures, as identified in his report, was pessimistic and sensational, and constituted “vivid” language. According to Dr Prowse, this language was not in the “information of interest” that Mr Houston was instructed to consider. Dr Prowse stated that it was important to consider whether the difference in language and tone in the media disclosures and the information of interest would have had a material impact on IOOF’s stock price. Dr Prowse’s opinion was that a portion of IOOF’s stock price decline could be attributed to the language and tone of the media disclosures. He further opined that this portion “could constitute the entire amount of the abnormal return”: at [66].

(3) Dr Prowse disagreed with Mr Houston’s assumption that the media would react with similar pessimistic and sensational language to a counterfactual disclosure by IOOF. Dr Prowse noted that the pessimistic and sensational language in the media disclosures involved the reporting of “hundreds of documents and emails” that were internal to IOOF. Dr Prowse opined that the disclosure of these internal materials was not part of the information of interest that Mr Houston was instructed to consider, and therefore, represented confounding information: at [67].

### Disagreement regarding the 22 June 2015 event day

202 The experts’ disagreement in relation to the 22 June 2015 event day can be grouped into two broad topics: firstly, the form of confounding information and its effect on the abnormal price movement on 22 June 2015; and secondly, the use of analyst commentary to draw inferences concerning the abnormal price reaction to the information of interest.

203 As to the first topic, Dr Prowse’s opinion was that negative and sensational language contained in the 20 to 22 June 2015 media disclosures was confounding information which negatively affected IOOF’s share price. Dr Prowse stated that the form of this language included negative and sensational language in the Fairfax articles, unflattering comparisons to historic Australian financial scandals, and negative and sensational language from internal IOOF communications and documents: at [99]. Mr Houston’s opinion was that there was no basis in either financial principle or empirical evidence to suggest that pessimistic and sensational language would cause a portion of price reaction that needed to be excluded from the total abnormal price movement on 22 June 2015: at [80].

204 Dr Prowse opined that there was a further item of confounding information that, in his opinion, would have negatively affected IOOF’s share price – namely, comments by Senator Williams calling for ASIC to open an investigation into IOOF with regards to allegations contained in the media articles: at [112]-[113]. Mr Houston opined that the information of interest would itself have been sufficient for the market to have anticipated an increase in the risk of an ASIC investigation of IOOF: at [82].

205 Mr Houston opined that there was only one item of confounding information that could have been captured in the abnormal price movement on 22 June 2015 – namely, IOOF’s 22 June 2015 ASX press release which responded to the media allegations. According to Mr Houston, that release conveyed that IOOF had appropriately responded to alleged misconduct, and the release was therefore inconsistent with the information of interest. In Mr Houston’s opinion, the potential effect of this item of confounding news was positive, meaning that Mr Houston’s estimate of the price effect of the information of interest was likely an underestimate of the true price effect of the information: at [85].

206 As to the second topic, Dr Prowse opined that the analyst reactions to the 20 to 22 June 2015 media disclosures demonstrated that a portion of the abnormal price movement on 22 June 2015 was attributable to the pessimistic and sensational language associated with those disclosures. According to Dr Prowse, this portion should be deducted from the abnormal price movement on 22 June 2015 to measure the extent of share price inflation attributable to the information of interest. Dr Prowse opined that this portion was “likely to be as large as the abnormal price decline on 22 June 2015”: at [75(c)]. Dr Prowse opined that it was important to review analyst reactions to the disclosures on 20 to 22 June 2015 and IOOF’s stock price decline on 22 June 2015, because it provided evidence of what factors contributed to the stock price decline: at [101].

207 Dr Prowse stated that, based on his quantitative review of analyst commentary, “there was no change in both the median of analysts’ earnings forecasts revisions for FY 2015 to FY 2017, and the median of analysts’ price target or fair value estimate revisions for IOOF’s stock”: at [104]. Dr Prowse opined that target prices (and fair value estimates) are derived from generally accepted valuation methods and can be expected to incorporate all new information released about a company, and therefore, a consensus of target prices (or fair value estimates) can be used to understand how analysts changed their view as to the valuation of IOOF: at [106].

208 Dr Prowse opined that he undertook a qualitative review of analyst commentary, and determined that all six analysts that published reports after the 20 to 22 June 2015 disclosures characterised the event date’s price response as an overreaction: at [107]. Dr Prowse referred to a further analyst report prepared by Goldman Sachs, which had been unavailable to him at the time he prepared the Prowse Report. He opined that this report also viewed the price response to the June 2015 media releases as an overreaction: at [107].

209 Mr Houston disagreed with Dr Prowse’s opinion that analyst commentary demonstrated that the abnormal price movement of IOOF’s shares on 22 June 2015 was an overreaction to the information of interest. In short, Mr Houston’s opinion was that the abnormal price movement was the only objective, contemporaneous measure of the effect of the information of interest on IOOF’s share price, and should be preferred to analyst opinions, which he characterised as inherently subjective. Mr Houston further opined that analyst prices targets were unsuitable for drawing inferences as to whether any abnormal price movement on 22 June 2015 constituted an overreaction to the substance of the disclosure. Mr Houston characterised price targets as reflecting an assessment of a company’s share value in 12 months’ time, and stated they were therefore a different variable from the observed change in the market’s valuation of a share today. In any case, Mr Houston considered that the majority of analyst reports did not characterise the price response as an overreaction. Mr Houston further observed that there was no subsequent market correction after 22 June 2015. In Mr Houston’s opinion, this contradicted Dr Prowse’s opinion that the abnormal price movement on 22 June 2015 was an overreaction. Mr Houston opined that, if analysts had perceived the price effect of the information of interest to be less than the abnormal price movement, then other sophisticated investors would have been strongly motivated to act until such time as the price overreaction had been corrected: at [90]-[98].

### Disagreement regarding the 7 July 2015 event day

210 The experts’ disagreement in relation to the 7 July 2015 event day can be grouped into three broad topics: firstly, the form of confounding information and its effect on the abnormal price movement on 7 July 2015; secondly, whether the abnormal price movement on 7 July 2015 captured the disclosure of new information of interest; and thirdly, the basis for any change in the market’s risk perception relating to IOOF’s shares.

211 As to the first topic, Mr Houston and Dr Prowse disagreed as to whether the Senate Committee hearing on 7 July 2015 contained any confounding information which contributed to the abnormal price movement on 7 July 2015. Dr Prowse opined that the Senate Committee hearing contained value-relevant negative information that was not included in the information of interest, and that the abnormal price movement on 7 July 2015 should be adjusted to account for this confounding information. According to Dr Prowse, this confounding information was in two forms: firstly, the pessimistic and sensational language in senators’ comments and the adversarial questioning of Mr Kelaher; and secondly, various criticisms of IOOF about perceived shortcomings of the PwC investigation during the Senate Committee hearing: at [152]-[154]. Dr Prowse opined that, based on his understanding, the information of interest did not include criticisms of PwC’s investigation by senators in a public hearing: at [154].

212 Mr Houston opined that the abnormal price movement on 7 July 2015 was unlikely to have been affected by any confounding information. For reasons previously summarised, Mr Houston disputed that there was any basis in financial principle or empirical evidence to suggest that pessimistic and sensational language could cause a portion of the 7 July 2015 price reaction: at [124]. Mr Houston also opined that the criticisms of PwC’s investigations during the Senate Committee hearing did not constitute confounding information, as those criticisms were merely partial corrections of IOOF’s ASX press release, which had stated that IOOF had appropriately dealt with all of the allegations: at [125]-[127].

213 As to the second topic, Mr Houston opined that the abnormal price movement on 7 July 2015 would have captured four categories of new information. Those categories of “new information”, and Dr Prowse’s opinion on each category, are set out below:

(1) Firstly, Mr Houston opined that the price movement on 7 July 2015 captured new information in relation to IOOF’s Roll Up model, which was conveyed by Mr Kelaher’s statement during the Senate Committee hearing on 7 July 2015 as to the challenges IOOF had faced in relation to its acquisition strategy: at [118(a)]. Dr Prowse’s opinion was that Mr Kelaher’s statement to the Senate Committee as to the integration challenges IOOF had faced was information known by the market prior to 22 June 2015 and, therefore, could not have been expected to have had an impact on IOOF’s share price movement on that day. This was because media releases in June 2015 explicitly discussed the realisation of acquisition-related risk. Further, Dr Prowse opined that a review of analyst commentary revealed that analysts did not view Mr Kelaher’s statement as new material information: at [157]-[158]. In response, Mr Houston opined that the comments made by Mr Kelaher would be taken to be an admission by the company itself, and this would have changed the perception of risk associated with the likelihood that integration risks had or were materialising: at [132].

(2) Secondly, Mr Houston opined that the price movement on 7 July 2015 captured new information arising from a Sydney Morning Herald article on 6 July 2015 (after market close) which disclosed past IOOF compensation of $2.8 million for poor financial advice: at [118(b)(i)]. Mr Kelaher confirmed the compensation disclosed in this article on 7 July 2015 during the Senate Committee hearing. Mr Houston opined that this information contrasted with comments by Mr Kelaher on 23 June 2015 that the allegations raised in media articles were unrelated to financial advice: at [134]. Dr Prowse analysed the price change in IOOF shares between the close of the market on 6 July 2015 and the open of the market on 7 July 2015. That analysis revealed that IOOF’s stock price increased during that time. Dr Prowse also reviewed analyst commentary following the 6 July 2015 article, and found that analysts did not view the information in the 6 July 2015 article as new material information. On this basis, Dr Prowse opined that the disclosures in the 6 July 2015 article would not be expected to have impacted IOOF’s share price on 7 July 2015: at [161]-[162].

(3) Thirdly, Mr Houston opined that the price movement on 7 July 2015 captured new information relating to IOOF’s handling of the alleged misconduct, which was revealed in the Senate Committee hearing of 7 July 2015: at [118(b)(ii)]. Mr Houston opined that the Senate Committee hearing conveyed that IOOF had not appropriately responded to various alleged misconduct, which conflicted with IOOF’s ASX press release on 22 June 2015: at [138]. Dr Prowse opined that, based on a review of the information disclosed during the Senate Committee hearing and the analyst commentary subsequent to the disclosures on 7 July 2015, this information was either not in contrast to the information released in IOOF’s ASX press release or was not regarded as material information by analysts: at [164].

(4) Fourthly, Mr Houston opined that the price movement on 7 July 2015 reflected an increase in the likelihood of the previously disclosed information being correct and relevant to the value of IOOF’s business: at [118(c)]. This was because statements made by Senators during the Senate Committee hearing in relation to the evidence they had seen indicated that there was a credible basis for the allegations: at [141]. Dr Prowse opined that the information conveyed during the Senate Committee hearing was largely the same information that had already been communicated to the market through comments made by Senator Williams on 24 June 2015. Further, Dr Prowse observed that the information did not result in a material change in IOOF’s stock price on 25 June 2015 (that is, the day after Senator Williams made his comments): at [167]. In response, Mr Houston opined that the Senate Committee hearing was “very different” from Senator Williams’ speech, as it involved questioning directed to the managing director of IOOF in an adversarial setting, with the Senate Committee hearing addressing the need identified in Senator William’s speech to “get some questions answered”: at [143].

214 As to the third topic, Mr Houston and Dr Prowse disagreed as to the basis for the perception of increased risk that would have been reflected in the abnormal price movement of IOOF’s shares on 7 July 2015. Dr Prowse opined, on the basis of his review of analyst commentary, that analysts considered increased regulatory risk as significant for IOOF’s share price. According to Dr Prowse, this heightened risk was not included in the information of interest that Mr Houston was instructed to consider: at [173]. Mr Houston opined that the Senate Committee hearing did not convey any new information to the market in relation to regulatory action. Instead, Mr Houston opined that any uncertainty relating to the Senate Committee was associated with the information of interest: at [146]-[149].

### Disagreement regarding the implications of the FAD

215 As set out above, Dr Prowse was instructed to compare the information contained in the FAD with the information released between 20 June 2015 and 22 June 2015 and on 7 July 2015. Dr Prowse’s opinion was that, assuming the information in the FAD was correct, if that information had been released on 22 June 2015, it was likely that IOOF’s stock price would have increased by more than it did on 22 June 2015 in response to IOOF’s 22 June 2015 ASX press release: at [177]. I

216 Mr Houston disagreed with Dr Prowse’s approach to assessing the price effect of the information in the FAD for three reasons.

(1) Mr Houston opined that the information in the FAD did not form part of IOOF’s ASX press release, and consequently, that press release could not be used to assess the likely effect of the information contained in the FAD: at [191]-[193].

(2) Secondly, Mr Houston opined that Dr Prowse’s analysis did not account for the difference between the information that was disclosed in IOOF’s press release and the information in the FAD. According to Mr Houston, the relevant difference was that the ASX press release was broad and generally positive in nature. By contrast, Mr Houston opined that the FAD was more fulsome and included admissions: at [194]-[196].

(3) Thirdly, Mr Houston noted that some of the information from the FAD was disclosed during the Senate Committee hearing on 7 July 2015, and there was a negative price reaction in IOOF’s shares on this day: at [197]-[198].

217 In support of Dr Prowse’s opinion, Dr Prowse emphasised two points:

(1) Firstly, Dr Prowse opined that the FAD contained clarifying details and corrections to both the June 2015 media articles and IOOF’s ASX press release. According to Dr Prowse, the information in the FAD was of an overall positive nature compared with both the June 2015 media articles and IOOF’s ASX press release. Relatedly, Dr Prowse stated that, although the FAD contained “clarifying details and some admissions with respect to allegations related to breach of password access and Kaplan and e-learning cheating”, the relevant analyst commentary did not raise concerns about those allegations. It followed that, in Dr Prowse’s opinion, the admissions in the FAD would not have had a negative material impact on IOOF’s share price: at [185]-[186].

(2) Secondly, Dr Prowse opined that IOOF’s negative share price reaction on 7 July 2015 could not be used to assess the price impact of the clarifying details contained in the FAD. This was because Mr Kelaher’s testimony did not disclose all of the clarifying details contained in the FAD. Further, those clarifying details were provided in an adversarial setting, and were accompanied by pessimistic and sensational language used during the hearing: at [188]-[189].

### Disagreement regarding share price inflation

218 For the reasons set out above, Mr Houston and Dr Prowse disagreed as to the extent to which the abnormal price movements on 22 June 2015 and 7 July 2015 reflected the impact of the information of interest on IOOF’s shares. They therefore also disagreed on the extent to which IOOF’s share price was inflated during the Relevant Period: at [199]-[203]

## The expert witness conclave

219 The expert witness conclave was conducted on days 4-6 of the trial. Although the conclave addressed a range of topics, only some of Mr Houston and Dr Prowse’s evidence during the conclave was relied on by the parties in their closing submissions. I set out below a summary of what I consider to be the key topics addressed during the expert witness conclave, on the basis of the parties’ closing written and oral submissions.

### Overview of the principles underlying an “event study”

220 Both Mr Houston and Dr Prowse provided evidence as to the methodology of an event study. Mr Houston opined that an event study is a widely recognised and accepted method for analysing the effect on the price of a security of the release of “new information”. According to Mr Houston, an event study seeks to attribute cause between an event of disclosure of information and the price reaction that follows.

221 Mr Houston stated that an event study was underpinned by two principles – firstly, that the price of an efficiently traded security represents an unbiased estimate of the present discounted value of the future cash flows of the company; secondly, that all publicly available information is quickly and fully reflected in the price of an actively traded security. Mr Houston opined that it followed from these two principles that only “new information” can have an effect on a company’s share price. Mr Houston stated that it also followed from the above principles that, if a sufficient number of participants in a market considered that the traded price of a security represented an under-reaction or overreaction to newly released information, then any such discrepancy between the observed price and the “fundamental” value of the security would be quickly eliminated by traders seeking to make a profit from that difference.

222 Dr Prowse generally agreed with Mr Houston’s description of the principles of an event study. However, he disagreed that the event study method said anything about whether a stock traded at its “fundamental” value.

223 Dr Prowse further stated that, in the vast majority of shareholder class action cases in which he was involved, an event study would be used as the “first step” in calculating any alleged share price inflation. One reason for this was the need to assess confounding information. Dr Prowse’s evidence, which is of some importance in this case, is that “an event study by itself can only estimate the stock price impact of *all* the information disclosed” on a particular day: Dr Prowse, T 220.34-36 (emphasis added). According to Dr Prowse, if there was information that may be influencing a company’s share price that is economically distinct from the information that is alleged should have been disclosed, then other financial, economic or valuation methods must be used to determine what that information is and whether it is material to the stock price.

### Scope of Mr Houston’s event study

224 At various times during the expert conclave, Mr Houston accepted that the price inflation estimate that he had provided in his reports assumed that the information alleged in the ASOC to have been disclosed to the public would be established. I note the following examples:

(1) I asked Mr Houston if his price inflation estimate was provided on the basis that all of the allegations that were disclosed to the public were made out. Mr Houston responded: “Well, no. The price inflation estimate that I’ve given is based on the allegations as they are without any consideration of the extent to which they may or may not have been made out”: Mr Houston, T 323.41-3. Mr Houston went on to explain that his price inflation estimate already factored in that some of the allegations had not been made out, because market participants would have recognised that the information disclosed to the public related to *allegations* of wrongdoing. He further noted that IOOF’s ASX press release on 22 June 2015 had contradicted the allegations, and that this disclosure further reduced the price effect of the allegations. I then asked Mr Houston whether, in the event I found that certain allegations as disclosed to the public in June and July 2015 were not made out, I would still be able to rely upon the price inflation estimate in his report. Mr Houston relevantly stated: “You would be able to rely on my price adjustment as the *starting point*, but then there would need to be a subsequent consideration of how that share price inflation estimate that I’ve derived should be adjusted up and down for those findings”: Mr Houston, T 325.35-8. (emphasis added).

(2) In cross-examination, senior counsel for Insignia put to Mr Houston that, if the Court found that any counterfactual disclosure by IOOF would have omitted reference to the allegations of insider trading or front running, those allegations would constitute confounding information. Mr Houston responded: “[I]f the counterfactual disclosure was properly that there should be no references whatsoever to allegations of insider trading or any other elements that you would care to name, then the – then it’s correct. So if they were present but should have been absent, then they – it would be appropriate to regard them as confounding news”: Mr Houston, T 356.31-5. Mr Houston also accepted as correct that, if there was a matter disclosed in the Fairfax articles and identified in the ASOC that the Court ultimately found should not have formed part of the counterfactual disclosure, the presence of that matter would become confounding news: Mr Houston, T 356.18-25. Dr Prowse similarly gave evidence that “it’s confounding news if it’s not in the counterfactual [disclosure] but is in the media articles”: Dr Prowse, T 357.29-30.

225 Relatedly, Mr Houston identified, in Houston Report 1 at [233], six potential items of confounding news in the media articles and IOOF’s 22 June 2015 ASX announcement. The first of these was an allegation that an employee was involved in naked short selling when it was banned. Mr Houston opined in the Houston Report 1 that this item of potential confounding news would be “unlikely to have contributed significantly to the price reaction on 22 June 2015 on the basis that these amount to examples of poor conduct by Insignia Financial, and various information as to poor conduct is included in the information of interest”: at [234]. Under cross-examination, Mr Houston elaborated on his reasoning by stating that, in his opinion, the incremental effect of the disclosure of naked short-selling “was unlikely to make any difference to the overall reputational consequences of the totality of the information that was disclosed that day”: Mr Houston, T 354.17-19 Such a response, I infer, assumed the truth of (and, in turn, IOOF’s obligation to disclose) the “totality of information” disclosed on 22 June 2015.

### Relevance of reputation to IOOF’s share price

226 Mr Houston opined that the information disclosed to the market in this proceeding was qualitative in nature. He opined that the information was likely to detract from the reputation of IOOF. Mr Houston opined that, from a financial theory perspective, information that detracted from a company’s reputation was relevant to a company’s valuation because it was capable of increasing the discount rate applied to the future cash flows of a company. Mr Houston explained that the discount rate is essentially a measure of risk and uncertainty. Consequently, information that detracted from the reputation of a company was expected to increase the discount rate applied by the market to the company because it reflected nervousness or uncertainty about whether those projected future cash flows would, in fact, be realised.

227 Mr Houston opined that the valuation impact of reputation was well recognised in the financial literature as a fundamental underpinning of the valuation of a company. In any case, Mr Houston observed that IOOF had itself emphasised in its annual report (presumably referring to IOOF’s 2013/2014 Annual Report) the importance of its reputation to its future growth.

228 Mr Houston identified a further pathway that connected past allegations causing reputational damage to a company’s valuation – that is where any reputational damage attracted the risk of regulatory investigation and sanctions.

229 Mr Houston clarified that he had not himself reached an opinion as to what would have been the appropriate discount rate for IOOF either before or after the information disclosures the subject of this proceeding. Mr Houston explained that this was difficult and impractical to measure. Mr Houston therefore stated that he was “really just painting a process of reasoning through financial theory to explain why, if you have a reputation damage, you should expect your share price to go down”: Mr Houston, T 216.35-7.

230 Dr Prowse stated that he generally agreed with Mr Houston’s evidence concerning the price effect of reputation. He accepted that reputation was important to a company and may influence that company’s share price. Dr Prowse similarly accepted that historical events that affected the reputation of a company could have an effect on analysts’ assessments of the company’s future earnings. However, he emphasised that the market was concerned with what might happen in the future and, consequently, the more historical the information, the less relevant the information would become.

### Effect of language on IOOF’s share price

231 Dr Prowse opined that the manner in which the information of interest was presented in this case mattered because that information was disclosed primarily through newspaper articles and comments from Senators and testimony from Mr Kelaher in the Senate Committee hearing. Dr Prowse opined that the sensationalist language that accompanied the disclosure of the information of interest had an effect on the abnormal price movements on 22 June 2015 and 7 July 2015.

232 During the expert witness conclave, Dr Prowse explained that his opinion had two bases. Firstly, he stated that financial research “clearly” demonstrates that “information provided to the market in a negative and sensationalist way has a systemic incremental negative effect on stock prices compared to a situation where the information is presented in neutral language”, and the impact is not transitory: Dr Prowse, T 222.29-32. Secondly, he stated that analyst commentary in response to the media releases in June 2015 supported his view. Dr Prowse opined that, taken as a whole, analysts did not change their valuation of IOOF as expressed in their target prices, and further, that they “universally” characterised IOOF’s share price decline on 22 June as an overreaction.

233 Mr Houston opined that “non-neutral” or “colourful” media coverage was not unusual where misconduct by a corporate entity was disclosed. In his opinion, a large portion of market participants were “sufficiently sophisticated … to figure out the distinction between commentary and fact” and make decisions to buy or sell shares accordingly: Mr Houston, T 320.9-11. Mr Houston went on to opine:

And, of course those buy/sell decisions are reflective of both commentary good and bad … So my point is that the market participants can see all of that or have the ability to see all of that and make their decisions accordingly by reference to the substance and, if you like, whatever processing commentary goes with that.

…

So Dr Prowse is effectively saying what – that the way the market would have responded is only to the sensational commentary and not to the parallel commentary that said this is an overreaction, which would suggest that instead of selling, people would have bought. And nothing about what Dr Prowse is saying can account for the contra-commentary, which we clearly know existed. And that is a fundamental difficulty with Dr Prowse’s theory of what should be done here. And my fundamental observation is that for all of the commentary that we saw, and diverse as it was, the best unbiased estimate of the price response of the substantive information is the price response that we saw. It’s not some hypothetical alternative price response which we have to guess at or speculate at. (Mr Houston, T 320.13-37).

234 Mr Houston further stated that, to his knowledge, there was no instance of a “securities disclosure event study undertaken anywhere or in the literature where the effects of language have been sought to be untangled from the substance of a disclosure”: Mr Houston, T 230, 41-4.

235 Dr Prowse was cross-examined at length on each of the Articles that he had cited in support of his opinion concerning the relationship between sensational and pessimistic language and the valuation of companies. A summary of this cross-examination is set out below at [236]-[258].

#### Tetlock Article

236 Dr Prowse was asked to identify the passage in the Tetlock Article which supported his opinion. Dr Prowse (at T 259.33-41) cited a passage of that article which stated:

First and foremost, I find that high levels of media pessimism robustly predict downward pressure on market prices, followed by a reversion to fundamentals. Second, unusually high or low values of media pessimism forecast high market trading volume. Third, low market returns lead to high media pessimism. These findings suggest that measures of media content serve as a proxy for investor sentiment or non-informational trading. By contrast, statistical tests reject the hypothesis that media content contains new information about fundamental asset values and the hypothesis that media content is a sideshow with no relation to asset markets.

237 Dr Prowse accepted that the Tetlock Article expressly found “relatively short term effects” on share prices. Dr Prowse accepted that the Tetlock Article was concerned with the performance of the market in general, as opposed to the performance of the shares of a particular company.

238 It was put to Dr Prowse that the passage on which he relied does not distinguish between whether the sentiment about the performance of the market is positive, negative or neutral and whether the language used to describe that sentiment is inflammatory, dramatic, anything other than neutral. In response, Dr Prowse stated that the author had a measure of tone, which included pessimism.

239 Mr Houston opined that the Tetlock Article, including the passage cited by Dr Prowse, did not distinguish between the price effect of the substance of information (expressed neutrally) and the price effect of pessimistic and sensationalist language.

#### Garcia Article

240 Dr Prowse accepted that the Garcia Article was effectively the same kind of article as the Tetlock Article, in that it was concerned with movements in the market in general rather than movements of any particular company’s share price. Dr Prowse accepted that the Garcia Article did not address “neutral language”. Instead, he stated that the article suggests that “negative tone of language has an impact on [the] stock price index over and above what would be implied by fundamentals”: Dr Prowse, T 239.24-5.

241 Dr Prowse was asked to identify the passage in the Garcia Article which supported his opinion. Dr Prowse (at T 272-3.40-3) cited the following passage:

It is plausible that part of the effect we document is related to the arrival of new information. We find that the effect of news partially reverses over the following few trading days, which argues for a non-informational impact. The reversal is quantitatively large, in the sense that more than half of the initial drift disappears over 4 days. But one cannot underestimate the role of a newspaper, such as the New York Times, as an important channel of financial news during most of our sample period. While the time-series data we use do not allow us to directly disentangle the information versus sentiment hypotheses, we conduct indirect tests that seem to give more bite to the sentiment interpretation of our data.

242 In cross-examination, Dr Prowse accepted that:

(1) the authors of the Garcia Article attempted to figure out whether, if the general sentiment of investors is positive or negative, that sentiment affects the performance of the market in a way separate from what might be regarded as the performance of the market in general;

(2) the highest the authors could put their finding was that “there seems to be more bite to the sentiment interpretation of their data”; but

(3) the effect documented by the authors disappeared, effectively, in a very short period of time, and reverses over the following few trading days.

243 As to the final point, Dr Prowse explained that both the Tetlock Article and Garcia Article found “relatively short term effects” on share prices, but they were the first articles in this area of research, with other articles finding longer-term effects: Dr Prowse, T 232.27-9.

#### Heston Article

244 Dr Prowse accepted that the Heston Article tested a “news effect” (that is, whether any news about a company had an effect on the company) and a “sentiment effect”. He explained that the Heston Article also distinguished the effect of news from positive or negative sentiment about the news.

245 Dr Prowse identified the Heston article as one of two articles that supported his opinion as to the temporal effect of negative and sensationalist language.

246 Dr Prowse was asked to identify the passage in the Heston Article which supported his opinion. Dr Prowse (at T 277.39-40) cited the following finding:

We find that the neural network appears to extract permanent information that is not fully impounded into current stock prices.

247 Dr Prowse stated that this passage implied that pessimistic language impacts share prices by changing investors’ perceptions of fundamentals or permanent information. However, in cross-examination, Dr Prowse accepted that the Heston Article never disentangled whether the news was good news or bad news from the expression of that news.

#### McKay Price Article

248 Dr Prowse accepted that, in the McKay Price Article, the vehicle of information that was analysed was earnings conference calls. The authors of the article specifically considered that part of the call after the prepared remarks by management. The authors considered whether that part of the call was, in general, positive or negative about the company. Dr Prowse accepted that the article did not distinguish between “vivid” and “pallid” language.

249 Dr Prowse was asked to identify the passages in the McKay Price Article which supported his opinion. He cited three passages (at T 270.7-34) which are extracted below:

We find that conference call discussion tone has highly significant explanatory power for initial reaction window abnormal returns as well as the postearnings- announcement drift. This holds after controlling for both the magnitude of the earnings surprise and the tone of the prepared managerial statements.

…

After controlling for the linguistic information in the earnings announcement, the tone of the conference calls do indeed provide additional value relevant information to market participants. These results hold after including additional variables known to affect returns and control for information disclosure for both the initial reaction window and the drift period.

…

We find that call tone is significantly related to the initial earnings announcement window abnormal stock returns, the post-earnings announcement drift, and abnormal trading volume, after controlling for the numerical representation of the earnings surprise.

250 During cross-examination, Dr Prowse conceded that the authors of the McKay Price Article were not controlling for the effect of the substantive information included in the conference call. Senior counsel for Mr McFarlane put to him that, to make good his opinion, the authors “would need to control for what is the content and then say, therefore, they can find some effect that’s just attributed to the language used on conference calls”. Dr Prowse responded: “Ideally, yes, but they haven’t done that here”: Dr Prowse, T 271.22-7.

#### Chen Article

251 Dr Prowse accepted that the Chen Article examined posts on social media to determine whether the sentiment expressed about a company in those posts was negative or positive.

252 Dr Prowse was asked to identify the passage in the Chen Article which supported his opinion. He identified (at T 274.24-44) the following passage:

To preview our findings, we observe that the fraction of negative words contained in SA [Seeking Alpha, a publication] articles and the fraction of negative words in SA comments both negatively predict stock returns over the ensuing three months. … Our results are robust to the inclusion of control variables reflecting analyst recommendation upgrades / downgrades, positive / negative earnings surprises, and the average fraction of negative words in Dow Jones News Services (DJNS) articles.

253 Dr Prowse accepted that the authors of the Chen Article did not control for the substance of the information in the social media posts examined. Dr Prowse was also unable to identify anywhere in the Chen Article where the authors separately identified the actual information and language used to express information in the social media posts under examination.

254 Dr Prowse was also taken to the following passage in the Chen Article (at T 276.23-6):

If opinions expressed through SA were unrelated to firms’ fundamentals, or if the information was spurious and already fully incorporated by financial analysts into their reported EPS forecasts, then no association should be observed between our earnings-surprise variable and our measure of peer-based advice. In contrast to this view, we find that the fraction of negative words in SA articles and comments strongly predict subsequent scaled earnings surprises. Given that earnings are unlikely to be caused by SA users’ opinions, the earnings-surprise predictability suggests that the opinions expressed in SA articles and comments indeed provide value-relevant information (beyond that provided by financial analysts).

255 It was put to Dr Prowse that this passage was inconsistent with his opinion. Dr Prowse did not accept this proposition.

#### Hales Article

256 Dr Prowse summarised the Hales Article as involving a sample of participants presented with “vivid” or “pallid” language concerning certain information. The sample participants were asked how that affected their views of the fundamentals of the company. According to Dr Prowse, the results of the study were that vivid language significantly influenced the judgment of “contrarian investors”, meaning short investors in a bull market or long investors in a bear market.

257 During cross-examination:

(1) Dr Prowse described the Hales Article as based on an “economics experiment”, and subsequently accepted that the thesis being tested by the authors was based not on economics but psychology.

(2) Dr Prowse accepted that the authors “basically found” that when vivid language was used and the content was consistent with what investors were already expecting, this did not seem to have any material effect on the investors’ assessment of future earnings, but when vivid language was used and the underlying information was inconsistent with investors’ expectations, it did seem to have a statistically significant effect on the investors’ predictions.

(3) Dr Prowse stated that he was not aware of the experiment in the Hales Article being applied in the context of any event study anywhere in the world. Dr Prowse further stated that he did not think that the experiment could be applied in the context of an event study.

(4) Dr Prowse accepted that the Hales Article did not deal with actual stock prices.

(5) Dr Prowse stated that he had not tried to replicate the experiment in the Hales Article, including for either a specific company or the share market in general.

258 Dr Prowse nonetheless opined that the Hales Article was “very consistent” with the notion that information provided to the market in a negative and sensationalist way has a systemic incremental negative effect on stock prices compared to a situation where the information is presented in neutral language and that this impact is not transitory and that it can last for a long time. Dr Prowse relevantly explained his opinion (at T 248.10-16) as follows:

Because what it says is that investors that hold – and what it finds is that investors that hold long positions in a stock forecast significantly lower earnings growth for the company when negative news is presented vividly as opposed to pallidly, and so, just as a matter of economic and financial logic, if that happens for a company and its investors, if that phenomenon is present, that will result in a decline in the company’s stock price because the people – the investors that hold long positions will reduce their review of the fundamentals and some of them will sell. (Dr Prowse, T 248.10-16)

259 In response, Mr Houston opined that:

(1) the findings in the Hales Article only applied to a subset of investors – that is, “where the language is contrary to [the investors’] position” (Mr Houston, T 249.26); and

(2) the experiment did not test decisions to buy and sell shares, and there was therefore difficulty replicating it in the “real world”, because “the market is full of professionals who are looking for just that kind of opportunity to act so as to close any price overreaction that you might observe”: Mr Houston, T 249.37-41.

### Measurement of the “fundamental value” of securities

260 A related area of disagreement that emerged during the expert witness conclave concerned the measure of the fundamental value of a company. Mr Houston opined that “essentially, there is no acceptance in the financial literature that stock prices when they are traded in a liquid efficient market can or do depart from their fundamental value for any significant amount of time”: Mr Houston, T 263.40-2. Mr Houston explained that in highly liquid, well-traded markets, if investors have a view that a company’s share price has departed from the fundamentals, then there is an arbitrage opportunity for investors to recognise that and to close that gap. Mr Houston stated that this was the basis for the well-accepted proposition that, when a stock is traded in a liquid market, the market operates efficiently. Mr Houston went on to state that, when there is efficient trading in a stock, the best estimate of the fundamental value of the company is the price as it is today.

261 In response, Dr Prowse expressed the following opinion:

I fundamentally disagree with Mr Houston’s characterisation of mainstream literature accepting the notion that the price today reflects the fundamental value of the company as expressed in the discounted future cash flows of that company as represented by the market. There is a host of literature that talks about large scale widespread differences between a stock price today of a company and its fundamental value, driven by a wide variety of factors …

And nothing in the tests that are run to determine whether a – a stock trades in a semi-strong form of an efficient market, nothing in those tests tells you anything about how the price relates to a fundamental value.

All those tests that Mr Houston has run for Insignia, all they tell you is, does the stock price react quickly to information? It doesn’t tell you whether it’s reacting correctly to information in terms of matching some change in fundamental value. (Dr Prowse, T 268.6-12, 33-9)

262 Under cross-examination, Dr Prowse relevantly:

(1) accepted that IOOF’s share price performed according to the semi-strong version of the efficient capital markets hypothesis;

(2) accepted that informational efficiency, in the sense that a stock price would react quickly to information, was consistent with the semi-strong version of the efficient capital markets hypothesis;

(3) accepted that a stock price would reflect all publicly available information;

(4) stated that Mr Houston’s contention was that informational efficiency by definition meant fundamental efficiency, and he disagreed with this contention; and

(5) accepted that he had not performed his own analysis to determine the fundamental value of IOOF.

### Dr Prowse’s analysis of analyst reactions to the 20 to 22 June 2015 disclosures.

263 As previously noted, Dr Prowse opined that, taken as a whole, analysts did not change their valuation of IOOF as expressed in their target prices, and further, that they “universally” characterised IOOF’s share price decline on 22 June 2015 as an overreaction. Dr Prowse was cross-examined in relation to these opinions.

264 Dr Prowse had initially referred to six reports in the Prowse Report, with a further analyst report identified and referred to in the Joint Expert Report. Dr Prowse was asked whether any of these analyst reports stated that the entirety of the price reaction seemed to be a consequence of sensationalist language. In response, Dr Prowse stated that he thought one of the reports might have contained such a statement, but he could not identify that report.

265 It was also put to Dr Prowse that his initial analysis in the Prowse Report of the movement of price targets by analysts contained an error, as he had stated that one analyst, Morningstar, had provided a “price target” when, in fact, Morningstar had provided a “fair value estimate”. Dr Prowse opined that, in his view, there was “very little difference between a fair value estimate and a target price”: Dr Prowse, T 282.9-10. Dr Prowse attributed the difference in name to analysts seeking to differentiate their brand from one another. He emphasised that Morningstar’s “fair value estimate” employed generally accepted methods of valuation – such as price-earnings ratio analysis or a discounted cash flow analysis – which he said was “exactly the way price targets are put together”: Dr Prowse, T 283.22.

266 Mr Houston opined that a “price target” was different to Morningstar’s “fair value estimate”. Mr Houston stated that a price target is a forecast of the price of the company in 12 months’ time. In contrast, Mr Houston explained Morningstar’s “fair value estimate” as follows:

Morningstar produces what it calls a fair value estimate, and that is a – and I’m just paraphrasing – essentially an estimate of the long-term value of the stock that they see today. So it’s a price today. But it’s also important to understand that that is not a prediction of the price today either. And that estimate – that fair value estimate is their long-term view of what they think the stock is worth. It’s also given in the context of two other price estimates: one above and one below, often quite a wide margin, and, essentially, the one above is the price that, if it reaches that, we think you should sell, and the one below, if the price is this low, we think you should buy.

So that fair value in estimate is one that sits in a range, and that range is quite wide. And necessarily – you will see from that it’s not a value estimate that purports really to say this is what the price should be today. It’s a longer-term view within bounds. (Mr Houston, T 282-3.38-3)

### The possible price reaction to Senator Williams’ calls for ASIC to take action

267 Dr Prowse was cross-examined on his opinion that comments made by Senator Williams calling for ASIC to open an investigation into IOOF with regards to allegations contained in the media article constituted a separate item of confounding information. Dr Prowse was asked to specify how many analyst reports he had reviewed had referred to the comments of Senator Williams. Dr Prowse said that he could not recall, but accepted that potentially none did.

268 In the Prowse Report, Dr Prowse had stated that ASIC had announced on 22 June 2015 that they were investigating IOOF, and further stated that this was likely to cause a negative price impact on IOOF’s share price: at [56]. In that report, Dr Prowse also stated that Senator Williams had called on ASIC to investigate IOOF, and this prompted ASIC to announce on 22 June 2015 that it was investigating the matter: at [76]. Dr Prowse went on to state: “In my opinion, the above examples of value relevant negative information would cause a negative price reaction incremental to what can be attributed to the substance of the Information of Interest”: at [77]. The references in Dr Prowse’s report to the relationship between ASIC’s announcement on 22 June 2015 and the price reaction on that day were erroneous, as ASIC’s announcement was made after the close of trading on 22 June 2015. Dr Prowse explained that he originally believed, while preparing the Prowse Report, that the ASIC investigation was announced during trading hours. Dr Prowse stated that, before publishing the Prowse Report, he discovered that this was not the case, and sought to re-write the report. He stated that he did not make all corrections necessary. Under cross-examination, he accepted that [56] of the Prowse Report in its final form was incorrect, and any amendments made to [76]-[77] of the Prowse Report were unclear (further acknowledging that “some people may view it as incorrect other unclear”): Dr Prowse, T 336.26-7.

269 The Joint Expert Report recorded that the experts agreed that ASIC’s announcement that it was investigating IOOF was released after the close of trading on 22 June 2015, and so was not captured in the abnormal price movement on that day: at [30]. In the Joint Expert Report, Dr Prowse also opined that Senator Williams’ calls for an ASIC investigation would have increased the market’s perception of the risk of an ASIC investigation, and this would have negatively affected IOOF’s stock price: at [112]-[114]. Dr Prowse was asked whether, in the Joint Expert Report, he identified that his initial analysis of this issue in the Prowse Report was incorrect or unclear. He stated that he did not expressly do so, but stated that he felt it was clear from the Joint Expert Report at paragraphs 30, 112-14 that the ASIC investigation was instigated after the close of trading on 22 June 2015.

270 Dr Prowse was also asked to explain the basis for his opinion that the call by Senator Williams was the cause of ASIC announcing that it would conduct an investigation. Dr Prowse stated that it was because Senator Williams was intimately involved in monitoring, policing and regulating the financial sector, so he considered ASIC would give weight to his call. Under cross-examination, Dr Prowse accepted that he did not have a detailed understanding of decision-making by ASIC.

271 Dr Prowse was also asked to explain how his experience led him to conclude that the market on 22 June 2015 perceived an increased risk of an ASIC investigation because of Senator Williams’ comments. Dr Prowse responded that the call to action was public information released on 22 June 2015 “from a high-profile senator who was involved intimately in the financial sector”. Dr Prowse stated he drew on his experience to “make a call” about how that public information might affect the market’s perception: Dr Prowse, T 340.24-33.

### Mr Kelaher’s testimony to the Senate hearing

272 Both experts were cross-examined in relation to their disagreement about whether the market would have discerned the Compromised Model Information on 7 July 2015 based on Mr Kelaher’s statements.

273 Dr Prowse’s opinion, as articulated in the expert conclave, was that previous media releases in June 2015 had discussed the realisation of the acquisition-related risk, and he consequently did not consider that the Compromised Model Information was “new information” at the time it was disclosed by Mr Kelaher during the Senate hearing. Dr Prowse further stated that integration risks were disclosed in media articles which relied on a source “close to the company”.

274 Further, Dr Prowse stated that, based on his review of analyst reports, analysts did not view Mr Kelaher’s statement on 7 July 2015 as “new material information”. Dr Prowse stated that, on his review of the analyst reports, he was unable to find any analysts that highlighted or picked up Mr Kelaher’s testimony concerning integration risks at all.

275 Under cross-examination, Dr Prowse explained his methodology in the following terms:

... I look to see whether realised challenges to the acquisition strategy, in terms of news, had come out earlier. It had, in the media articles. So there’s a basis for potentially coming to the conclusion that this is not new information and, therefore, can’t have – influence the stock price. But I didn’t stop there. I then tested that hypothesis by looking at analyst reports and that – and since there was no mention in analyst reports subsequent to the Senate Committee hearing, I concluded that there was no evidence for this being material information to the marketplace. (Dr Prowse, T 374.19-25)

276 Mr Houston opined that Mr Kelaher’s testimony to the Senate hearing concerning integration-related risks having materialised constituted “new information”. He emphasised that the authority carried by Mr Kelaher as Managing Director had “the important attribute of reducing any apprehension or discount that might have been applied to the previous media source allegations”: Mr Houston, T 372.28-9. He further stated that, having reviewed the analyst commentary relied on by Dr Prowse, his opinion was that the analysts were talking about the “*existence*” of integration risks. Mr Houston explained:

There had been no information provided that would allow them to understand whether or not that was realised or the extent to which that was realised. We then had the media articles which concluded that – continued on that theme for which there was – or perhaps reinforced that theme for which there was some uncertainty about the strength of those allegations. And then, finally, we had this Senate Committee hearing when Mr Kelaher, in his own terms, was quite candid about the realisation of those risks. (Mr Houston, T 372-3.43-2)

277 Mr Houston was taken to extracts from two media articles published in June 2015, which contained allegations relevant to challenges with IOOF’s Roll Up Model. Those articles relevantly stated:

The troubles at IOOF could be blamed on an aggressive sales culture and hunger for deals. A source close to the company says the group’s penchant for acquisitions meant there was no choice but to consolidate as the new IOOF was a mess of “liquorice allsorts” that was expensive to administer and made it difficult to monitor compliance. (“Boiler room throws customers to the wolves,” Sydney Morning Herald, 20 June 2015)

A scandal at financial services giant IOOF involving claims of insider trading, frontrunning and “misrepresentation” of performance numbers raises issues about culture and the insidiousness of vertical integration. …

The acquisitions have created the challenge of trying to marry a hotchpotch of technologies, platforms, dealer groups – both aligned and owned by IOOF – and different cultures. (“IOOF scandal puts spotlight on vertical integration,” Australian Financial Review, 21 June 2015)

278 Mr Houston was asked to compare these extracts to Mr Kelaher’s testimony in the Senate Committee hearing, in which, referring to IOOF’s acquisition strategy, he stated “candidly – it has also thrown up many challenges in respect of merging IT systems; internal policies and protocols; and, most importantly, creating a single culture among staff coming from often diverse and formerly competitive organisations”. It was put to Mr Houston that Mr Kelaher’s testimony was exactly what was said in the media article extracts. Mr Houston’s response was as follows:

[W]e can discuss whether the words mean different things, and I think this is talking about the existence of a challenge. I read Mr Kelaher’s statement as being more an account of the realisation of those challenges because he says “has thrown up many challenges”. That’s a past tense statement. And – but even if we were to assume for the moment that these two pieces of commentary are identical, if we just assume that for a moment … we still have the distinction between the allegations in the media which have uncertainty created to them and the confirmation of those allegations in this passage from Mr Kelaher. (Mr Houston, T 389-90.46-7)

279 Mr Houston further opined that, although analyst reports may provide insight into which items of information may be relevant to a share price change, he did not consider that, simply because an item of new information was not referred to by analysts, it followed that there was no connection between that item of information and the share price change. Dr Prowse disagreed with this opinion. Dr Prowse stated that analyst commentary can provide insight into the importance of information contained in an announcement, including which items of information were relevant to an observed change in share price (as Mr Houston agreed). Dr Prowse stated that, as part of this analysis, analyst commentary could be relied on to assign “zero” weight to a particular item of information.

### Mr Houston’s comparative analysis of the ASOC and the media disclosures (Appendix A2)

280 Mr Houston was cross-examined on his analysis in Appendix A2 to Houston Report 1. Mr Houston stated that in that appendix, he had attempted to analyse whether the media articles published between 20 to 22 June 2015 and on 7 July 2015 contained within them the information that was pleaded in the ASOC – namely, the March 2014 complaint, the Historical Information, the March 2014 Information and the Compromised Model Information.

281 Mr Houston was taken to Table A2.1 within Exhibit A2, which set out the information disclosed in media articles from 20 June 2015 to the close of trading on 22 June 2015. Mr Houston accepted that the left-hand column in the table identified the information pleaded in the ASOC, the middle column identified one or more media articles, and the right-hand column identified quotations from the media articles. The table contained the following entry.



282 Mr Houston explained that he had aligned the content of the media article identified in the right-hand column with the pleaded allegation in the left-hand column of the table.

283 Mr Houston was taken to a further entry in Table A2.1, which is extracted below:





284 Mr Houston accepted that, in this entry, he had identified an equivalence of information between the pleaded case in the ASOC at paragraph 20(c4), which referred to insider trading, and the various references to insider trading in the Sydney Morning Herald articles quoted in the right-hand column of the table.

285 Mr Houston accepted that, in the above examples, he made his own judgment about whether the information in the left-hand column and right-hand column of Table A2.1 was relevantly the same or similar. Mr Houston subsequently clarified that his analysis concerned the similarity between “the *substance*” of what was conveyed in the media articles and the pleaded information in the ASOC: Mr Houston, T 302.39-43. It was put to Mr Houston that this did not depend on his expertise, as it was just his reading of the English language. In response, Mr Houston stated:

Well, in terms of expertise, I mean, this is a sort of requirement of an event study, that one has to satisfy one’s self that the information is new. And, I guess, the principal skill in that is the ability to interpret words on a page, but that is a routine part of the event study method. (Mr Houston, T 298.20-23)

286 Mr Houston was taken to a further entry in Table A2.1, which is extracted below:



287 Mr Houston was asked, if he put himself in the position of an investor reading the media articles, whether the investor may have interpreted what was contained in those articles as referring to an actual investment fund managed by IOOF. In response, Mr Houston stated that he did not have an opinion about what an investor would think. He was further asked whether he was qualified to offer any opinion at all about whether what was conveyed in the above-quoted portions of the Sydney Morning Herald articles would have been material to an investor in IOOF. In response, Mr Houston relevantly stated:

[T]he contemporaneous information that I have looked at shows that all of the items taken together on – and their disclosure – on 20 to 22 June gave rise to a material price reaction, and so, I think I am qualified to make that observation and I am also qualified as part of that process to examine the contemporaneous commentary by equity analysts, the majority of which referred to the reputation or consequences in a negative way of the material that was given. I’m not at any stage in this process offering an opinion of one – of materiality or the contribution of any one of these items, because there are many, to the total … (Mr Houston, T 304.12-19)

288 Mr Houston was asked repeatedly to explain his understanding of the meaning of the reference to “funds” in the quoted extracts of the Sydney Morning Herald articles. Mr Houston’s responses to these questions were unsatisfactory. At one point, he stated that Table A2.1 merely contained a summary of the media articles, notwithstanding that he had previously accepted that the table contained quotations from those articles. He also stated that, for the purpose of his analysis, he had not reached an opinion as to the meaning of “funds” in the quoted extracts. He later stated that, because the quoted extracts stated “out performance numbers would no longer be produced as representative” he believed that the extracts were referring to a representative fund.

289 In the context of Mr Houston’s evidence concerning the meaning of the quoted extracts of the Sydney Morning Herald articles referring to the outperformance number of funds, it was put to Mr Houston that none of the contemporaneous analyst reports raised the misrepresentation of performance numbers as a significant part of the disclosure. In response, he stated that there was a diversity of factors in the media articles and IOOF’s disclosures that were recorded in the analyst reports. He subsequently accepted that he was in no better position than the Court to read the relevant analyst reports to determine what they said.

290 Mr Houston subsequently also accepted that the Court was able to look at his analysis in Table A2.1 within Appendix A2 to form a view about whether he had correctly assessed the degree of similarity or otherwise between the quoted extracts in the various media articles and the pleaded information in the ASOC.

## Findings in respect of the expert evidence of Mr Houston and Dr Prowse

291 Based on my observation of the demeanour and responses of Mr Houston and Dr Prowse during the expert conclave, and having considered their expert reports, I consider both of them to be generally reliable and truthful expert witnesses. To the extent that either Mr McFarlane or Insignia invited me to reject their evidence in total as being unsatisfactory and unreliable, I decline to do so. I make the following specific findings in respect of the expert evidence of Mr Houston and Dr Prowse.

### Principles underlying an “event study”

292 I accept the evidence of Dr Prowse and Mr Houston, as recorded in the Joint Expert Report, that an event study is a widely accepted methodology for estimating the effect on the price of a traded security of one or more items of news, provided that the following four conditions are satisfied:

(1) Condition 1 – The event is a well-defined news item or series of items;

(2) Condition 2 – The times that the news reaches the market are known;

(3) Condition 3 – There is no reason to believe that the market anticipated the news; and

(4) Condition 4 – It is possible to isolate the effect of the news from market, industry, and other company-specific factors simultaneously affecting the company’s security price.

293 I accept that if the four conditions identified above are met, an event study can be used to estimate the extent to which new information has had an effect on the price of a security.

294 I accept that the event study methodology is founded upon two financial principles. Firstly, the semi-strong form of the efficient market hypothesis holds that all publicly available information is quickly and freely reflected in the price of an actively traded asset such as a share security. Secondly, only new information can have an effect on a company’s share price as all known information may be reflected in the share price.

295 I accept that IOOF shares traded in a “semi-strong form” efficient market during the Relevant Period.

296 I accept that where “confounding information” is present, the share price effect on that confounding information needs to be removed from the total abnormal return to isolate the share price effect of the information of interest.

297 I accept that once the share price effect of the information of interest is estimated, it can then be used to estimate the extent of “share price inflation” for each day of the Relevant Period.

298 Mr Houston and Dr Prowse both agreed on the magnitude of the abnormal price movements on 22 June 2015 and 7 July 2015 – that is, a reduction of $1.45 or 13.6% on 22 June 2015 and a reduction of $0.46 or 5.2% on 7 July 2015.

299 I accept Mr Houston’s opinion that his event study was based on all of the Alleged Material Information being established by Mr McFarlane. If there were some allegations which were not made out then the price inflation estimate in his report would need to be adjusted. Mr Houston accepted that he had not undertaken such an exercise as his event study had been based on all of the Alleged Material Allegations being made out at trial.

300 Mr Houston accepted that if the allegations of insider trading or front running were not made out, and consequently any counterfactual disclosure by IOOF should omit reference to such allegations, then those allegations would constitute confounding information.

301 The event study undertaken by Mr Houston was not designed for, and was not capable of, determining the magnitude of abnormal price movements on 22 June 2015 and 7 July 2015 if the Court finds that only some of the Alleged Material Information was proven to be true. Mr Houston was not able to estimate the magnitude of the abnormal price movements where only some of the Alleged Material Information had been proven to be true.

### Relevance of reputation to IOOF’s share price

302 I accept Mr Houston’s opinion that, from a financial theory perspective, information that detracted from a company’s reputation was relevant to a company’s valuation because it was capable of increasing the discount rate applied to the future cashflows of the company. I accept Mr Houston’s opinion that the discount rate is essentially a measure of risk and uncertainty. I accept Mr Houston’s opinion that information that detracted from the reputation of a company was expected to increase the discount rate applied by the market to the company because it reflected nervousness or uncertainty about whether those projected future cashflows would, in fact, be realised.

303 I accept Mr Houston’s opinion that the valuation impact of reputation was well-recognised in the financial and economic literature as a fundamental underpinning of the valuation of a company. Dr Prowse generally agreed with Mr Houston’s evidence concerning the price effect of reputation. I accept Dr Prowse’s opinion that the market was concerned with what might happen in the future and, consequently, the more historical the information, the less relevant information would become.

304 I accept Mr Houston’s evidence that the information disclosed to the market in this proceeding was likely to detract from the reputation of IOOF. Mr Houston’s evidence in this regard did not appear to be challenged by Dr Prowse.

### Effect of language on IOOF’s share price

305 The six articles which Dr Prowse relies upon to support his opinion concerning the relationship between sensational and pessimistic language used in the Fairfax articles and the valuation of IOOF’s shares does not, in my view, provide a recognised economic thesis or methodology which is accepted by economists as providing support for Dr Prowse’s opinion.

306 I find that the Tetlock Article, and the particular passage of that article to which Dr Prowse referred in cross-examination, does not provide support for Dr Prowse’s opinion. That is because, the Tetlock Article was concerned with the poor performance of the market in general, as opposed to the performance of shares of a particular company.

307 I find that the Garcia Article does not provide support for Dr Prowse’s opinion concerning the relationship between sensational and pessimistic language and the value of shares in companies. The Garcia Article, like the Tetlock Article, was concerned with movements in the market in general rather than movements in the share price of a particular company.

308 I find that the Heston Article does not provide support for the opinion expressed by Dr Prowse. The Heston Article, as Dr Prowse accepted in cross-examination, tested a “news effect” (that is, whether any news about the company had an effect on the company) and a “sentiment effect”. It does not provide any support for Dr Prowse’s opinion of the effect of sensational and pessimistic language on the share price of a particular company.

309 I find that the McKay Price Article does not provide any support for Dr Prowse’s opinion on the effect of sensational and pessimistic language on a company’s share price.

310 The McKay Price Article analysed earnings conference calls. The authors of the article considered whether the call was, in general, positive or negative about the company. The McKay Price Article does not provide any support for Dr Prowse’s opinion of the effect of sensational or pessimistic language on the share price of a particular company.

311 I find that the Chen Article does not provide any support for the opinion expressed by Dr Prowse on the effect of sensational and pessimistic language and the share price of particular companies. The Chen Article examined posts on social media to determine whether the sentiment expressed about a company in those posts was negative or positive. The Chen Article did not consider the price effect of sensational or pessimistic language on the share price of a particular company.

312 I find that Hales Article does not provide support for the opinion expressed by Dr Prowse that sensational or pessimistic language can affect the share price of a particular company. Dr Prowse accepted in cross-examination that the authors of the Hales article were testing a thesis that is based not on economics but on psychology, Dr Prowse stated that he was not aware of the experiment in the Hales Article being applied in the context of any event study anywhere in the world. Dr Prowse accepted that the Hales article did not deal with actual stock prices. I find that the Hales article provides no support for the opinion expressed by Dr Prowse.

313 I do not accept Dr Prowse’s opinion that pessimistic and sensational language can of itself have a negative effect on a company’s stock price beyond the stock price effect of the underlying content of the information of interest. I also do not accept Dr Prowse’s opinion that the sensational and pessimistic language in the media disclosures on 20 June 2015 to 22 June 2015 and 7 July 2015 should be regarded as “confounding information”, and a “portion” of the abnormal price movement identified by Mr Houston should be deducted from Mr Houston’s estimate of the total abnormal price movement. I am of this view for the reasons that follow.

314 I am not satisfied that the six academic articles referred to by Dr Prowse provide an accepted economic thesis or methodology that pessimistic and sensational language can of itself have a negative effect on a company’s stock price beyond the stock price effect of the underlying content of the information of interest.

315 I accept Mr Houston’s opinion that media commentary in relation to information of interest generally does not amount to confounding information. Media commentary is part of the process of information dissemination and absorption that informs security price. I accept Mr Houston’s opinion that the six academic articles relied upon by Dr Prowse do not provide any accepted economic thesis or methodology which would describe pessimistic and sensational language used in media disclosures as confounding information.

316 I do not accept Dr Prowse’s opinion that a portion of IOOF’s stock price decline could be attributed to the language and tone of the media disclosures. I also reject Dr Prowse’s opinion that this portion “could constitute the entire amount of the abnormal return”.

317 Based on a qualitative review undertaken by Dr Prowse of analysts’ commentary reports after the 20 to 22 June 2015 disclosures, Dr Prowse opined the event day price response as an overreaction. I reject this opinion of Dr Prowse and prefer and accept Mr Houston’s opinion that had the abnormal price movement been an overreaction to the information of interest then one would have expected in an efficient market that there would have been a market correction after 22 June 2015. Mr Houston observed that there was no subsequent market correction after 22 June 2015. This, in Mr Houston’s opinion, contradicts Dr Prowse’s opinion that the abnormal price movement on 22 June 2015 was an overreaction. I accept Mr Houston’s expert opinion on this point.

### Measure of the “fundamental value” of securities

318 On the topic of the measurement of the “fundamental value” of securities, I prefer the expert opinion of Mr Houston to that of Dr Prowse. I accept Mr Houston’s opinion that in highly liquid, well-traded markets, if investors have a view that a company’s share price has departed from its fundamental value, then there is an arbitrage opportunity for investors to recognise and to close that gap. I accept Mr Houston’s opinion that it is well-accepted in economic theory that when a stock is traded in a liquid market, the market operates efficiently. I accept Mr Houston’s opinion that when there is efficient trading in a stock, the best estimate of the fundamental value of the company is the share price that day. I accept that the share price of a particular company on any given day reflects all of the publicly available information on that company. I accept that IOOF’s share price performance is in accordance with the semi-strong version of the efficient capital markets hypothesis.

### Price reaction to Senator Williams calls for ASIC to take action

319 I accept Mr Houston and Dr Prowse’s opinion in the Joint Expert Report that ASIC’s announcement of an investigation into IOOF which was released after the close of trading on 22 June 2015 and, as a result, was not captured in the abnormal price movement on that day.

320 I do not accept Dr Prowse’s evidence that the call by Senator Williams for ASIC to investigate IOOF negatively affected IOOF’s share price. That opinion was not supported by any contemporaneous analyst reports referring to Senator Williams’ comments. Dr Prowse’s opinion ultimately appeared to rest merely on the fact that Senator Williams was a high-profile senator involved in the financial sector. I do not regard this as a sufficient explanation for Dr Prowse’s opinion that Senator Williams’ comments negatively affected the share price of IOOF on 22 June 2015.

### Mr Kelaher’s testimony to Senate Hearing

321 I accept Mr Houston’s opinion that Mr Kelaher’s statement on 7 July 2015 constituted “new information” because it confirmed IOOF was facing integration risks from its acquisition strategy. Previous media statements referred to the uncertainty of the risks associated with IOOF’s acquisition strategy whereas the statement made by Mr Kelaher on 7 July 2015 confirmed the realisation of those risks. In this way, Mr Kelaher’s statement was “new information”.

### Mr Houston’s comparative analysis of the ASOC and the media disclosures – Appendix A2

322 In its closing written submissions at [438]-[440], Insignia contended that Mr Houston was in no better position than the Court to conduct the analysis he purported to undertake in Appendix A2 to Houston Report 1. Mr Houston had stated, in cross-examination, that the task involved “the ability to interpret words on a page”, and Insignia contended that this was not a task which Mr Houston was more skilled to perform than the Court. Insignia further contended, at [443], that Mr Houston’s analysis was not based on any specialised knowledge or expertise and, in any event, was wrong and unreliable.

323 I reject Insignia’s contention that Mr Houston’s comparative analysis in Appendix A2 was not based on any specialised knowledge or expertise. Section 79(1) of the *Evidence Act 2008* (Cth) prescribes two conditions of admissibility of expert opinion evidence: firstly, the witness must have “specialised knowledge based on the person’s training, study or experience”; secondly, the witness’s opinion must be “wholly or substantially based on that knowledge”. As to the first condition, “specialised knowledge” is knowledge which is “outside that of persons who have not by training, study or experience acquired an understanding of the subject matter”. As to the second condition, it is sufficient that an opinion is substantially based on specialised knowledge based on training, study or experience: *Honeysett v R* (2014) 253 CLR 122 at [23]-[24].

324 I do not consider that Mr Houston’s comparative analysis of the text of the disclosures and the pleaded Alleged Material Information, as recorded in Appendix A2, is limited to merely “interpret[ing] words on a page”. Mr Houston’s evidence was that “the ability to interpret words on a page” was the “principal skill” that he used, but his evidence was also that this was “a routine part of the event study method”. Mr Houston explained that this is because a requirement of any event study is the determination of whether information disclosed to the market is “new”. I consider that the comparative analysis undertaken by Mr Houston is therefore informed by his experience in interpreting the text of disclosures, which is a “routine part” of the event study method, in which he has extensive experience. This is sufficient to establish that Mr Houston’s comparative analysis is substantially based on Mr Houston’s specialised knowledge arising from his experience as an event study expert.

325 I also reject Insignia’s submission that the Court should reject the entirety of Mr Houston’s comparative analysis in Appendix A2 as unreliable. That submission relies on a number of asserted qualitative differences between the text of the relevant disclosures and the Alleged Material Information, which are set out in Insignia’s closing written submissions at [441]. The differences there identified were largely not meaningfully put to Mr Houston in cross-examination, and ought to have been if Insignia sought to rely on those differences to ground a submission that the entirety of Mr Houston’s comparative analysis was unreliable.

326 Nonetheless, Insignia did directly put to Mr Houston, in cross-examination, one alleged qualitative difference between the text of the relevant disclosures and the Alleged Material Information, which was not accounted for in the matching exercise recorded in Appendix A2. That difference related to the allegations in two Fairfax articles concerning the Buy-model and the content of ASOC paragraph 17(b), which refers to IOOF’s material overstatement of the performance of IOOF’s “model portfolio”. Mr Houston’s opinion that the ASOC and Fairfax articles conveyed substantively the same information was challenged on the basis that the articles referred to the misrepresentation of the performance figures of “funds” whereas the ASOC refers only to the performance of a “model portfolio”. As discussed at [288], I found Mr Houston’s answers in response to cross-examination on this topic unsatisfactory. I accept Insignia’s submission that there is a significant qualitative difference between the terms of the Fairfax articles, insofar as they referred to the Buy-model, and the terms of ASOC paragraph 17(b) in that the Fairfax articles conveyed that IOOF had misrepresented the performance of its actual funds in which client money was invested, and ASOC paragraph 17(b) merely alleged that IOOF has misrepresented the performance of a model portfolio. I accept Insignia’s submission that Appendix A2 of Houston Report 1 does not account for this difference. I return to the significance of this difference at [667]-[668] below.

## Conclusion on expert evidence

327 I have found, for the reasons set out below, that Mr McFarlane has only proved the truth of some of the Alleged Material Information. Mr Houston’s event study was premised on all of the Alleged Material Information being established as true. The event study was not designed to estimate the magnitude of the abnormal price movements where only some of the Alleged Material Information has been proven to be true. As a consequence, the price inflation estimate calculated by Mr Houston cannot be relied upon in circumstances where only some of the Alleged Material Information has been proven to be true, and therefore required to be disclosed in a counterfactual disclosure. Mr Houston said that if only some of the Alleged Material Information was true then it would be necessary to undertake an adjustment to his price inflation estimate. Mr Houston said in evidence that he had not undertaken that adjustment exercise. As a consequence, the event study undertaken by Mr Houston cannot be relied upon to calculate the abnormal price movements on 22 June 2015 and 7 July 2015.

# CONSIDERATION OF CONTINUOUS DISCLOSURE CASE

## Did IOOF contravene s 674 of the *Corporations Act*?

328 During the Relevant Period, s 674(2) of the *Corporations Act* and ASX Rule 3.1 required IOOF to make immediate disclosure of information of which it was aware which was not generally available and a reasonable person would expect, if the information were generally available, to have a material effect on the price or value of IOOF shares.

329 Mr McFarlane alleges that the Alleged Material Information satisfied that criteria and IOOF was required to disclose the Alleged Material Information to the market during the Relevant Period. IOOF did not make such a disclosure. Mr McFarlane contends that it thereby breached s 674 of the *Corporations Act*.

## Truth of the Alleged Material Information and IOOF’s awareness

330 To succeed, Mr McFarlane must establish the truth of the matters alleged in respect of the Historical Information, the March 2014 Information and the Compromised Model Information, which Mr McFarlane collectively refers to as the Alleged Material Information. If Mr McFarlane has established on the evidence the truth of some or all of the Alleged Material Information then he must establish IOOF’s “awareness” of that information. I now turn to consider these issues.

### The Historical Information

331 The Historical Information comprises a series of allegations of conduct or “incidents” which were alleged to have occurred between 1995 and 2014. In his closing written submissions, Mr McFarlane alleged that IOOF knew of the Historical Information by the time of the March 2014 complaint (4 March 2014): at [73]. Each piece of information said to comprise the Historical Information is pleaded at ASOC [20] which I consider below.

#### ASOC paragraph 20(a) – 2009 First and Final Warning Letter

332 Mr McFarlane alleges, at ASOC paragraph 20(a), that IOOF was aware that on 19 May 2009, the Head of Research, Peter Hilton, had been given the 2009 First and Final Warning Letter for “improper share trading”. Insignia admits this allegation but notes that the letter was given to Mr Hilton at the conclusion of the 2009 AWM Investigation: FAD [20(c)].

333 In his closing written submissions at [75], the version of the 2009 First and Final Warning Letter relied on by Mr McFarlane was a letter dated 19 March 2009. However, a subsequent version of the 2009 First and Final Warning Letter was prepared on 27 May 2009. I find on the evidence that the relevant letter was the amended version dated 27 May 2009 and not the earlier draft dated 19 May 2009. It is to the content of this amended letter that I refer in this judgment when referring to the 2009 First and Final Warning Letter. Nothing in these reasons turns on the differences between the 19 May 2009 and the 27 May 2009 versions of the 2009 First and Final Warning Letter.

334 The 2009 First and Final Warning Letter was issued by Mr Carter to Mr Hilton, and relevantly stated:

This letter confirms our formal discussion held 22 January 2009 & 9 April 2009 regarding trading behaviours.

In these discussions, we reviewed your involvement and behaviours in share trading whilst in the employment of Bridges. I have considered your responses and it is deemed that your behaviour and actions warrant a formal warning.

In general, if you are to continue in this role, your performance/behaviour needs to improve, along with your ability to achieve set goals and demonstrate leadership qualities.

As discussed, the expectations going forward are:

* provide AWM with a current register for yourself and Shirlene on a quarterly basis
* obtain approval from your Manager or Company Secretary for all future share or investment transactions for yourself or Shirlene
* Attend compulsory training in Chinese Walls, Insider Trading, Personal Trading, Code of Conduct and Conflicts of Interest to be undertaken by an ASX Responsible Executive

Please be aware that failure to improve and maintain an adequate improvement in the above areas may result in immediate termination of your employment.

335 In the light of Insignia’s admissions, the truth of the matters alleged in ASOC paragraph 20(a) is not in dispute.

336 Notwithstanding this, it should be observed that the 2009 First and Final Warning Letter did not identify the share trading that the 2009 AWM Investigation considered improper. The context in which Mr Hilton was given the 2009 First and Final Warning Letter is evident from the 13 May 2009 Email, being the email from Mr Urwin to Mr Riordan, which set out his conclusions and recommendations in respect of Mr Hilton as follows:

Based on file notes and discussions with the above I would like to make the following recommendations:

**Peter Hilton:**

First and final warning

Peter’s role as the Head of Research requires Peter to show due skill, care and diligence towards trades executed on behalf of his wife Shirlene and himself.

It has not been proved that Peter was Front Running trades placed on behalf of his wife Shirlene, however, some of the execution was close or coincided with dissemination of Research.

Peter’s position and involvement in these transactions meant he should have due regard to the risks and consequences of his or Shirlene’s actions.

We have addressed the Conflicts of Interest issues and the changes in process regarding placements and having access to Inside Information.

Reporting

This is not reportable to the Regulator (ASIC or ASX) as it is not systemic. This is the first time these issues have been raised against Peter.

Actions Going Forward:

- All of Peter’s or Shirlene’s trades are to be approved by Michael Carter before being placed with Stockbroking.

- Peter to keep Register of Interest up to date on a quarterly basis for Shirlene’s and Peter.

- Disclaimers will be used to disclose holdings when preparing Research reports. This will also comply with the ASIC request to make information more explicit in our policy.

- Peter to attend compulsory Chinese Walls, Insider Trading, Personal Trading, Code of Conduct and Conflicts of Interest Training to be undertaken by ASX Responsible Executive

337 From this email, it is apparent that Mr Urwin concluded, at the end of the 2009 AWM Investigation, that:

(1) it had not been proved that Mr Hilton was “front running” trades placed on behalf of his wife, Shirlene Hilton. However, the execution of the trades was close or coincided with the dissemination of research by Mr Hilton’s Research team;

(2) Mr Hilton’s position and involvement in the transactions meant he should have due regard to the risks and consequences of his and Mrs Hilton’s actions; and

(3) the trades were not reportable to either ASIC or the ASX as they were not systemic and this was the first time these issues had been raised against Mr Hilton.

338 Mr McFarlane does not challenge the findings and recommendations of Mr Urwin arising from the 2009 AWM Investigation. The outcome of the investigation was to issue Mr Hilton with the 2009 First and Final Warning Letter.

339 I find that Mr McFarlane has established, on the evidence and Insignia’s admissions, the substantial truth of the matters alleged in ASOC paragraph 20(a). The only matter on which the evidence and the plea at ASOC paragraph 20(a) diverge concerns the date of the 2009 First and Final Warning Letter.

#### ASOC paragraph 20(b) – Conduct resulting in 2009 First and Final Warning Letter

340 Mr McFarlane alleges, at ASOC paragraph 20(b), that IOOF was aware that Mr Hilton “engaged in improper share trading before 19 May 2009 which resulted in the 2009 First and Final Warning Letter being issued to him on that date”. Insignia denies this plea: FAD [20(d)]. However, Insignia admits that “possible concerns” were raised in around December 2008 about potential front running of research reports relating to the share trading activity of Mr Hilton: FAD [20(a)]. Insignia also admits that, following completion of the 2009 AWM Investigation, it was concluded that: Mr Hilton’s trading did not amount to front running; Mr Hilton was trading in securities through his wife’s account which could give rise to a potential conflict of interest with his role as Head of Research; and this was done without approval: FAD 20(b).

341 I have explained above the context for the issuing of the 2009 First and Final Warning Letter to Mr Hilton following the 2009 AWM Investigation in dealing with ASOC paragraph 20(a).

342 Mr McFarlane, in his closing written submissions at [73]-[86], identifies the following materials upon which he submits the Court should find that Mr Hilton had engaged in improper share trading before 19 May 2009 which resulted in the 2009 First and Final Warning Letter being issued to him:

(1) Firstly, Mr McFarlane refers to the 19 May 2009 version of the 2009 First and Final Warning Letter, which expressly referred to a discussion on 4 May 2009 regarding “improper share trading”.

(2) Secondly, Mr McFarlane refers to a 7 January 2009 file note made by Mr Urwin of a discussion he had with Mr Riordan, General Counsel of IOOF, which referred to his “initial concern” that the Research team had recommended that planners buy stock at the same time as “selling it for [Mr Hilton’s] wife and the Questor Property Fund which [Mr Hilton] is responsible for managing”. The Questor Property fund was a fund whose responsible entity was Questor Financial Services Ltd, an AWM entity. The note further stated that “it may appear that staff have got out easy as the price dropped to the detriment of existing members of the fund”. This is a reference to the “**ING Office Fund Issue**”, which is further elaborated on below at [342(3)(d)] and [360].

(3) Thirdly, Mr McFarlane refers to a 20 January 2009 memorandum prepared by Mr Riordan to Michael Carter, styled “ASX Share Trading & Placements”, who was at the time the Chief Executive Officer of Bridges. The memorandum relevantly identified four issues, namely:

(a) a “Conflict Issue”, that Mr Hilton was “selling his wife’s stock at the same time as having a Research Report to the Network to buy the same stock”;

(b) a “Short-Sale Issue”, being a “potential breach of the ASX Market Rules” by a trader having placed a sell order for 20,000 units in the IOF when the trader was not the beneficial holder of those units (instead they had been allocated to the Questor Property Fund);

(c) a “Placement Issue”, being a question whether proper procedures were in place to ensure “equity” as between staff and to ensure compliance with the overriding duty to the issuer to “obtain the maximum benefit from any Placement offer”; and

(d) an “ING Office Fund Issue”, referring to an incident in December 2008 in which planners and staff had cancelled their orders for units in IOF after the unit price of the offer went below the offer price, subsequently resulting in the cancelled orders being allocated to the Questor Property Fund, which in turn caused the Questor Property Fund to breach its benchmark weighting and to suffer an “immediate and worsening” loss.

(4) Fourthly, Mr McFarlane refers to a memorandum prepared by Mr Urwin summarising his first interview with Mr Hilton on 22 January 2009. The memorandum relevantly recorded Mr Hilton as having stated that:

(a) he had his own trading account, and also traded on behalf of an account held by his wife and the Questor Property Fund account;

(b) when trading on behalf of his wife’s account, his wife approved every trade;

(c) he had traded inconsistently with the Research team’s recommendations, and that he had done so because his wife had a “‘trading perspective’ within her portfolio”;

(d) there would be other examples of him having traded inconsistently with the Research team’s recommendations due to his wife’s trading perspective, and to “look through the trading records”;

(e) by taking up the shortfall arising from the IOF Placement, Questor Property Fund had not been “put … over benchmark” because, according to Mr Hilton, “the mandate was broad”; and

(f) existing members of the Questor Property Fund had been disadvantaged by the decision of the fund to take up additional units in the IOF.

(5) Fifthly, Mr McFarlane refers to an annotated “Cash Management Account” statement for Mrs Hilton dated 6 February 2009 (**2009 Cash Management Account Statement**), which identifies:

(a) a $100,000 allocation for Platinum Asset Management on 17 May 2007 with a subsequent sale and proceeds received 11 days later of $169,219.20;

(b) a $139,650 allocation for the Challenger Infrastructure Fund on 19 July 2007 with subsequent sales and proceeds received six days later for a total of $147,831.78; and

(c) a purchase of Macquarie Convertible Preference shares on 8 July 2008 with a research report being issued the next day on 9 July 2008, with a subsequent sale and proceeds received on 18 November 2008.

(6) Sixthly, Mr McFarlane refers to a memorandum prepared by Mr Riordan summarising his further interview of Mr Hilton on 9 April 2009, titled “Interview with Peter Hilton – Trading Behaviours”. That memorandum refers to two examples of trading activity of apparent concern to Mr Urwin – a purchase by Mr Hilton’s wife of stock in Toll Holdings Limited in August 2008, and the allocation of shares in a Platinum Asset Management placement to Mr Hilton’s wife in May 2007. The memorandum relevantly recorded:

**2) Toll Trade:**

* Peter advised that he was not aware of any trades placed on behalf of Shirlene’s account before the research recommendation was disseminated to the network.
* With regards to the toll trade, I explained that an updated Research report was sent to the network on 27 August 2009 – Maintain BUY. Peter explained that the stock was already a BUY, so an unchanged recommendation ought not trigger the Front Running issue.
* I explained to Peter that a Research report was given to the network and it was based on updated information. Peter was the author of the report. Shirlene placed an order to BUY Toll on the 26 August 2008. Peter advised that he assumed that the order would not be executed until after the embargo period had expired.
* I explained to Peter the process undertaken by the Responsible Executive or his or her delegate to review staff orders against the embargo list. I advised that it was impossible to put a hold on the order as the Research report had not been disseminated to the network.

…

**5) Platinum Placement**

* I advised Peter that his wife had been allocated the highest amount in this placement ($100,000).
* Peter advised that the allocation process had been reviewed by the CEO Bridges and he was unaware of allocated amounts to others so the relativity meant nothing to him.

343 The files and memoranda identified above and relied upon by Mr McFarlane to establish the allegation in ASOC paragraph 20(b) came into existence prior to the conclusion of Mr Urwin’s 2009 AWM Investigation. Further, the 19 May 2009 version of the 2009 First and Final Warning Letter was not the final version of the letter; the final version of the letter did not contain a reference to “improper share trading”. Given this, I have some doubt whether the matters to which I was taken by Mr McFarlane, without more, establish that Mr Hilton was engaging in improper share trading before 19 May 2009.

344 Notwithstanding this, Insignia admits ASOC paragraph 20(a) and accordingly, it is not in dispute that Mr Hilton was issued with the 2009 First and Final Warning Letter for improper share trading: FAD [20(a)]. The letter referred to discussions with Mr Hilton about his “trading behaviours” and recorded a conclusion by Mr Carter that “I have considered your responses and it is deemed that your behaviour and actions warrant a formal warning”. I infer that this conclusion related to Mr Hilton’s share trading prior to that date. The fact that it was deemed appropriate to issue Mr Hilton a “formal warning” grounds an inference that such share trading was improper. Further, the 13 May 2009 Email records Mr Urwin’s conclusion that the execution of certain undisclosed trades “was close or coincided with dissemination of Research” and that “Peter’s position and involvement in these transactions meant he should have due regard to the risks and consequences of his or Shirlene’s actions.” I again infer that this is a reference to share trading the subject of Mr Urwin’s investigations, which Mr Urwin considered to be improper.

345 On this basis, I find that IOOF was aware that Mr Hilton had engaged in improper share trading, and that this resulted in the 2009 First and Final Warning Letter being issued to him, albeit as noted above, my finding is that the relevant letter was the amended version of the letter dated 27 May 2009. I find that Mr McFarlane has established, on the evidence, the substantial truth of the matters alleged in ASOC paragraph 20(b).

#### ASOC paragraph 20(c) – Improper share trading after 2009 First and Final Warning Letter

346 Mr McFarlane alleges, at ASOC paragraph 20(c), that IOOF was aware that Mr Hilton “continued to engage in improper share trading after receipt of the 2009 First and Final Warning Letter and before the time of the March 2014 complaint”. The allegation is denied: FAD [20(d)].

347 As previously noted, I have found that the relevant version of the 2009 First and Final Warning Letter was dated 27 May 2009. I therefore proceed on the basis that the relevant question is whether Mr McFarlane has established IOOF’s awareness of Mr Hilton’s continued improper share trading between 27 May 2009 and 4 March 2014.

348 Mr McFarlane, in his oral opening submissions (Mr Hodge KC, T 86.13-14) and closing written submissions at [91]-[92], relies upon three documents in support of this allegation of improper share trading after receipt of the 2009 First and Final Warning Letter. The first document is the December 2014 complaint made by Chhai Ung, an analyst in the Research team. The second document is the PwC Insider Trading Report. The third document is an Excel spreadsheet, titled “Summary of findings”, which appears to record various trades either following, or closely ahead of, research reports being issued, and a trade of IOOF’s shares during an embargo period.

349 As to the first document, Mr Ung’s December 2014 complaint identified 58 examples of alleged insider trading or front running by Mr Hilton, of which 57 were expressly stated to have occurred between 1998 and 8 December 2008, being a period during which Mr Hilton was an employee of AWM, not IOOF. Self-evidently, these 57 examples pre-date Mr Hilton being issued with the 2009 First and Final Warning Letter which I have found was dated 27 May 2009. The other example referred to by Mr Ung involved the APA Group and is relevantly set out below:

* As an example, on 10 December 2014, an equity investment, APA Group made an announcement.
* Before the team had publish a research report on APA, Mr Peter Hilton spoke with a number of significant financial advisers about our views and recommendation and advised junior colleagues including myself to call a number of financial advisers with significant holdings in APA Group before publication of research reports and before dissemination of retail client letters.
* From 12 May 2014 to December 2014, Mr Chhai Ung was harassed by financial planners such as Sharon Green to send her research reports and advise her of recommendation changes before dissemination. Sharon Green and other financial planners stated in words to the effect of “…Peter tells us beforehand, how come you don’t… it helps me prepare SOAs [statement of advice]”

350 As is evident from the above, Mr Ung’s description of the relevant event was in vague terms. So far as it can be understood, Mr Ung’s description of Mr Hilton’s conduct did not identify any “insider trading/front running”. In fact, Mr Ung’s description with respect to the APA Group and Mr Hilton’s conduct did not refer to any trading activity at all. I find that the documents in evidence which arise out of Mr Ung’s December 2014 complaint do not provide an adequate foundation to prove the matters alleged in ASOC paragraph 20(c).

351 The second document relied upon by Mr McFarlane to prove the allegations in ASOC paragraph 20(c) is the PwC Insider Trading Report. That report was commissioned by IOOF into the share trading of Mr Hilton from December 2008 through to 30 March 2015. The scope of the work was defined in the report as being to investigate and determine whether “there is any evidence from the past six years that Mr Hilton had engaged in insider trading or ‘front running’ [or] plagiarised material with respect to research reports he has produced”.

352 The PwC Insider Trading Report did not identify any evidence indicating Mr Hilton had engaged in front running from 22 December 2008 to March 2015 through research reports released by IOOF or Bridges. The report noted that it had identified “no instances of Mr Hilton buying securities through either his or his wife’s accounts ahead of issuing a favourable research report in relation to the same security, or issuing a negative report and buying securities shortly after the price had moved”.

353 The PwC Insider Trading Report did however identify the following instances where trades through Mrs Hilton’s account breached “IOOF/Bridges policies”:

(1) A sale of shares by Mrs Hilton in Adelaide Managed Funds Asset Back Yield Trust on 16 February 2009. This occurred prior to the issuing of the 2009 First and Final Warning Letter to Mr Hilton and is therefore not relevant to the pleaded allegation in ASOC paragraph 20(c). PwC found that this trade occurred within two days after the release of a relevant research report. Importantly, the PwC Insider Trading Report stated that the research report recommendation for the stock was a “hold”. PwC found that the trade was in breach of a requirement in the trading policy that staff not trade for a period of two calendar days from the time when the Research team issues a new “buy” recommendation in a report. The PwC Insider Trading Report did not clarify how the identified trade breached the cited requirement in the trading policy, given that the trade was executed in circumstances where the research recommendation was a “hold” and not a new “buy”.

(2) A purchase of shares by Mrs Hilton in Tatts Group on 9 August 2011 which took place the day after a research report had been issued, and which was consistent with the “buy” recommendation (**Tatts Group Transaction**). PwC noted in its report that this trade was within the two-day embargo period under IOOF’s personal trading policy. However, other than being a breach of IOOF’s personal trading policy, it is not apparent how a trade consistent with a research recommendation executed after the recommendation was issued could give rise to a finding of illegal insider trading by Mrs Hilton.

(3) A sale of shares in Lend Lease on 1 February 2012 in circumstances where a research report recommending the shares be purchased was issued three weeks later on 22 February 2012 (**Lend Lease Transaction**). PwC noted in its report that this trade likely breached a requirement in IOOF’s trading policy that research staff not deal in securities the subject of “current research”. It should be observed however that the sale of shares in Lend Lease on 21 February 2012 took place 21 days before a report was released with a “buy” recommendation. On its face, this is not indicative of trading conduct which in any way seeks to take advantage of the timing of the release of a research report.

(4) A purchase of shares in ResMed Inc on 31 January 2013 and a sale of those shares on 1 February 2013, in circumstances where a research report with a “buy” recommendation was issued on 6 February 2013 (**ResMed Transaction**). The PwC Insider Trading Report noted that the trading was not front running as the stock had been bought and sold before any research report was issued. Nonetheless, the report stated that PwC considered the trading likely breached requirements in IOOF’s trading policy not to deal in securities the subject of “current research” and requirements not to trade inconsistently with research. Again, however, in circumstances where the purchase and the sale of the shares occurred before the research report was issued, there cannot be any suggestion of trading off the effect of the report.

354 The third document relied on by Mr McFarlane is the Excel spreadsheet, titled “Summary of findings”. The spreadsheet refers to the sale of shares in Adelaide Managed Funds Asset Back Yield Trust on 16 February 2009, the Tatts Group Transaction and the Lend Lease Transaction, each of which were referred to in the PwC Insider Trading Report and have been described above. The spreadsheet also referred to a further two transactions which were described, respectively, as involving a trade “closely ahead of current research reports issued”, and a “trade of IOOF shares during embargo”. The submissions of Mr McFarlane did not provide any further context as to the provenance of the spreadsheet beyond describing it as an “IOOF discovered document”. In these circumstances, I am not satisfied that the spreadsheet independently supports a conclusion that Mr Hilton continued to engage in improper share trading after receipt of the 2009 First and Final Warning Letter and before the time of the March 2014 complaint.

355 Having regard to the above, I consider that the only document which is capable of supporting the allegation in ASOC paragraph 20(c) is the PwC Insider Trading Report. That report establishes that, on three occasions following the 2009 First and Final Warning Letter – the Tatts Group Transaction, the Lend Lease Transaction and the ResMed Transaction – Mr Hilton engaged in conduct which was in breach, or likely in breach, of IOOF’s trading policies. I am satisfied that a contravention of IOOF’s trading policies is capable of constituting “improper” share trading. I am therefore satisfied that Mr McFarlane has established the facts which underpin the allegation in ASOC paragraph 20(c) – that is, that IOOF was aware that Mr Hilton “had continued to engage in improper share trading after receipt of the 2009 First and Final Warning Letter and before the time of the March 2014 complaint”. Accordingly, I find that Mr McFarlane has established the truth of the matters alleged in ASOC paragraph 20(c).

#### ASOC paragraph 20(c1) – Post-2009 improprieties and possible improprieties

356 Mr McFarlane alleges, at ASOC paragraph 20(c1), that IOOF was aware that since 2009 there had been multiple incidents within IOOF of “impropriety” or “possible impropriety” which arose from one of the following:

(1) information barrier breaches (or “Chinese wall” breaches) (ASOC [20(c1)(i)]);

(2) non-compliance with IOOF’s staff trading policy (ASOC [20(c1)(ii)]);

(3) IOOF staff taking placement allocations ahead of clients (ASOC [20(c1)(iii)]);

(4) failure to manage conflicts of interest (ASOC [20(c1)(iv)]);

(5) data integrity and cyber security failures (ASOC [20(c1)(v)]);

(6) failures of compliance oversight (ASOC [20(c1)(vi)]),

and these are recorded in one or more of IOOF breach registers; documents passing between IOOF and ASIC during the course of inquiries undertaken by ASIC that commenced in about July 2015; documents passing between IOOF and PwC during the course of investigations undertaken by PwC that commenced in or about March 2015 and July 2015.

357 Insignia denies this plea: FAD [20(d)].

358 Mr McFarlane identifies incidents corresponding with ASOC paragraph 20(c1) in the following documents:

(1) an aide-memoire dated 23 June 2023, which refers to 40 “compliance breaches” and 28 “unit pricing errors”;

(2) his closing written submissions at [96]-[117], which refers to 18 incidents said to support Mr McFarlane’s plea at ASOC paragraph 20(c1); and

(3) in his closing written submissions at [118]-[119], which extracts findings by ASIC in a letter dated 25 January 2016.

359 Collectively, the above incidents will be referred to as the **Breach Information**.

360 Of the above incidents, particular emphasis was placed on the ING Office Fund Issue, which has been referred to above at [342(d)] and [342(4)(e)-(4)(f)]. In overview:

(1) In December 2008, the IOF undertook a placement of units as part of a capital raising. At the time, Bridges had in place a procedure in relation to placements in which Bridges was invited to participate which permitted up to 20% of the offering to be allocated to certain staff members, being staff who were members of “The Portfolio Service” (**TPS**), a name given to a collection of funds and managed investment schemes within a division of AWM.

(2) On 4 December 2008, the Bridges Research team issued a positive recommendation to its planner network in relation to the IOF Placement. On the same day, an internal IOOF email informed certain IOOF staff of an “investment opportunity” in the IOF. The email noted that IOF had last traded at $1.02 but was issuing units at $0.80. Staff were warned that “the major near term risk is that you apply at $0.80 and the unit price trades below this level prior to allotment”.

(3) Ultimately, 11,000,0000 units were to be allocated as part of the IOF capital raising. 4,802,5000 units were to be allocated to IOOF staff or planners. Of those, Mr Hilton was allocated 100,000 units. 2,197,500 units were to be allocated to Questor Property Fund. Another fund was to be allocated 4,000,000 units.

(4) When the IOF resumed trading, the unit price had dropped to $0.70. An email forwarded to Mr Urwin on 31 December 2008 stated that, at this time, “Jamie Moss was instructed by Michael Carter and Peter Hilton on Monday to get in contact with planners (8) and staff (8) allowing them to retract their request for units”. Mr Hilton was directed to keep his allocation of units. The remaining planners and staff cancelled their request.

(5) The cancelled orders (approximately 4,700,000 units) were then allocated to the Questor Property Fund, over and above its prior allocation of units. The additional allocation to the Questor Property Fund caused it to suffer a loss of 10 cents per unit, and also caused it to breach its benchmark weighting.

361 I accept Mr McFarlane’s submissions that the ING Office Fund Issue evidenced IOOF’s staff preferring their own interests twice during the course of the incident: firstly, when the allocation of shares in IOOF was thought to be profitable, staff took allocations ahead of their clients; and secondly, when it became clear that the allocated units would be out of the money, those units were allocated to the Questor Property Fund, which suffered a $470,250 loss to ensure that the planners and staff did not. I also accept Mr McFarlane’s submissions that the ING Office Fund Issue constituted an impropriety, or possible impropriety, arising from IOOF staff taking placement allocations ahead of clients, a failure to manage conflicts of interest, and a failure of compliance oversight.

362 I note that the ING Office Fund Issue occurred in December 2008, and technically therefore does not fall within the conduct pleaded at ASOC paragraph 20(c1), which is limited to incidents of impropriety “in and since 2009”. However, the incident appears to have first been brought to the attention of Mr Urwin by email on 31 December 2008, and was investigated in January 2009. No issue is taken by Insignia as to whether the ING Office Fund Issue is an incident falling within ASOC paragraph 20(c1) on the basis of the date on which it occurred. In these circumstances, I am satisfied that the ING Office Fund Issue substantially satisfies the criteria of ASOC paragraph 20(c1).

363 Mr McFarlane’s submissions and aide-memoire do not address the other examples of the Breach Information in the same level of detail as the ING Office Fund Issue. Instead, they primarily extract or summarise the contents of IOOF’s breach registers. A difficulty with Mr McFarlane’s case on this issue is that neither Mr McFarlane’s aide-memoir nor his closing written submissions at [102]-[117] categorise the various incidents by reference to the categories set out at ASOC paragraph 20(c1)(i)-(vi). Nonetheless, on the basis of IOOF’s closing written submissions at [318] and my analysis of the allegations in Mr McFarlane’s closing written submissions at [102]-[117], I am satisfied that Mr McFarlane has established the existence of the following incidents since 2009: information barrier breaches (ASOC [20(c1)(i)]); potential non-compliance with IOOF’s staff trading policy (ASOC [20(c1)(ii)]); potential failures to manage conflicts of interest (ASOC [20(c1)(iv)]); and potential data integrity and cyber security failures (ASOC [20(c1)(v)]). For reasons that will be apparent in my analysis of the materiality of this information, it is not necessary to comprehensively list each incident referred to in Mr McFarlane’s aide memoir or his closing written submissions at [102]-[118]. It is sufficient to provide the following examples of incidents identified by Mr McFarlane which fall within each of the above categories:

(1) The aide memoire refers at [13] to IOOF’s breach register entry concerning the “ETC incident” involving Mr Youds which was discovered on 16 April 2009. As set out at [402]-[403] below, an investigation of that incident resulted in a first and final warning letter being issued to Mr Youds for trading through his superannuation and CommSec accounts in breach of an IOOF policy. Insignia has admitted that, following the investigation of that incident, it was concluded that Mr Youds’ purchase of ETC shares was in breach of the Bridges “Chinese Walls” Policy and its personal trading policy: FAD [20(e)(iii)]. In the light of this, I am satisfied this incident evidences an information barrier breach and non-compliance with applicable staff trading policies (ASOC [20(c1)(i)], [20(c1)(ii)]).

(2) The aide memoire refers at [14] to IOOF’s breach register entry concerning “[p]otential [f]ront [r]unning” by Mr Hilton, which was discovered on 29 August 2009. This appears to be a reference to the improper share trading of Mr Hilton which is summarised at [342] above, and which resulted in the 2009 First and Final Warning Letter being issued to him. The breach register entry records that Mr Hilton was required to undertake “Chinese Walls training … again”. I am satisfied this incident evidences a “possible impropriety” arising from an information barrier breach, or a failure to manage conflicts of interest (ASOC [20(c1)(i)], [20(c1)(iv)]).

(3) Mr McFarlane’s closing written submissions at [102] also refers to a breach register entry for 20 May 2008, which states that a Bridges Financial Services Pty Ltd employee, Mr Justin Fraser, had confessed “to knowingly and deliberately receiving payments for plan fees directly from clients without declaring these payments”. I am satisfied that these incidents each evidence a failure to manage conflicts of interest (ASOC [20(c1)(iv)]).

(4) The aide memoire at [2], [5] and [7] refers to what appear to be IT errors. I am satisfied that these incidents evidence a data integrity failure (ASOC [20(c1)(v)]).

364 I have not been able to identify any incidents (in addition to the ING Office Fund Issue) which relate to IOOF staff taking placement allocations ahead of clients (ASOC [20(c1)(iii)]) or failures of compliance oversight (ASOC [20(c1)(vi)]).

365 Mr McFarlane’s closing submissions at [118]-[119] also sought to rely on the findings from the ASIC investigation into IOOF’s compliance arrangements that commenced in July 2015, and which is referred to at [57]-[58] above. ASIC’s findings arose from an investigation, undertaken between 20 July 2015 and January 2016, into the allegations in the Fairfax articles. ASIC’s findings were recorded in a letter to IOOF dated 25 January 2016, which set out the outcome of ASIC’s investigation. The letter advised:

ASIC reviewed various trades in detail. Based on the available information we have decided to take no further action in relation to these allegations of insider trading. This decision was previously communicated to IOOF on 9 December 2015 during a telephone call between Lin-Yi Bi and Gary Riordan. However, we are concerned that there were instances where a staff member traded in securities in the knowledge that those securities were the subject of yet to be published research. We are concerned that IOOF does not have effective controls around the handling of confidential information and staff training. …

Our review has identified a number of concerns relating to IOOF’s compliance arrangements, in particular its processes for breach and incident reporting, managing conflicts of interest, staff trading policy, disclosure, whistle-blower management and protection, and the management of cyber risks.

Schedule A to this letter sets out our concerns in more detail, including specific examples.

366 In the letter, ASIC also noted that IOOF had engaged PwC to undertake a review of the group’s regulatory breach reporting policy and procedures, and the control environment within its Research team. ASIC expressed concern that the scope of PwC’s review was too narrow and stated:

The serious nature of some of the issues identified and the process to identify and deal with them including notification to the Board are suggestive of broader problems with the compliance culture within IOOF. Cultural issues including deficiencies in the risk management system and a lack of focus on the interests of IOOF customers in preference to any other interest may have had a bearing on some of the issues identified.

367 In Schedule A, ASIC raised various concerns and gave examples as follows:

(1) under the heading “Breach Reporting”:

ASIC notes the breach by a Cash Management Trust (CMT) managed by Questor Financial Services Limited which over distributed to two internal unit holders (ie two internally managed superannuation funds) $616 million in May 2009 due to a failure in the reconciliation process. …

Consequently, ASIC is concerned that IOOF may not be in a position to adequately identify breaches of financial services laws, its compliance plan or its internal policies and procedures because IOOF does not have a well-structured compliance testing mechanism to identify breaches and when appropriate, rectify breaches in a timely manner.

ASIC is concerned that IOOF’s breach reporting processes may be inadequate.

(2) under the heading “Management of Conflicts”:

ASICs review of IOOF’s management of conflicts of interest within its Research Advice Team identified the following inadequacies:

– Inadequate measures used to identify and evaluate potential or actual conflicts of interest that arise within its Research Advice Team (whether perceived, actual or potential). This includes inadequate documentation and record keeping of conflicts of interest, especially in relation to staff trading activities;

– Inadequate monitoring procedures in place to ensure that any non-compliance with IOOF’s conflicts management arrangements are identified and appropriately acted upon. This includes the lack of a detailed conflict policy governing the production, editing and dissemination of research reports;

– Inadequate arrangements to avoid conflicts, including poor internal team structures and failures to segregate duties. This is evident in the fact that the Research Advice Team in addition to providing research services also performs a number of nonresearch activities including, but not limited to, product recommendations and capital raisings for the broader IOOF Group;

– Inadequate avoidance of conflicts evidenced by staff placing themselves in a position where there is a material conflict between their own interest and those of their clients, such as preferential stock allocations to staff;

– Inadequate disclosures of conflicts of interest to ensure affected persons are sufficiently informed; and

– A general lack of awareness regarding conflicts of interest amongst the research staff.

(3) Under the heading “Disclosure”:

ASIC understands that it is IOOF’s practice to categorise existing members transferring from the Fund’s Employer Plan into the Personal Division as smokers in relation to ongoing insurance cover. This is despite current smoking rates being approximately 20% of the general population. This may have resulted in increased insurance premiums being paid by these members.

ASIC is concerned that IOOF may have failed to comply with the disclosure requirements in section 1017B of the Act by not notifying members who are transferred into the Fund’s Personal Division of material changes and increases in fees.

This is also an example where IOOF may not have adequately managed a conflict of interest.

(4) Under the heading “Cyber Security”:

ASIC is concerned that IOOF’s ability to protect and manage its sensitive and most valuable information, as well as identify, manage and minimise the impact of cyber-attack if one should occur is inadequate. IOOF risk management systems should protect against the unlawful or inappropriate access to sensitive material and information systems, including by unauthorised employees. ASIC has recently provided guidance on the issue of cyber resilience in Report 429 Cyber Resilience.

(5) Under the heading “ASIC’s observations on IOOF’s corporate culture in relation to risk management”:

Our review identified a low level of awareness and lack of importance assigned to risk management among IOOF’s Research Advice Team staff, including senior members. This is evident by a senior staff member cheating on their compliance training programs with the assistance of a junior staff member. This suggests that risk management was more a matter of form rather than one of substance among that team’s staff. While recognising the personal behaviours of individuals were a factor management action to monitor and stop such behaviour appears to have been inadequate. The failure by management to take effective action over such issues encourages poor behaviour.

…

It is clear from our review that there were instances where important risk issues did not come to the attention of the IOOF Board and senior management in a timely manner. In our view this could be caused by a culture that fails to actively encourage the disclosure of concerns or difficulties at the operational level This may have been exacerbated by a corporate structure that includes multiple separate business brands

…

We found instances where the IOOF Board and senior management did not adequately promote and support whistle blowing within the organisation despite policies designed to facilitate and encourage whistleblowing behaviour.

368 IOOF subsequently responded to ASIC’s concerns in a table titled “IOOF and ASIC Review Report dated 25 January 2016”. In summary:

(1) In response to ASIC’s expressed concern about an IOOF staff member trading in securities when those securities were the subject of yet-to-be-published research, IOOF stated that the Research team’s securities trading register had been updated.

(2) In response to ASIC’s expressed concern about the scope of the PwC review, IOOF stated that the issues relating to the Research team were isolated, extended back to 2009, involved a small number of individuals, and did not point to cultural problems across the whole business. IOOF noted that it had undertaken various changes to its procedures and policies in response to ASIC’s concerns.

369 I accept that ASIC’s letter of 25 January 2016 provides an evidentiary foundation for the conclusion that a Cash Management Trust managed by Questor Financial Services Limited over-distributed to two internal unit holders and that, although the incident was notified to Questor Financial Services in February 2010, the incident was not reported to ASIC until 2012. A natural inference arises that such an incident arose from a failure of compliance oversight.

370 I also accept that the reference in ASIC’s letter of 25 January 2016 to IOOF’s practice of categorising existing members transferring from the Fund’s Employer Plan into the Personal Division as smokers in relation to ongoing insurance cover is evidence of a “possible impropriety” by IOOF. However, I note that ASIC’s description of this incident is framed equivocally – it states that the incident “may have resulted” in increased premiums being paid by members, and expresses ASIC’s concerns that IOOF “may” have failed to comply with its disclosure requirements or to manage a conflict of interest. Without more information, this is insufficient to ground a positive finding that IOOF’s conduct in this instance amounted to an actual impropriety, albeit it does represent a “possible impropriety”.

371 The reference to “a senior staff member cheating on their compliance training programs with the assistance of a junior staff member” is clearly a reference to Mr Hilton having instructed a direct report to complete Kaplan and eLearning training on his behalf (a matter subsequently alleged in the March 2014 complaint). I accept that such an incident evidences a failure of compliance oversight because Mr Hilton’s conduct was not identified prior to the March 2014 complaint.

372 I otherwise do not accept that ASIC’s letter of 25 January 2016 provides an evidentiary foundation to support Mr McFarlane’s plea as to the existence of improprieties or possible improprieties of the types pleaded in ASOC paragraph 20(c1)(i)-(vi). The remainder of the letter constitutes high level conclusions about the adequacy of IOOF’s systems, or otherwise refers to incidents which cannot clearly be said to arise by reason of one of the issues identified in ASOC paragraph 20(c1)(i)-(vi). Such conclusions cannot constitute by themselves evidence of specific incidents of impropriety or possible impropriety as pleaded in ASOC paragraph 20(c1).

373 Taken together then, I accept that the Breach Information provides an evidentiary foundation for the conclusion that since 2009 IOOF was aware that it had engaged during the Relevant Period in multiple incidents of impropriety or possible impropriety arising from:

(1) information barrier breaches (ASOC paragraph 20(c1)(i))

(2) non-compliance with IOOF’s staff trading policy (ASOC paragraph 20(c1)(ii));

(3) IOOF staff taking placement allocations ahead of clients, albeit the one example of this occurred in December 2008 (ASOC paragraph 20(c1)(iii));

(4) failure to manage conflicts of interest (ASOC paragraph 20(c1)(iv));

(5) data integrity and cyber security failures (ASOC paragraph 20(c1)(v)); and

(6) failures of compliance oversight (ASOC paragraph 20(c1)(vi).

374 It follows that Mr McFarlane has established the substantial truth of ASOC paragraph 20(c1).

#### ASOC paragraph 20(c2) – Buying and selling shares preceding research reports

375 Mr McFarlane alleges, at ASOC paragraph 20(c2), that IOOF was aware that Mr Hilton’s wife, or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative research released by IOOF, in particular:

(1) an investment in Toll Holdings in or about 2009;

(2) an investment in IOF in about 2009; and

(3) an allocation of shares in the Platinum Asset Management Float in about 2008.

376 Insignia denies this plea: FAD [20(d)].

377 Mr McFarlane, by his solicitors’ letter dated 19 June 2023, states that he abandons the claim in relation to the investment in IOF and the Platinum Asset Management Float.

378 The claim remaining in respect of “an investment in Toll Holdings in or about 2009” is a reference to the “Toll Trade” referred to in Mr Riordan’s memorandum summarising his interview with Mr Hilton on 9 April 2009, which is extracted at [342(6)] above. This transaction was the subject of an investigation by Mr Carter who, on 31 March 2009, sent an email to Mr Riordan about this and other matters. In that email, Mr Carter relevantly stated: “I do not believe there has been any breach of the ASX market rules for front running” and he did not propose to take any action against Mr Hilton. Mr Carter noted in his email in respect of this transaction:

An order was placed on 26/8/08 with stockbroking. A research report was issued on 27/8/08 as a buy recommendation (Note: that research had maintained buy recommendations on the stock for over 12 months ie. since 7/6/07 in six previous reports). An order to purchase the securities was completed on 29/8/08.

The timing of the order with stockbroking was due to office movements and an assumption was made that the order would not be executed until the end of the 2 day embargo. This in fact was the outcome and the purchase did not breach any trading rules in this instance.

379 Mr Carter’s email thus recorded that the relevant trade was not, in fact, settled until two days after the release of the relevant research report. In any case, that report maintained a buy recommendation which had been in place since June 2007.

380 I am not satisfied on the evidence in respect of the Toll Trade that Mr McFarlane has established the truth of the matters alleged in ASOC paragraph 20(c2).

381 In his closing written submissions at [129]-[130], Mr McFarlane seeks to also refer to further examples of trading activity by Mr Hilton on behalf of his wife taken from the allegations made in Mr Ung’s December 2014 complaint.

382 Insignia, in its closing written submissions at [202] and [204], submits that the allegations of insider trading in Mr Ung’s December 2014 complaint are nonsensical and not made by a “considered, careful or credible complainant”. In turn, Insignia submits that “to the extent anything said by Mr Ung is relied upon by the applicant to prove its case, the Court should treat it with a high degree of scepticism”. However, the parties have ultimately agreed that the December 2014 complaint is admissible to prove the timing and nature of the trades, and the timing and nature of research reports, referred to in the December 2014 complaint: Agreed Ruling on Respondent’s Outstanding Objections dated 27 June 2023, Item 1.

383 Mr Mc Farlane’s closing written submissions at [130] identify 25 trades by Mr Hilton on behalf of his wife, spanning between 1998 and 2008, which Mr McFarlane submits meet the specific criteria of ASOC paragraph 20(c2). Those trades are as follows:

(1) purchasing shares in Energy Equity Corporation on 14 January 1998 before publishing a positive report that day and then selling those shares later that day;

(2) purchasing shares in Energy Equity Corporation on 22 April 1998 before publishing a positive report on 1 May 1998;

(3) purchasing units in The Fairfax Trust on 16 December 1998 before publishing a positive report on 17 December 1998 and then selling those units on 22 December 1998;

(4) purchasing shares in Lang Corporation Ltd on 22 March 1999 and 24 September 1999 before publishing positive reports on, respectively, 27 May 1999 and 27 September 1999 and then selling those shares on 11 and 15 October 1999;

(5) purchasing shares in BHP on 6 October 1999 before publishing positive research the same day and then selling those shares on 19 October 1999;

(6) purchasing shares in Commonwealth Bank of Australia on 10 March 2000 before publishing positive research on 13 March 2000 and then selling those shares on 16 March 2000;

(7) purchasing shares in Clover Corporation Ltd on 23 March 2000 before publishing positive research the same day and selling those shares on 4 April 2000;

(8) selling shares in CSL Ltd on 21 July 2000 before issuing negative research on 25 July 2000;

(9) purchasing shares in Harvey World Travel on 11 December 2000 before publishing positive research on 12 December 2000 and then selling those shares on 11-15 January 2011;

(10) purchasing shares in Qantas Airways Ltd on 25 September 2001 before publishing positive research and then selling those shares that same day;

(11) purchasing shares in WMC Ltd on 21 November 2001 before publishing positive research and then selling those shares on the same day;

(12) purchasing shares in Pacific Dunlop Ltd on 28 November 2001 before publishing positive research on 3 December 2001 and selling those shares on 12 December 2001;

(13) purchasing shares in Oil Search Ltd on 23 January 2002 before publishing positive research and then selling those shares on the same day;

(14) purchasing shares in Brambles Industries Ltd on 4 March 2002 before publishing positive research that day and then selling those shares on 5 March 2002;

(15) purchasing shares in Coles Myer Ltd on 6 May 2002 before publishing positive research and then selling those shares on the same day;

(16) selling shares in Amcor on 7 May 2002 before publishing negative research on 8 May 2002;

(17) purchasing shares in TAB Ltd on 23 July 2002 before publishing positive research on 29 July 2002, 30 July 2002 and 12 September 2002 and then selling those shares on 16 September 2002;

(18) purchasing shares in Qantas Airways Ltd on 24 June 2002 before publishing positive research on 26 June 2002 and then selling those shares on 16 July 2002;

(19) purchasing shares in Brambles Industries Ltd on 28 June 2002 before publishing positive research on 5 July 2002 and then selling those shares on 8 July 2002;

(20) purchasing shares in AMP Ltd on 7 August 2003 before publishing positive research and then selling those shares on the same day;

(21) purchasing shares in AMP Ltd on 28 August 2003 before publishing positive research and then selling those shares on the same day;

(22) purchasing shares in Colonial First Private Capital Ltd on 1 June 2005 before publishing positive research on 3 June 2005;

(23) purchasing convertible preference shares in Suncorp Metway on 12 June 2008 before issuing positive research on 18 June 2008;

(24) purchasing convertible preference shares in Macquarie on 8 July 2008 before publishing positive research on 9 July 2008; and

(25) purchasing shares in Toll Holdings on 26 August 2008 before publishing positive research on 27 August 2008.

384 I accept Mr McFarlane’s submissions that each of the above trades falls within the criteria of ASOC paragraph 20(c2). Insignia has not sought to contradict the assertions in the December 2014 complaint as to the date of the trades and the timing and content of relevant research reports. I am therefore satisfied that the additional allegations identified in Mr McFarlane’s closing written submissions establish the substantial truth of the matters alleged in ASOC paragraph 20(c2), namely that IOOF was aware that Mr Hilton’s wife or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative coverage by research released by IOOF. However, Mr McFarlane has not established that the three transactions referred to in ASOC paragraph 20(c2) – being the investment in Toll Holdings in or about 2009, the investment in IOF in about 2009, and the allocation of shares in the Platinum Asset Management Float in 2008 – are examples of the type of conduct referred to in ASOC paragraph 20(c2).

#### ASOC paragraph 20(c3) – Particular transactions by Mrs Hilton

385 Mr McFarlane alleges, at ASOC paragraph 20(c3), Mrs Hilton:

(1) made a profit of $69,000 selling shares in Platinum Asset Management on 28 May 2007 which shares Mr Hilton had “caused to be allocated to her … from the allocation for IOOF’s customers” and in respect of which Mr Hilton “did not disclose a conflict of interest” (**Platinum Asset Management Transaction**) (ASOC paragraph 20(c3)(i));

(2) made a $8,182 profit selling shares in Challenger Infrastructure Fund on 19 and 20 July 2007 which shares Mr Hilton had “caused to be allocated to her … from the allocation for IOOF’s customers” and in respect of which Mr Hilton “did not disclose a conflict of interest” (**Challenger Infrastructure Fund Transaction**) (ASOC paragraph 20(c3)(ii)); and

(3) bought and sold Macquarie Convertible Preference Shares on 8 July 2008 and 13 November 2008 respectively in circumstances where Mr Hilton had published two positive reports on those shares on 9 July 2008 and 12 August 2008 and Mr Hilton “did not disclose a conflict of interest” (**Macquarie Transaction**) (ASOC paragraph 20(c3)(iii)).

386 Insignia denies this plea: FAD [20(d)].

387 The evidence for the trades is found in Mrs Hilton’s 2009 Cash Management Account Statement, which is summarised at [342(5)] above, and the December 2014 complaint.

388 It is unclear what the alleged vice of the transactions described in ASOC paragraph 20(c3) is. As best as can be determined, it appears that the impropriety arises from the fact that “Peter Hilton did not disclose a conflict of interest” in connection with these transactions. With respect to the Platinum Asset Management Transaction and the Challenger Infrastructure Fund Transaction, to the extent Mr McFarlane’s criticism is that Mr Hilton allocated shares to his wife from the allocation for IOOF customers, the evidence does not support such an allegation.

389 The evidence reveals the following:

(1) Mrs Hilton made a profit of approximately $69,000 on selling Platinum Asset Management shares on 28 May 2007. The 2009 Cash Management Account Statement recorded that the shares were purchased on 17 May 2007 for $100,000, and sold for $169.219.20. A handwritten notation next to the transactions stated “Allocation”. Mr Ung’s December 2014 complaint alleged Mr Hilton published and disseminated a positive research report on Platinum Asset Management on 29 October 2007, that is approximately five months after the trade. Mr Ung alleged: “Allocations were for the Firm. Mr Peter Hilton sold 20,000 at $8,4160 on behalf of Shirlene Hilton for $169,219,20”. Mr McFarlane’s submissions do not point to any evidence that the shares allocated had been taken “from the allocation for IOOF’s customers”, beyond the opaque statement by Mr Ung that “Allocations were for the Firm”, and the handwritten statement “Allocation” on the Cash Management Account statement next to the transaction in question. Neither of these vague statements are sufficient to establish that the shares had been taken “from the allocation for IOOF’s customers”.

(2) Mrs Hilton made a profit of $8,181.27 on the sale of Challenger Infrastructure Fund shares on 24 and 25 July 2007. The 2009 Cash Management Account Statement recorded that the shares were purchased on 19 July 2007 for $139,650, and sold on 24 and 25 July 2007 for $79,994.27 and $67,837.51 respectively. A handwritten notation next to the transactions stated “Allocation”. Mr Ung’s December 2014 complaint alleged Mr Hilton published and disseminated a positive report on Challenger Infrastructure Fund on 11 October 2007, more than two months after the trade. These shares were allocated to Mrs Hilton on 19 July 2007. Mr Ung again alleged: “Allocations were for the Firm. Mr Peter Hilton took firm allocation on behalf of his wife Shirlene Hilton”. Again, Mr McFarlane’s closing written submissions do not point to any sufficiently clear and reliable evidence that the shares allocated to Mrs Hilton had been taken “from the allocation for IOOF’s customers”.

390 For the above reasons, I am not satisfied on the evidence that Mr McFarlane has established the truth of the underlying facts to prove the facts pleaded at ASOC paragraph 20(c3)(i) and (ii).

391 With respect to the Macquarie Transaction, Mrs Hilton’s 2009 Cash Management Account Statement recorded the purchase of Macquarie Convertible Preference Shares on 8 July 2008 for $20,000. A handwritten notation next to that transaction refers to a “Research Report 9/7/2008”. The statement recorded the sale of Macquarie Convertible Preference Shares on 13 November 2008 for $18,081.40.

392 Mr Ung’s December 2014 complaint relevantly states:

* On 8 July 2008, Mr Peter Hilton bought 200 at $100.00 on behalf of Shirlene Hilton for $20,000.
* On 9 July 2008, Mr Peter Hilton published and disseminated a positive report on MQCPA. Mr Peter Hilton’s recommendation was BUY.
* On 12 August 2008, Mr Peter Hilton published and disseminated a positive report on MQCPA. Mr Peter Hilton’s recommendation was BUY.
* On 13 November 2008, Mr Peter Hilton sold 200 at $90.4070 on behalf of Shirlene Hilton for $18,081.40.
* No disclosures of Mr Peter Hilton’s conflict of interests are made in any reports published and disseminated by Mr Peter Hilton.

393 The Macquarie Transaction was the subject of an investigation by Mr Carter. On 31 March 2009, Mr Carter sent an email to Mr Riordan, the General Counsel of IOOF, and advised in respect of the Macquarie Convertible Preference Shares as follows:

An order and purchase of securities occurred on 8/7/08. This coincides with the issue of a research report with a buy recommendation on the same day.

This transaction was part of the IPO of the securities in which TPS clients were eligible to participate. Hence Peter was unable to control the timing of the purchase as they are allotted at the same time as other TPS unit holders.

394 Mr Carter concluded that “I do not believe there has been any breach of the ASX market rules for front running”. Mr Carter did not propose any action be taken against Mr Hilton.

395 Taken together, Mrs Hilton’s 2009 Cash Management Account Statement and the December 2014 complaint establish that the Research team had published two positive reports in July and November 2008 recommending a “buy” in respect of Macquarie Convertible shares. The evidence also establishes that Mrs Hilton bought and sold those shares on 8 July 2008 and 13 November 2008 respectively.

396 Mr McFarlane’s closing written submissions with respect to ASOC paragraph 20(c3)(iii) (at [136]-[149]) do not identify a basis for the contention that Mr Hilton “did not disclose a conflict of interest” in connection with the Macquarie Transaction other than Mr Ung’s December 2014 complaint. However, I am satisfied that other evidence referred to during the course of the proceeding – namely, the interview between Mr Urwin and Mr Hilton on 22 January 2009, in which Mr Hilton is recorded as having stated that “he does not disclose holdings of stock being recommended to the Bridges network” – is capable of supporting a conclusion that Mr Hilton “did not disclose a conflict of interest” in connection with the Macquarie Transaction. Insignia’s closing written submissions also did not directly controvert the proposition that Mr Hilton “did not disclose a conflict of interest” in connection with the Macquarie Transaction.

397 On the basis of the above conclusions, I am satisfied that Mr McFarlane has established the truth of this aspect of his plea at ASOC paragraph 20(c3)(iii). However, it remains to be observed that, other than a general failure to disclose a conflict of interest (which was the consequence of Mr Hilton’s position that he did not disclose his stock holdings the subject of recommendations to the Bridges network), the evidence falls far short of establishing any impropriety in the Macquarie Transaction. This is a matter which bears on the materiality of this allegation, to which I will later return.

#### ASOC paragraph 20(c4) – Insider trading and/or market manipulation incident

398 By ASOC paragraph 20(c4), Mr McFarlane pleads that IOOF was aware that:

in or about 2009 there was an insider trading and/or market manipulation incident in relation to the Malaysian entity Entertainment Media and Telecoms Company (ETC), involving IOOF staff and:

(i) a crossing of more than 24 million shares in ETC between IOOF’s Manifest Balanced Equity Fund and Questor Financial Services;

(ii) the crossing coincided with IOOF subsidiary Bridges initiating coverage on ETC;

(iii) a staff member at IOOF placed personal trades in ETC before the crossing; and

(iv) the crossing pushed up the share price of ETC, allowing the staff member to trade his personal shares for a profit.

399 By letter dated 19 June 2023, Mr McFarlane’s solicitors have advised that the only part of this allegation that Mr McFarlane presses is “that in or about 2009 there was an incident in relation to [ETC**]**, involving IOOF staff” and thus does not press sub-subparagraphs (i)-(iv) or seek to establish that there was an “insider trading and/or market manipulation incident”.

400 Insignia accepts that: there was an “incident”; that the “incident” related to ETC, and that it “involved IOOF staff”. In these circumstances, I find that Mr McFarlane has established the truth of the amended allegation in ASOC paragraph 20(c4).

#### ASOC paragraphs 20(c5) to (c8) – Investigation of Mr Youds

401 Mr McFarlane alleges, at ASOC paragraphs 20(c5) to (c8), that IOOF was aware that: the 2009 ETC incident was investigated (c8(i)); this investigation led to a first and final warning being issued to a staff member, Mr Youds ((c5)(i), (c8)(ii)); a request was made for Mr Youds to donate the proceeds of the profit from the sale to a charity ((c5)(ii)); ASIC was not notified of the incident ((c6), (c8)(iii)); and the failure to notify the matter to ASIC was “a breach of ASIC’s Regulatory Guide 238” (c7). Insignia denies this plea, save that it admits that, in 2009, it:

(1) investigated whether an AWM employee named Edward Youds was in possession of price-sensitive information when he purchased shares in ETC in 2009;

(2) concluded that Mr Youds was not in possession of price-sensitive information when he purchased ETC shares, and accordingly the matter was not reported to ASIC;

(3) concluded that Mr Youds’ purchase of ETC shares was in breach of the Bridges Chinese Walls Policy and Code of Conduct (Personal Trading) policy, and accordingly Mr Youds was issued with a first and final warning in relation to inappropriate share trading and donated the proceeds of profit from the sale of the ETC shares (approximately $1,850) to a charity designated by AWM (FAD [20(e)].

402 The evidence establishes that Mr Urwin conducted an investigation into the ETC incident (being the incident alleged in Mr McFarlane’s solicitors’ letter dated 19 June 2023). It appears that this investigation related to an allegation of potential insider trading by Mr Youds in connection with a trade he placed with ETC on 20 March 2009. On 4 May 2009, Mr Urwin interviewed Mr Youds about the matter. A memorandum of the interview records the following:

**1) Background:**

* Rob explained that he had received information from the Senior DTR regarding a potential crossing of ETC and previous purchase of ETC from Edward Youds.

…

**4) Insider Trading:**

* Edward explained that during a meeting with Peter Hilton about the Manifest portfolio on 19th March 2009 he said that Questor was looking to retain ETC shares within Questor.
* Edward placed his trade to purchase ETC on the 20th March 2009.
* Rob asked Edward if he knew what insider trading was. Edward confirmed he was aware that it was a criminal offence to use price sensitive confidential information for his own benefit and had seen recent events of insider trading events documented in the papers.
* Rob asked Edward what profit he had made on the purchase of ETC and Edward advised 75% since it was bought (being the value of $2,000).
* Later that day Peter Hilton called Edward and told him that he shouldn’t have traded that stock.
* Rob asked Edward why he did not raise the issue with Compliance? Edward advised that he didn’t know who the appropriate person to notify was.
* Rob then asked if Edward felt that Compliance were approachable and he said yes he assumed so although his dealings with ASX Compliance staff was limited.
* Edward also advised that he had been having sleepless nights.
* Edward advised that he had done his own research on the stock and had mentioned it to Jehan and Amit as a good buy prior to placing his order with Stockbroking.
* Rob asked Edward if he had communicated it to others and he did not recall.

403 On 13 May 2009, Mr Urwin sent an email to Mr Riordan setting out his conclusions and recommendations in relation to his investigation, including the ETC incident involving Mr Youds. Mr Urwin found that it had not been proved that Mr Youds had price-sensitive information on the ETC trade, albeit his position and involvement in the transaction meant he should have due regard to the risks and consequences of his actions. No finding of illegality was made. A first and final warning letter was issued to Mr Youds. The basis for this letter was that Mr Youds had admitted to having traded through his superannuation and CommSec accounts in breach of an IOOF policy that required all trading to occur via Bridges. Mr Youds’ profits on the ETC trade were in the order of $2,000. Mr Youds offered to donate the proceeds of the trade to a charity. Mr Urwin determined that the matter was not reportable to ASIC or the ASX as Mr Youds’ conduct was “not systemic”, and “this is the first time these issues have been raised against [Mr Youds]”.

404 Insofar as Mr McFarlane complains that ASIC was not notified of the ETC incident, and that such failure was a breach of ASIC’s Regulatory Guide 238 (**RG 238**), those allegations are misconceived. RG 238 was first issued in July 2012. It provided regulatory guidance relevantly in relation to the suspicious activity reporting obligations of market participants under Part 5.11 of the ASIC Market Integrity Rules (ASX Market) 2010. Those obligations were introduced by *ASIC Market Integrity Rules (ASX Market) Amendment 2012 (No 1)*, which were dated 12 July 2012. RG 238 therefore came into effect some three years after the ETC incident. At RG 238.3, the Regulatory Guide expressly acknowledged that ASIC would waive the obligation to comply with market integrity rules for suspicious activity reporting until 20 January 2013.

405 I am satisfied on the evidence and admissions of Insignia, that IOOF was aware of the ETC incident and the conclusions and recommendations of the investigation conducted by Mr Urwin which resulted in a first and final warning letter being issued to Mr Youds for breach of a policy that required all personal trading to be conducted via Bridges. Insignia does not dispute that it did not notify ASIC of the incident. I find that Mr McFarlane has established the truth of the matters alleged in ASOC paragraphs 20(c5(i)), (c6) and (c8).

406 I find that Mr McFarlane has established the substantial truth of ASOC paragraph 20(c5(ii)). Although the evidence does not establish that Mr Youds was requested to donate his profits from the sale of ETC shares to a charity, and instead that this was an offer made by Mr Youds, I do not regard this as a material difference to Mr McFarlane’s pleaded case.

407 I find that Mr McFarlane has not established the truth of the matters alleged in ASOC paragraph 20(c7). IOOF cannot be said to have breached a requirement in an ASIC Regulatory Guide when the Regulatory Guide was not in effect at the time that IOOF became aware of the ETC incident.

#### ASOC paragraph 20(c9) – Investigation of Mr Malguri

408 Mr McFarlane alleges, at ASOC paragraph 20(c9), that IOOF investigated Mr Malguri for insider trading in 2009; concluded that the trades investigated were outside embargo parameters; and did not notify ASIC of the investigation. Insignia admits the allegations as pleaded in ASOC paragraph 20(c9): FAD [20(f)]. It is therefore not in dispute that Insignia was aware of the matters the subject of the allegation in ASOC paragraph 20(c9).

409 It is nonetheless useful to set out what the evidence reveals about the allegations concerning Mr Malguri. The evidence discloses that, on an unknown date, Mr Malguri informed Mr Urwin that he had on previous occasions traded through a CommSec account contrary to IOOF’s personal trading policy. Mr Urwin referred to that matter in his email to Mr Riordan on 11 May 2009 and indicated that he was “currently investigating these trades and dates in conjunction with research reports”.

410 On 12 May 2009, Mr Malguri provided documents to Mr Urwin in relation to his trading through CommSec, including a record of his trades and emails that he had previously exchanged with Bridges Stockbroking about the matter. One of the documents provided to Mr Urwin was an email chain on 16 October 2008, in which Mr Malguri had approached a manager in Bridges Stockbroking in October 2008 to inquire as to whether the Bridges’ trading policy required that staff only trade through Bridges Stockbroking. On the same day, Bridges Stockbroking advised Mr Malguri, in response to his query, that “all staff are to deal through Bridges Stockbroking”. A spreadsheet provided to Mr Urwin records that Mr Malguri’s last trade on his CommSec account was 23 October 2008.

411 Mr Urwin’s findings, as recorded in the 13 May 2009 Email to Mr Riordan were as follows:

Amit has disclosed that he has traded through COMSEC because he was not aware of the Personal Trading Policy. Once he was aware he has traded through Bridges stockbroking.

These trades have been reviewed against the Bridges Research reports and they are outside embargo parameters.

412 IOOF issued Mr Malguri with a caution for breaching the Bridges’ personal trading policy. Mr Urwin concluded that the matter was not required to be reported to ASIC or the ASX as it was “not systemic”. Mr Urwin’s report of Mr Malguri’s conduct contains no reference to any insider trading.

#### ASOC paragraph 20(c10) – Email from Bridges financial planner

413 Mr McFarlane alleges, at ASOC paragraph 20(c10), that IOOF was aware that on 16 December 2013, a Bridges financial planner sent an email questioning recommendations made by the Research team and stating that:

I refer your email sent just now and was wondering if someone from Research could explain why you are recommending we place 50 per cent of our clients’ managed fund portfolios into funds that have consistently underperformed their respective Morningstar Benchmarks. … From the research reports issued this morning, I believe these recommended funds have exceeded the benchmark on just two out of 36 occasions. … Surely not??? What’s going on here, I can’t help but feel our Research team has finally been compromised!!

414 Insignia admits the allegation in ASOC paragraph 20(c10): FAD [20(g)]. It follows that it is not in dispute that IOOF was aware of the email referred to in ASOC paragraph 20(c10).

415 Nonetheless, I note that ASOC paragraph 20(c10) does not state to what the allegations in this email specifically relate, or whether the allegations are true. There has been no attempt by Mr McFarlane to prove whatever is the underlying complaint.

#### ASOC paragraph 20(c11) – Bridges financial planners banned by ASIC

416 Mr McFarlane alleges, at ASOC paragraph 20(c11), that IOOF was aware that “[s]ince 2009, IOOF financial planning subsidiary companies (including without limitation Consultum Financial Advisors Pty Ltd) had been the subject of regulatory action by ASIC”, resulting in two planners who were both authorised representatives of Bridges’ Financial Services Pty Ltd being banned and one of those two also being sentenced to a term of imprisonment.

417 Insignia admits that it knew that two Bridges financial planners (Mr Justin Fraser and Mr Alan Brown) were banned by ASIC in 2009 and 2011 respectively, and that one of those two was also sentenced to a term of imprisonment (Mr Brown). However, Insignia says that this information was generally available having been made the subject of ASIC media releases at the time: FAD [20(h)].

418 The media releases to which Insignia refers in its closing written submissions are a release last updated on 29 June 2011 concerning Mr Fraser, and a release dated 14 December 2009 concerning Mr Brown, and were published on ASIC’s website: at [545]. Those releases identified Mr Fraser and Mr Brown as authorised representatives of Bridges, stated that they had been banned by ASIC from providing financial services, and identified ASIC’s findings against Mr Fraser and Mr Brown. Consequently, the non-disclosure of this information could not constitute a contravention under s 674 of the *Corporations Act*, as the information constituted “generally available information” within the meaning of s 674(2)(c)(i).

419 I note however that, on review, the releases did not identify that Mr Brown had been sentenced to a term of imprisonment. It is not clear on the evidence when Mr Brown was sentenced to a term of imprisonment, but the particulars to FAD paragraph 20(h) allege that this occurred in November 2009.

420 I find on the evidence that the fact that Mr Fraser and Mr Brown had been banned by ASIC from providing financial services was generally available information. However, I find, on the evidence before me, that the fact that Mr Brown was imprisoned was not publicly available information.

#### ASOC paragraph 20(d) – Unit pricing errors

421 Mr McFarlane alleges in ASOC paragraph 20(d) that IOOF had at least 16 breaches of its own risk policies including unit pricing errors, at least one or more of which were reported to the Australian Prudential Regulation Authority (**APRA**) but not disclosed to the market. These unit pricing errors are recorded in an extract from Insignia’s breach register which is dated 31 March 2014. Further errors are identified in the aide-memoire prepared by Mr McFarlane’s solicitors dated 23 June 2023.

422 IOOF, in its closing written submissions at [341], does not contest that, at various points in time, there were 16 or more breaches of its risk policies, including some unit pricing errors.

423 I find that Mr McFarlane has established that IOOF was aware that it had at least 16 breaches of its own risk policies, including unit pricing errors. I find, on the evidence, that Mr McFarlane has established the truth of the matters alleged in ASOC paragraph 20(d).

### The March 2014 Information

#### ASOC paragraphs 17 and 22(a)

424 Mr McFarlane, at ASOC paragraph 22(a), pleads that while investigating the March 2014 complaint, IOOF knew or ought to have known that the allegations in the March 2014 complaint (as set out in ASOC paragraph 17, and summarised at [31] above) were “true, or alternatively, substantially true”. The relevant allegations said to be true concern: preferential treatment; Buy-model errors; password sharing; inadequate resourcing of the Research team leading to plagiarism, impractical deadlines for research reports; that Mr Hilton had instructed staff to complete his Kaplan and eLearning modules on his behalf; and bullying.

425 Insignia admits that as a result of IOOF’s investigation of the March 2014 complaint, IOOF concluded that some of the allegations were substantially true, namely: overstating the performance of IOOF’s hypothetical Buy-model Portfolio (alleged in ASOC paragraph 17(b)); breach of password access (alleged in ASOC paragraph 17(c)); failure to properly attribute third party research reports in research presentations (alleged in ASOC paragraph 17(d)); and Mr Hilton’s practice of instructing direct reports to complete his Kaplan and eLearning training (alleged in ASOC paragraph 17(g)): FAD [22(a)(i)]. Insignia relies upon a number of additional factual matters which it alleges are relevant to the allegations and which need to be considered in order to understand the allegations in their full context: FAD [22(d)], [22(e)] and [22(g)]. IOOF otherwise denies that the allegations in the March 2014 complaint were true or substantially true: FAD [22(a)(ii)].

426 During opening, Mr McFarlane’s senior counsel indicated that Mr McFarlane does not press, as part of ASOC paragraph 22(a), that the allegations relating to bullying were true (that is, the allegations in ASOC paragraphs 17(f) and (i)).

427 As a result of the above, this leaves the truth of the following three allegations from the March 2014 complaint in issue:

(1) the allegation in ASOC paragraph 17(a) that Mr Hilton gave selective and preferential treatment to some of his particular planners and clients by providing them with price-sensitive material whilst leaving other planners and/or clients to face unknown risks;

(2) the allegation in ASOC paragraph 17(e) that IOOF’s Research team was inadequately resourced, leading to shortcuts being taken such as the alleged plagiarism, with only two analysts in the department:

(1) covering all of the ASX200 stocks plus other equities which might come onto that index;

(2) during reporting season being expected to produce reports on approximately 300 companies over a three-week period, equating to approximately 14 stock reports per day; and

(3) the allegation in ASOC paragraph 17(h) that Mr Hilton imposed impractical deadlines for research reports during reporting seasons which placed client investments at risk by not giving due consideration to the results, a practice which ASIC explicitly warned against and then became a source of intimidation and harassment.

428 It is necessary, however, to address each of the allegations in ASOC paragraph 17, other than the allegations relating to bullying in ASOC paragraphs 17(f) and (i) which are no longer pressed.

#### ASOC paragraphs 17(a)/22(a) – Selective and preferential treatment

429 By ASOC paragraphs 17(a) and 22(a), Mr McFarlane alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the following allegation was true or, alternatively, substantially true: Mr Hilton, gave selective and preferential treatment to some of his particular planners and clients by providing them with price-sensitive material whilst leaving other planners and/or clients to face unknown risks. Mr McFarlane’s plea at paragraph 17(a) is supported by particulars, which refer to an email sent by Max Riaz to Mr Urwin on 2 April 2014. The email relevantly stated:

In the [email] below is what I communicated initially with [Ms Corcoran]. I haven[’]t included in it things like favourable treatment of large clients like [Mr Hilton] privately calling his favourite planners (eg, [J]ames [M]cgregor) and getting his clients out of Templeton Global Growth fund (TGG) when he thought the stock was expensive while leaving other clients in there facing the risk”.

430 Other than this email, no evidence was adduced by Mr McFarlane to substantiate Max Riaz’s allegation of Mr Hilton “calling his favourite planners … and getting his clients out of Templeton Global Growth fund (TGG) when he thought the stock was expensive”.

431 During the hearing, Mr McFarlane sought to substantiate the allegation in ASOC paragraph 17(a) by relying on an incident not expressly identified in Max Riaz’s email. That incident allegedly related to a bespoke stock report being issued in relation to Goodman PLUS on 23 January 2014.

432 The evidence in support of the Goodman PLUS incident arises from email correspondence between Zach Riaz, Max Riaz’s brother, to Mr Urwin dated 14 March 2014. The evidence is that a stock report prepared in relation to Goodman PLUS dated 23 January 2014 recommended “BUY”. That report was emailed to a planner, Stephen Lewis, by Zach Riaz on 23 January 2014. Mr Hilton was copied to this email. On 30 January 2014, Mr Lewis placed a $249,842.46 order for Goodman PLUS securities. In contrast to the recommendation in the report issued to Mr Lewis, a High Yield Table dated 2 December 2013 had marked Goodman PLUS as a “HOLD”. An email from Zach Riaz to Mr Urwin on 17 March 2014 noted that Goodman PLUS was also marked as a “HOLD” in a table sent out by IOOF on 17 March 2014, and further asserted that Mr Urwin could “go back to all the weekly reports I put out this year. We have not had it on a Buy”. In a separate email sent on 14 March 2014 to Mr Urwin, Zach Riaz alleged that the report was “not sent out to the network but done specifically for Stephen’s client”.

433 On 19 March 2014, Mr Urwin emailed Mr Farrell, copying Ms Corcoran, informing them of Zach Riaz’s allegation. He stated:

When I questioned Peter on this he was evasive, reviewed the report, saw that there was no analyst recorded on the report and said it shouldn’t have gone out. I explained to him that he instructed Zac to complete the research and that Zac cc: him on the email.

I further asked “how this would look at by ASIC” which he said “not good”.

I am not aware if this has happened with other securities?

434 IOOF investigated the March 2014 complaint, and the results of its investigation were recorded in the “Summary & Action Plan” dated April 2014. The Summary & Action Plan recorded under “Other Comment”:

Favourable clients – Research must not have different recommendations for the same security throughout the network e.g. Goodman Plus Jan 2014.

435 Max Riaz’s allegation in his 2 April 2014 email to Mr Urwin of Mr Hilton privately calling his favourable planners (e.g. James McGregor) and “getting his clients out of Templeton Global Growth Fund (TGG) when he thought the stock was expensive while leaving other clients in there facing the risk … in 2013” was not addressed in the Summary & Action Plan and does not appear to have been the subject of a finding by IOOF in the course of investigating the March 2014 complaint.

436 In total then, Mr McFarlane has identified one recommendation provided to Mr Lewis which was inconsistent with other recommendations made by IOOF in respect of Goodman PLUS. There is no other evidence to indicate that there were other occasions on which this had occurred, or to otherwise substantiate the allegation pleaded in ASOC paragraphs 17(a) and 22(a). The most that can be said about the Goodman PLUS allegation is that, during the initial investigation into that recommendation, concern was expressed by Mr Urwin that Mr Hilton was evasive, and Mr Hilton allegedly acknowledged that the inconsistent recommendation would not look good to ASIC. The subsequent Summary & Action Plan dated April 2014 did not contain a positive finding that, in this case, Mr Hilton had engaged in selective or preferential treatment to some of his planners and clients, while leaving other planners and/or clients to face known risks. I have not been taken to any evidence to establish that the recommendation to buy shares in Goodman PLUS was price-sensitive.

437 Given the above, I am not satisfied on the evidence that Mr McFarlane has established the truth of the allegation pleaded in ASOC paragraph 22(a) insofar as it concerns the allegation concerning selective and preferential treatment of clients recorded in the March 2014 complaint, as referred to in ASOC paragraph 17(a).

#### ASOC paragraphs 17(b), 22(a) and 22(d) – Buy-model

438 Mr McFarlane alleges in ASOC paragraphs 17(b) and 22(a) that IOOF knew or ought to have known that the following allegation was true or, alternatively, substantially true: that since at least the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model with the material overstatement arising from IOOF’s under-provision in the model for the proper cost base; and that the resulting overstated performance numbers were marketed to clients and planners.

439 Insignia admits that the allegations in the March 2014 complaint that since the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model, were substantially true: FAD [22(a)].

440 There is a further allegation in ASOC paragraph 22(d) that “while investigating the March 2014 complaint, IOOF knew or ought to have known that … IOOF had not notified the recipients of representations made in relation to its Buy-model of the overstatement of its performance (including its adviser/dealer network, market analysts and clients” and/or issued a correction in respect of such misrepresentations.” Insignia admits that IOOF did not notify the recipients of the Buy-model that, in or around March 2014, IOOF had identified errors in the methodology that had been used to calculate the hypothetical performance figures included in the Buy-model: FAD [22(d)(i)].

441 In the light of the admissions made by IOOF, it is not in dispute that, since the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model. Nor is it in dispute that IOOF had not notified the recipients of the Buy-model of any overstatement of the Buy-model’s performance.

442 Nonetheless, during the course of the hearing, I was taken to a number of documents recording the investigation of the “Buy-model” issue which provide context to the allegations in ASOC paragraphs 17(b), 22(a) and 22(d) and to which it is necessary to make reference. The allegation itself was put in the following terms by Max Riaz in an email to Ms Corcoran on 5 March 2014:

Please note that Peter Hilton in 2013 took Perennial Investments to town for misrepresenting their performance numbers and immediately notified Chris Kelaher of the incident and took credit over the issue and how he was trying to get the best outcome for clients. And yet he himself has miscalculated his own equities buy model performance numbers for years and have completely got it wrong and when he found out about the miscalculation in 2013 he simply swept the issue under the carpet and moved on without notifying clients and presumably his superiors. Outperformance numbers are of paramount importance because it is on this basis the clients entrust their funds with us to manage on the platform and it is these numbers that underwrite our existence as a cost to the company. If we don’t outperform then we do not add value and we have no right to existence. This is how important this issue is! This is a serious issue of deceitful behaviour, unethical conduct, mismanagement of process, lack of checks and balances and a significant contingent risk to the company’s reputation. Perennial alone would have a field day on him if they found out let alone the network, ASIC or anyone outside.

443 Further, in an interview with Ms Corcoran on 11 March 2014, Zach Riaz explained that he had determined that the spreadsheet being produced in relation to the Buy-model was “significantly wrong”. He stated that he then “escalated this over 6 months ago” to Max Riaz, and they then both informed Mr Hilton. The note of the interview then recorded the following:

[Zach Riaz] very disappointed that [Mr Hilton] never asked to see the number [or] to have them explained. He appeared to shrug it off. This is an issue for [Max Riaz] and [Zach Riaz] as it appears that he just swept it under the carpet and it should be been restated and something should have been actioned. [Zach Riaz] stated this is fraud as significantly different and clients have invested money based on these represented figures. [Zach Riaz] said clients use this data consistently.

444 On 13 March 2014, Zach Riaz sent an email to Ms Corcoran, which he also forwarded to Mr Urwin. His email attached various spreadsheets which he said were “all the previous Buy Models going back to 2010”. Max Riaz calculated that:

(1) For FY2010, IOOF had reported that it had outperformed the relevant index by 5.14%, when it had underperformed the index by 6.80%;

(2) For FY2011, IOOF had reported that it had outperformed the relevant index by 3.51%, when it had underperformed the index by 5.72%;

(3) For FY2012, IOOF had reported that it had outperformed the relevant index by 6.61%, when it had outperformed the index by 5.91%;

(4) For FY2013, IOOF had reported that it had outperformed the relevant index by 7.14%, when it had underperformed the index by 0.80%.

445 It appears from various internal IOOF documents that, by the time of the March 2014 complaint, Mr Hilton approved a change to the methodology used in the Buy-model after being notified by Max and Zach Riaz of his concerns about the Buy-model methodology. The relevant evidence is as follows:

(1) In Max Riaz’s email to Mr Urwin on 2 April 2014, which was said to be what he communicated to Ms Corcoran in their meeting on 4 March 2014, Mr Riaz stated:

I remember telling Peter that “there is an issue with the buy model [performance] calculation methodology. He then asked how bad are the numbers? To which [I] responded pretty bad. He then went through the calculation methodology with [Zach Riaz] and asked [Z]ach to run with the corrected methodology going forward and so in his capacity as the head of [Research] he approved the new buy model performance measurement methodology and for the buy model report to be completely overhauled This was implemented at the start of fyl4.

(2) In an interview on 11 March 2014 between Ms Corcoran and Michael Dennis, an analyst in the Research team, Mr Dennis stated that “the numbers now being produced are correct”. Similarly, in an interview on the same day with Tracy Abercromby, a manager in the Research team, Ms Abercromby stated that she thought the issue had been identified “about 6 months ago” and stated that “she doesn’t think these numbers have been disclosed to the network since last year as has never seen the December figures”.

(3) The Summary & Action Plan recorded a finding with respect to the Buy-model that:

These figures have been distributed continually as part of the weekly summary however of late they are now the correct numbers.

446 IOOF’s internal investigations also recorded contrary views as to whether Zach Riaz was correct in his assertion that the previous calculations used for the Buy-model were inappropriate, and the significance of this error for IOOF. I note the following:

(1) As set out above, Max Riaz’s contention in his email to Mr Urwin of 5 March 2014 was that the “outperformance numbers are of paramount importance because it is on this basis the clients entrust their funds with us to manage”.

(2) On 11 March 2014, in an interview with Ms Corcoran, Zach Riaz stated that “clients have invested money based on these represented figures” and further that “clients use this data consistently”.

(3) It may also be noted that, although not arising during IOOF’s internal investigations of the March 2014 complaint, in the December 2014 complaint, Mr Ung, referring to the Buy-model issue, stated that: “[c]lients and financial planners are impressed with the falsified outperformance”.

(4) On 10 March 2014, Ms Corcoran interviewed Mr Hilton. Mr Urwin conducted a further interview with him a week later, on 17 March 2014. In both interviews, Mr Hilton was asked questions about the use of the Buy-model. In his interview with Ms Corcoran, Mr Hilton stated “we are not managing this money this is merely a representation of the performance”. In his interview with Mr Urwin, Mr Hilton accepted that the Buy-model’s performance figures were shown to the network and that “the planners will respond badly to this bad news”. He also stated that financial planners used the performance figures to promote the Research team.

(5) The notes of the interview between Ms Corcoran and Mr Dennis on 11 March 2014 relevantly recorded:

[Mr Dennis] said that it was established last year (by [Zach Riaz]) that the model was not calculating correct in respect of some aspects. [Zach Riaz] asked [Mr Dennis] to check. [Mr Dennis] did check and agreed with [Zach Riaz]’s conclusion that the methodology has been wrong. … He said the numbers were very wrong. He said he was not sure what was done about advising people they were incorrect.

(6) The notes of the interview between Ms Corcoran and Mr Dennis on 11 March 2014 relevantly recorded: “[Ms Abercromby] said she has heard this through the grape vine however doesn’t understand why this is a big issue as they are only representative numbers.”

(7) In an email to Mr Urwin on or about 27 March 2014, Chris Bigg, an analyst in the Research team, stated “I strongly believe you cannot attain an objective performance calculation by using the Riaz model”. Mr Bigg went on to identify his reasons for considering that the methodology for calculating the performance of the Buy-model proposed by Zach Riaz was inaccurate. Mr Bigg further stated: “Performance reporting for clients is presented through the Pwatch Valuation Summary report which is independently calculated based on market pricing”. Mr Bigg also stated that “that buy model performance has rarely been presented on at our conferences”.

(8) In correspondence between Mr Urwin and David Limbrick, a staff member who had “experience with performance reporting” on 28 and 31 March 2014, Mr Limbrick also expressed doubt as to the correctness of Zach Riaz’s methodology for calculating the Buy-model’s performance, and provided an explanation for his doubt.

447 Notwithstanding the above, the Summary & Action Plan ultimately concluded that the Buy-model “data has been wrong (ie not usual) practice since 2001”. The Summary & Action Plan went on to conclude:

*Finding:*

…

* The issue is one of non-reporting and escalation. At the time Peter Hilton was made aware that the data may not be accurate he should have escalated this to M Farrell and M Carter and a decision should have been made.
* These figures have been distributed continually as part of the weekly summary however of late they are now the correct numbers.
* The data is not fraud rather inaccurate.

*Action:*

* A decision has been made about how to communicate this to the relevant parties.
* [Michael Farrell] to establish how to communicate this to the relevant parties.

448 The above contextual matters are relevant to an assessment of the materiality of the allegations in ASOC paragraphs 17(b), 22(a) and 22(d), to which I will later return.

#### ASOC paragraphs 17(c) and 22(a) – Password access

449 Mr McFarlane alleges, at ASOC paragraphs 17(c) and 22(a), that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the following allegation was true or, alternatively, substantially true: Mr Hilton instructed Max Riaz to use Mr Hilton’s network password to sign-off on non-disclosure forms for capital transactions. Insignia admits that the allegations in ASOC paragraph 17(c) are substantially true: FAD [22(a)]. Insignia also accepts, in its closing written submissions at [351], that Mr Hilton had instructed Max Riaz to use Mr Hilton’s network password to sign off on non-disclosure forms for capital raising.

450 Consistently with Insignia’s admissions, the Summary & Action Plan dated April 2014, which was prepared by Ms Corcoran and to which Mr Urwin contributed, made a finding that Mr Hilton had shared his password and should “receive a letter advising of the breach and a final warning that if he breaches this policy he will be dismissed”.

451 I find, on the evidence and admissions made by IOOF, that Mr McFarlane has established the truth of the allegations in ASOC paragraph 22(a) insofar as they concern the allegations concerning password access recorded in the March 2014 complaint, as referred to in ASOC paragraph 17(c).

#### ASOC paragraphs 17(d), (e), (h), 22(a), (c), (e) – Plagiarism, resourcing and deadlines

452 In overview, the position on the pleadings in ASOC paragraphs 17(d), (e), (h) and 22(a), (c) and (e) is as follows:

(1) Mr McFarlane alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the following allegation in the March 2014 complaint was true or, alternatively, substantially true: “IOOF plagiarised third party research reports and distributed that research without attribution or taking the time to verify that the research was accurate and/or had a reasonable basis”: ASOC [17(d)] and [22(a)]. Insignia admits that this allegation is substantially true: FAD [22(a)].

(2) Mr McFarlane alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that “the activities of the Research team were not in accordance with ASIC Regulatory Guide 79 in relation to research report providers, in particular Part C ‘Research quality, methodology and transparency’”: ASOC [22(e)]. Insignia partially denies this allegation: FAD [22(e)]. Insignia admits that as part of the March 2014 investigation, IOOF reviewed a number of presentations which were found to contain material that had not been appropriately attributed: FAD [22(e)(iv)]. However, Insignia further contends that:

(a) the allegation of plagiarism related to IOOF’s publication of research reports published by JP Morgan which either was obtained improperly, or used without proper attribution; and

(b) at the relevant time, a contractual arrangement was in place which permitted IOOF to use content from JP Morgan’s research reports in certain circumstances: FAD [22(e)(i)-(ii)].

(3) Mr McFarlane alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the following allegation in the March 2014 complaint was true or, alternatively, substantially true: “IOOF’s Research team was inadequately resourced, leading to shortcuts being taken such as the alleged plagiarism, with only two analysts in the department: (i) covering all of the ASX200 stocks plus other equities which might come onto that index; and (ii) during reporting season being expected to produce reports on approximately 300 companies over a three-week period, equating to approximately 14 stock reports per day”: ASOC [17(e)] and [22(a)]. Insignia denies the substance of this allegation: FAD [22(a)].

(4) Mr McFarlane similarly alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that “there was inadequate resourcing (technological and human) of the Research team …”: ASOC [22(c)]. Insignia denies this allegation: FAD [22(c)].

(5) Mr McFarlane similarly alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that Mr Hilton imposed impractical deadlines for research reports during reporting seasons which placed client investments at risk by not giving due consideration to the results, a practice which ASIC explicitly warned against and then became a source of intimidation and harassment: ASOC [17(h)] and [22(a)]. Insignia denies the substance of this allegation: FAD [22(a)].

453 In the light of the admissions made by Insignia, the plagiarism allegation referred to in ASOC paragraph 17(d) is not in dispute.

454 I now turn to analyse the overlapping questions of whether Mr McFarlane has established the substantial truth of:

(1) the allegation in ASOC paragraph 22(e) that IOOF’s activities were not in accordance with ASIC Regulatory Guide 79 (**RG 79**) (in particular Part C of that Guide);

(2) the allegation in ASOC paragraphs 17(e), 22(a) and 22(c) that IOOF’s Research team was inadequately resourced; and

(3) the allegation in ASOC paragraph 17(h) and 22(a) that Mr Hilton imposed impractical deadlines for research reports which placed client investments at risk.

455 ASIC’s RG 79, titled “Research report providers: Improving the quality of investment research” and dated December 2012, relevantly provided under Part B (titled “Research reports and research report providers”):

79.30 We do not consider that research report providers can effectively meet their obligations to manage and disclose their conflicts of interest where research is “white labelled” (i.e. prepared by one entity and rebranded and distributed by another), without attribution to the research report provider who originally prepared it. Distributing research in this way makes it difficult for users to assess the value of the research and the impact of any conflicts of interest on the quality and integrity of the research. Licensees preparing research reports can meet their obligations where a research report is co-branded with the licensee distributing the report.

79.31 If a research report prepared by one licensee (A) is provided to other persons (clients) by another licensee (B) then, for the purposes of this guide. Licensee A is the research report provider, and not Licensee B (regardless of whether Licensee B also puts its own name on the research report). However, this is only the case where:

(a) Licensee A causes or authorises Licensee B to provide the advice contained in the research report to other persons; and

(b) Licensee B makes no material changes to the advice contained in the research report.

…

79.33 Where Licensee B makes material changes to the research prepared by Licensee A, Licensee B assumes the obligations of the research report provider as set out in this guide. Any recommendations in the report must be those of Licensee B *based on its own assessment* of the product in compliance with the quality, conflicts, transparency and disclosure requirements of this guide. (emphasis added)

456 ASIC’s RG 79, under Part C (titled “Research quality, methodology and transparency”), contained the following provisions relevant to resourcing of Australian Financial Services Licensees:

79.74 AFS licensees have general obligations under s912A(l) of the Corporations Act to:

…

(d) have adequate financial, technological and human resources to provide the financial services covered by their licence and to carry out supervisory arrangement

…

79.76 Human resources are a key input to research report providers’ processes and output. Research report providers should allocate sufficient resources to support the effective performance of their research staff.

...

79.78 Research report providers often cover a substantial number of financial products of varying complexity. Careful consideration needs to be given to balancing the commercial imperative to provide broad product coverage with the need to maintain the quality of research output and the allocation of adequate staff time to each research report.

…

79.79 To analyse financial products well, research report providers need to allocate appropriate resources to each research task. This includes allocating sufficient numbers of staff with suitable qualifications for the research task and setting appropriate timelines for the completion of tasks.

457 ASIC’s RG 79, under Part C, also contained provisions requiring that research reports be based on reasonable grounds at RG 79.89-79.91. Notably, RG 79.91 provided:

79.91 To reduce the risk that research reports are not based on reasonable grounds, research report providers should ensure that each report reflects the views of the person who takes responsibility for it (e.g. the person who prepared it or the person who approved its distribution).

458 IOOF’s Research Policy dated June 2014 recorded that the Research team comprised 10 people: the Head of Research, six managed fund analysts, two equity analysts and an administrative assistant.

459 Max Riaz’s email of 3 March 2014 to Mr Hilton, which has relevantly been set out at [28] above, alleged that the reports that he had been producing were “highly compromised in the areas of snatching material from other sources without mentioning proper sources without sourcing mentioned”. Max Riaz went on to state that “the financials are plagiarised from JP Morgan”. The effect of Max Riaz’s email was that it was necessary to plagiarise from JP Morgan reports because of the lack of adequate resourcing of equities analysts to produce the relevant reports. He stated that he had produced “37 reports in the month of February”. He stated: “The easy option for me will be to re-badge the JP Morgan report and there will be no delays but then please be informed that I will have very updated knowledge of what I am reporting on and it further compromises my professional integrity.”

460 In his email to Mr Urwin on 2 April 2014, Max Riaz made a further assertion about the resourcing of the Research team, alleging that:

[O]ften we have to cut & paste (plagiarise) information from external sources in the body of the report and pretend as if its our own. The reason why this has been going on for years is because you have two analysts covering literally the entire equities market (its not just the ASX200 stocks as there are stocks that go in out of the index all the time). The size of our coverage has to be seen on the scale of size and time. Time because each reporting period we are obliged to produce reports as companies report their financials. The two analyst are expected to publish sellside like research reports but without the necessary resources which includes lack of time as I mentioned. During the reporting season (interim & final, twice a year), we are expected to work like machines and produce reports on around 300 companies over say a three week period. This equates to a workload of 14 stock reports a day.

461 I observe that one aspect of Max Riaz’s allegations in his 3 March 2014 allegations and his 2 April 2014 allegations appears to be inconsistent. Whereas, in his email of 3 March 2014, Max Riaz stated he had produced 37 reports in the month of February, in his email of 2 April 2014, he alleged that two analysts were expected to produce reports “on around 300 companies over a three week period”, equating to “14 stock reports a day”.

462 Mr Hilton’s initial position in response to Max Riaz’s allegations is recorded in a draft proposed response to Max Riaz’s email of 3 March 2014, which Mr Hilton sent to Ms Corcoran on 4 March 2014. Ms Corcoran advised against sending the response, and it does not appear to have been sent to Max Riaz. The draft response relevantly stated:

Max, 37 reports in Feb is an average of xxx per day. Given an analyst is monitoring changes in between interim and final reporting, then it should not take long to decide if your view has changed. This would appear [to] be confirmed in that you completed six reports all of which were forwarded to me on the evening of 3rd March. An average of xxx per day is not sufficient output in my view. I have had to ask that you increase output in previous reporting periods. Reporting season is the busiest time of year for an equity analyst Max, that is why I was surprised when you contemplated annual leave during February without the ability to still complete reports.

If a report is highly compromised, it should not be forwarded to me for approval. You have an obligation not to provide compromised research and I am alarmed at the possibility you have. With respect to “snatching material from other sources without mentioning proper sources” the research reports finalized by yourself are considered your views Max and I have always worked on this basis. If there are instances where this is not the case, please advise immediately.

Your view on plagiarism is disappointing. Yes we do use quant from JP Morgan, however it is with permission and I need not provide you with the finer details or group commercial agreements. The definition of Plagiarism is to use without permission and this is not the case.

ASIC does require adequate time for an analyst to produce a report and it is my view you do have adequate time. An initiating coverage report can be expected to take some time. However, during reporting season you are not initiating coverage, rather you should be in a reasonable position to to decide if a result is above, in line or below expectations.

…

It is not my view that we contravene ASIC requirements, nor have you been privy to recent resourcing discussions.

463 Mr Hilton’s reference to having “permission” to use JP Morgan analysis appears to be a reference to a Research Agreement between Ord Minnett Limited (an entity that was part-owned by IOOF and JP Morgan) and JP Morgan in relation to the provision and use of JP Morgan research (**JP Morgan Research Agreement**). The agreement relevantly provided that JP Morgan would provide its research reports to Ord Minnett (cl 2.1); that Ord Minnett may provide the reports to any of its related bodies corporate (including IOOF) (cl 2.5); that the reports were permitted to be used by Ord Minnett or its related entities “as the basis for conducting and producing independent and suitably adapted” research reports for distribution to their retail client base (cl 4.1); and that such use was on various conditions, namely that the relevant entity would take full ownership and responsibility for the research, would not indicate explicitly or by implication that JP Morgan was involved in the preparation of the research, would not cite JP Morgan as a source, and would devise and apply its own recommendation criteria and terminology that is different to, and independent of, the recommendation criteria and terminology used by JP Morgan in the research (cl 4.2).

464 In a subsequent interview with Mr Urwin on 17 March 2014, Mr Hilton was also asked about the resourcing of the Research team. Mr Urwin asked him whether he had the staffing and resources with the appropriate skills and expertise. Mr Hilton responded: “No. The current course of events highlights this. We have a growing network which has placed strains on current resources and during peak periods”.

465 During the course of investigating Max Riaz’s complaint, Mr Urwin was provided with various documents asserting or evidencing that Mr Hilton and his team had previously considered whether the Research division’s activities were in accordance with RG 79. This included:

(1) an email from Mr Hilton to Mr Urwin on 20 March 2014, stating that he had reviewed the Guide “in its entirety and decided we were largely compliant, some minor changes were implemented”. It appears from the email chain that Mr Hilton was asserting that this review was undertaken in December 2012;

(2) an email from Mr Hilton to Mr Farrell on 24 June 2013, in which Mr Hilton, referring to the Guide, stated that attribution to JP Morgan and Ord Minnett was not required, “as we consider that we are making significant changes to the reports (others may have a different view)”;

(3) an email from Mr Hilton to Mr Urwin on 1 April 2014, which contained a table analysing the requirements in RG 79 and comments as to whether any change was required to existing processes in the Research team. It is not entirely clear when this analysis was undertaken, however Mr Hilton’s comments indicated that it was prepared in response to an update to RG 79 which occurred in December 2012. The table was prepared by Ms Abercromby. On the issue of distributing research prepared by another licensee, it was determined that there was “no change required to the existing process”. This was because: “The analyst will materially change the information in this report and independently determine a Rating. The Research recommendation clearly articulates the rationale for the rating”.

466 The investigation of Max Riaz’s complaint resulted in mixed conclusions as to whether IOOF’s conduct constituted impermissible plagiarism and whether the Research team was inadequately resourced:

(1) The Summary & Action Plan dated April 2014 recorded a finding that an agreement with JP Morgan allowed “all entities within the IOOF group to utilise Research, to use the data however they are not allowed to mention the source, therefore this is not plagiarism in this context”. The Summary & Action Plan further stated that there were a number of research presentations which were “not correctly sourced or did not have a disclaimer attached”. It was determined that various actions would be taken in response to these findings, including: that a policy in relation to plagiarism would be established and rolled out to the Research team; that the IOOF marketing team would review all presentations to ensure they were adequately sourced; and that Mr Hilton would be required positively to ensure that each presentation or research report had the appropriate disclaimer attached.

(2) A member of IOOF’s legal team prepared a memorandum analysing the requirements of RG 79 dated 12 May 2014, which included comments about the application of the Guide to IOOF’s Research team (**RG 79 Memorandum**). The memorandum acknowledged that “one of the key issues” in the review was the attribution of research reports to other research providers. The memorandum further stated that where material changes have been made to a research report, the Research team “will assume the obligations of a research report provide”. On the other hand, the memorandum stated that where material changes had not been made, “the report must be attributable to the licensee who prepared the report”. However, the report did not contain a positive finding that IOOF had in fact contravened RG 79 by relying on reports prepared by JP Morgan without attribution. The memorandum also did not contain a finding as to the adequacy of resourcing within the Research team, instead stating that “this is a business requirement”.

467 It appears that IOOF made changes to its resourcing of the Research team following the March 2014 complaint. On 12 March 2014, Mr Hilton sought approval from Mr Farrell to hire an additional research analyst as a priority. Mr Hilton relevantly stated:

The Research Team comprises 4 Managed Fund Analysts, 2 Equity Analysts (one of whom is presently on leave for an undefined period), Head of Research (covering as an equity analyst) and an Administration Assistant. Research staff members have been increasingly involved in the regulatory demands imposed by bodies including APRA which detracts from investment tasks as well as demands from other internal departments and IFA’s. This appointment is a priority and will be followed by a request for an equity analyst in order that research can meets its obligations

468 By 10 April 2014, IOOF had hired an additional research analyst.

469 The Summary & Action Plan, which was last amended on 8 April 2014, also appeared to contemplate a further review of the Research team structure, relevantly stating:

Structure needs to be revisited to ensure that there is the right delegation in place and that Peter is able to spend adequate time in the office to manage and mentor the staff. If in event that this is not possible then should determine if a resource within the team should be responsible for the day to day people management

470 Against this background, on 14 April 2014, Mr Hilton and Ms Abercromby met with Jacqueline Hippolite, a member of IOOF’s HR team. Ms Hippolite requested that “in order to ensure that our next meeting addresses the resource requirements now and in the near future can I please ask that you draft new PDs [position descriptions] for all staff”. On 16 April 2014, Mr Hilton sent to Mr Farrell and Ms Hippolite the updated position descriptions and requested approval to hire an additional analyst.

471 On 16 May 2014, IOOF announced its acquisition of SFGA, a financial advice and wealth management business. The acquisition was completed via a scheme of arrangement in August 2014. Following the announcement of the acquisition, further consideration was given to the resourcing of the Research team:

(1) On 11 June 2014, on the basis of the advice of a member of IOOF’s legal team on the same day, Ms Abercromby suggested in an email to Mr Hilton that: “To manage any potential conflict of interest IOOF should source external research for distribution to advisers”. The relevant advice of IOOF’s legal team, which was set out in an email from Victoria Fraraccio, legal counsel at IOOF, to Ms Abercromby dated 11 June 2014, included an analysis of RG 79, and a statement that “ASIC RG 79 states that where a licensee wishes to distribute research about its own products a clear conflict of interest arises. In such cases, ASIC expects licensees to avoid the conflict by obtaining research from an external source”. By email on 15 July 2014, Mr Hilton raised the matter with Mr Farrell, noting that “we have been collating some data on coverage from external research houses regarding which IOOF funds they cover”. A memorandum prepared by Ms Abercromby outlining the business case for outsourcing research reports dated 21 October 2014 relevantly referred to Mr Farrell having requested Mr Hilton to consider outsourcing managed fund research reports.

(2) An internal IOOF document, whose title and author are not identified, but which appears to be dated 18 November 2014 referred to resourcing of the Research team. The document referred to the scope of the Research team’s role “[l]ess than 2 years ago” and went on to state “the current an[d] foreseeable future is vastly different”. The document subsequently stated: “We are concerned with the current resourcing we will be unable to fulfill our regulatory requirements or continue the high service standards offered to advisers”.

(3) Similarly, a draft document titled “Advice Division Restructure December 2014” relevantly stated:

Over the last 12 months the Advice Division has consolidated and grown, specifically through the acquisition of SFG. As a result of this consolidation and growth it is necessary to re-assess the structure to meet the needs of the business. An effective group of shared services and a structure “fit for purpose” is now required as IOOF now has a leading position in the industry, specifically when measured by Funds Under Advice.

(4) On 15 January 2015, Mr Farrell sent an email to Mr Kelaher and other executives endorsing an outsourcing proposal. Mr Farrell’s email relevantly stated:

As discussed briefly at the Leadership meeting last Friday, the intention is to engage an external research provider to provide IOOF research with core managed fund research rather than perform analysis of an ever growing list of managed funds internally.

…

I endorse this proposal and recommend that we move to commercial negotiations and implement as soon as practicable. This solution assists with the growing adviser base and associated demands, the need to have an external research house reviewing IOOF (and related body corporate) funds, makes the increased oversight of the Lonsdale APL and the APL review a more streamlined solution and transition and provides capacity for the IOOF research team to provide added value services to the network.

(5) On 11 February 2015, Melinda Hofman, Corporate Affairs Manager at IOOF, sent a message on behalf of Mr Kelaher, which referred to various changes being implemented across IOOF’s advice and shared services divisions, including the appointment of Matthew Drennan as the Group Head of Research and Portfolio Construction, reporting to Mr Farrell. Mr Hilton’s title was changed to Head of Advice Research, reporting to Mr Drennan. In making this announcement, the email relevantly stated:

Following the acquisition of SFG Australia (SFGA) in August last year, the remainder of 2014 was spent better understanding the business, its people and their processes.

To ensure the structure of IOOF meets the requirements of the changing face of the industry, IOOF’s business strategy, and its continued growth, the leadership group have agreed on a number of changes across our advice and shared services divisions, which now incorporates the SFGA business and prepares the group for the opportunities and challenges we face in 2015.

(6) On 29 July 2015, Matthew Drennan gave a presentation to the IOOF Risk & Compliance Committee in which he referred to a “[p]lan to remove functions from the Research team and create more robust Chinese Walls around stockbroking and research business”. Mr Drennan further noted that “Although sharing research is industry practice it will not be acceptable going forward”. On the following day, Mr Drennan sent a copy of his notes from his presentation to the Risk & Compliance Committee. Those notes referred to (without elaboration) the “revised structure and responsibilities of Research team”, the appointment of required staff, and referred to a further “RG 79 gap analysis and recommendations”.

(7) In about July 2015, IOOF engaged PwC to carry out a review of the current design and operating effectiveness of the systems processes and internal controls for, amongst other things, the “Research Advice team”. On 28 August 2015, PwC issued the PwC Interim Report setting out its findings and recommendations with respect to the first phase of PwC’s scope of review, being the review of the design of IOOF’s systems, processes and internal controls. That report contained a finding that: “due to the broad range of investments, many of which are domiciled offshore, the size of Research does not appear sufficient to monitor all relevant products on the Platform in depth.” In the report, PwC further stated:

We observed that two members of Research are responsible for preparing research in respect of ASX 200 securities. Currently research on equities is done using a combination of research from third party research providers (Ord Minnett and Lonsec) and/or in-house research. Under the current business model, it appears staff members are currently stretched in undertaking their research. We acknowledge this risk is mitigated as more research is outsourced.

472 Having regard to the above evidence, I am satisfied that Mr McFarlane has established the truth of the allegation in ASOC paragraph 22(e) that IOOF’s activities were not in accordance with RG 79 (in particular, Part C of that Guide).

473 The evidence establishes that the terms of the JP Morgan Research Agreement permitted IOOF to use research reports prepared by JP Morgan. However, nothing in the JP Morgan Research Agreement could have the effect of superseding the guidance in RG 79. As noted above, RG 79.33 (in Part B) permitted the use by one licensee (Licensee B) of research by another licensee (Licensee A) in circumstances where material changes had been made to the report, so long as any recommendation in the report was based on Licensee B’s “own assessment” of the product in compliance with the quality, conflicts, transparency and disclosure requirements of the Guide. RG 79.91 (in Part C) further provided that research report providers should ensure that each report reflects the views of the person who takes responsibility for it.

474 In the present case, the allegation of Max Riaz, as recorded in his email of 3 March 2014, was to the effect that the reports he was producing for IOOF were “highly compromised”, that he was merely plagiarising or re-badging JP Morgan’s reports, and that this compromised his “professional integrity”. Max Riaz was one of two analysts producing such reports. I draw the inference from these allegations that Max Riaz’s position was that he was not undertaking his “own assessment” of the JP Morgan reports before issuing reports in IOOF’s name, nor did those reports reflect his views. Max Riaz’s allegations were not contradicted by Mr Hilton, who merely stated, in his draft proposed response on 4 March 2014 that, he had always proceeded on the basis that reports finalized by Max Riaz represented his views. In these circumstances, I am satisfied that Mr McFarlane has established the allegation in ASOC paragraph 22(e) that IOOF’s activities were not in accordance with RG 79, in particular RG 79.33 and RG 79.91.

475 I am satisfied that Mr McFarlane has established the truth of the allegations in ASOC paragraph 22(c) that IOOF’s Research team was inadequately resourced. Taken together, the evidence supporting this plea comprises: the allegations made by Max Riaz in his emails of 3 March 2014 to Mr Hilton and 2 April 2014 to Mr Urwin; Mr Hilton’s comments on resourcing in his interview with Mr Urwin on 17 March 2014; steps taken in March and April 2014 to hire additional resources at the research analyst level; an internal IOOF document dated 18 November 2014 referring to a concern about “current resourcing”; steps taken in 2015 to restructure the Research team, including by outsourcing fund research; and a finding by PwC in its Interim Report to the effect that staff members were “currently stretched in undertaking their research”.

476 Some of this evidence, on closer analysis, does not, on its own, support a conclusion that the Research team was inadequately resourced. More particularly:

(1) The internal IOOF document dated 18 November 2014 does not support a conclusion that the Research team was inadequately resourced. It is clear from the language of that document that it is referring to future resourcing levels, in the light of anticipated changes at IOOF.

(2) I do not consider that the steps taken in 2015 to restructure the Research team support a conclusion that IOOF’s Research team was inadequately resourced at the time that March 2014 complaint was made. These steps were taken following IOOF’s announcement of its merger with SFGA, and this merger appears to have contributed to the restructure of the Research team.

(3) I also do not consider that the PwC Interim Report supports a conclusion that the Research team was inadequately resourced at the time of the March 2014 complaint. The PwC Interim Report was prepared on 28 August 2015; that is, some six months after the restructure of IOOF’s advice and shared services division was announced. The report expressly refers to arrangements whereby “research on equities is done using a combination of research from third party research providers … and/or in-house research”. Those arrangements differ from the resourcing arrangements in the Research team that prevailed at the time of the March 2014 complaint. PwC’s findings therefore cannot be relied upon to draw any conclusion as to the adequacy of resourcing arrangements for the Research team at the time of the March 2014 complaint.

477 Nonetheless, on balance, I consider that the evidence does establish that, at the relevant time, the Research team was inadequately resourced. Max Riaz’s emails of 3 March 2014 to Mr Hilton and 2 April 2014 to Mr Urwin clearly articulate a concern with resourcing of the Research team. At first, Mr Hilton appeared to wish to contest these allegations – as demonstrated by his draft proposed response to Max Riaz on 4 March 2014. However, that response was not sent. By the time he was interviewed on 17 March 2014, Mr Hilton acknowledged that “the current course of events” highlighted that he did not have staffing and resources with the appropriate skills and expertise. Following the March 2014 complaint, IOOF hired an additional research analyst, and Mr Hilton made a request to hire a further research analyst. I therefore find that IOOF was aware that the Research team was inadequately resourced as alleged in ASOC paragraph 22(c).

478 I am not, however, satisfied that IOOF was aware that the allegation as to under-resourcing in the March 2014 complaint, as recited in ASOC paragraph 17(e), was true or substantially true. As noted above, I accept that the evidence establishes that IOOF’s Research team confronted resourcing issues. However, the allegation put by Max Riaz on 2 April 2014 and referred to in ASOC paragraph 17(e) was that: (i) IOOF’s Research team relied on only two analysts in the department covering all of the ASX200 stocks plus other equities which might come onto that index; and (ii) during reporting season, those two analysts were “expected to produce reports on approximately 300 companies over a three week period, equating to approximately 14 stock reports per day”. That allegation is difficult to reconcile with Max Riaz’s email to Mr Hilton on 3 March 2014, in which he stated that he had produced 37 reports in the month of February. It is also inconsistent with an IOOF document, dated 29 June 2015, responding to allegations in the Fairfax articles which stated that: “the industry has a universe of 300 stocks and thousands of managed funds, but IOOF’s approved product list (and direct equities list) is much smaller”. I am not satisfied that Mr McFarlane has established the truth of ASOC paragraph 22(a), insofar as it refers to the allegation in ASOC paragraph 17(e).

479 I am satisfied that Mr McFarlane has established that IOOF was aware of the truth of the allegation in ASOC paragraph 17(h), namely that Mr Hilton set impractical deadlines for research reports during reporting seasons which placed client investments at risk by not giving due consideration to the results. Such a conclusion flows logically from my conclusion that IOOF’s Research team was under-resourced, and the statements by Max Riaz that, by reason of this under-resourcing and his workload during reporting season, it was necessary for him to plagiarise JP Morgan reports without giving those reports due consideration. On the basis of this evidence, I draw the inference that the deadlines imposed by Mr Hilton to prepare research reports were impractical, and that this resulted in the Research team preparing reports without due consideration. I accept that an inference also arises from Max Riaz’s email of 3 March 2014, which I draw, that the consequence of this was that client investments were placed at theoretical risk by reason of Max Riaz’s lack of consideration of the content of the reports he was publishing. I note, however, that no evidence was adduced by Mr McFarlane that, in fact, the research reports produced by Max Riaz were defective in a way that caused clients to suffer loss.

480 I note that RG 79.74, 79.76, 79.78, and 79.79 provide, broadly, that Australian Financial Services Licensees must ensure the sufficiency or adequacy of resources for the production of research reports and the performance of research tasks, and ensuring that staff have sufficient time for completion of tasks. Having concluded that IOOF was inadequately resourced for the purposes of producing research reports (see at [477] above), and that Mr Hilton set impractical deadlines for producing research reports (see at [479] above), I also conclude that IOOF’s activities were not in accordance with these paragraphs of RG 79. This a further basis for my conclusion, set out at [472] above, that Mr McFarlane has established the truth of the allegation in ASOC paragraph 22(e) that IOOF’s activities were not in accordance with RG 79 (in particular, Part C of that Guide)

#### ASOC paragraphs 17(g), 22(a), 22(g) – Kaplan and eLearning

481 Mr McFarlane alleges in ASOC paragraphs 17(g) and 22(a) that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the following allegation in the March 2014 complaint was true or, alternatively, substantially true: Mr Hilton instructed a direct report to complete Kaplan and eLearning training for him. Insignia accepts this allegation as true: FAD [22(a)]. Relatedly, Mr McFarlane makes an allegation in ASOC paragraph 22(g) that Mr Hilton “had not maintained his skills and knowledge and was not of good fame and character to be a responsible manager”. Insignia admits that, following an internal investigation, IOOF concluded that there was substance to the March 2014 complaint allegations concerning Mr Hilton’s failure to complete his online learning modules and mandatory continuous education programs, but otherwise denies the allegation: FAD [22(g)].

482 Mr McFarlane’s allegation that Mr Hilton was not of “good fame and character” or “fit and proper to be a responsible manager” appears to be a reference to the specific requirements of the then ASIC Regulatory Guide 105 (**RG 105**) (now superseded but in force at the time of the Summary & Action Plan) concerning persons nominated as responsible managers to ASIC for the purposes of being recorded as such on the licence of an Australian Financial Services Licence holder. Amongst other things, an Australian Financial Services Licensee was required to ensure that persons nominated were of “good fame and character” (RG 105.33), and were required to maintain and update their knowledge and skills (RG 105.7). The Summary & Action Plan recorded a finding that Mr Hilton was instructing his direct reports to complete his training requirements. Various actions were prescribed in the Summary & Action Plan, including “[r]emoval of Responsible Manager status immediately as no longer qualifies as fit and proper”. Such a finding necessarily followed by reason of Mr Hilton not maintaining his training, skills and knowledge as required by RG 105. However, the Summary & Action Plan did not record a broader finding by IOOF that Mr Hilton was no longer “fit and proper” to remain as Head of the Research team.

483 I find, on the evidence and on the admissions made by Insignia, that IOOF, as a result of investigating the March 2014 complaint, was aware that Mr Hilton had instructed a direct report to complete Kaplan and eLearning training on his behalf. As a consequence, IOOF determined that Mr Hilton had not maintained his training and that he could no longer qualify as a responsible manager nominated by IOOF under its financial services licence.

484 I am satisfied that Mr McFarlane has established the truth of the allegations in ASOC paragraphs 17(g), 22(a) and 22(g).

#### ASOC Paragraph 22(b) – Non-compliance with 2009 First and Final Warning Letter

485 Mr McFarlane alleges in ASOC paragraph 22(b) that “while investigating the March 2014 complaint, IOOF knew or ought to have known that … [Mr Hilton] had failed to comply with the 2009 First and Final Warning Letter but had not been dismissed or disciplined, as foreshadowed in that letter”. Insignia denies this pleading: FAD [22(b)].

486 The key issue in relation to this allegation is how it is said that Mr Hilton “failed to comply with the 2009 First and Final Warning Letter”. That letter contained three requirements:

(1) Mr Hilton was required to provide AWM with a current register of interests for himself and his wife on a quarterly basis;

(2) Mr Hilton was required to obtain approval from his manager for all future share or investment transactions for himself or his wife; and

(3) Mr Hilton was required to attend compulsory training in Chinese Walls, Insider Trading, Personal Trading, Code of Conduct and Conflicts of Interest to be undertaken by an ASX Responsible Executive.

487 As to the first requirement, Mr McFarlane contends in his closing written submissions that there is no evidence of Mr Hilton providing AWM with a current register of interests quarterly, and that, in fact, the earliest that any register of interests was established was sometime in July 2015: at [202].

488 On the evidence, the precise date that IOOF established a register of interests is unclear. The PwC Final Report referred to a “Register of Interests” as being a “work-in-progress”. On the other hand, an amended IOOF conflicts of interest policy dated August 2014 referred to a requirement that the Research team maintain a register of relevant interests in securities which shows holdings of securities for research staff. Ultimately, however, it is not necessary to resolve this point. The time at which, on the documents, IOOF established a formal policy concerning the maintenance of a register of interests is not relevant to an assessment of whether and when Mr Hilton complied with the requirement in the 2009 First and Final Warning Letter to provide AWM with a current register of interests for himself and his wife. Mr McFarlane bears the onus of establishing on the balance of probabilities any failure to comply with this requirement. Mr McFarlane has not adduced any evidence to establish this failure.

489 There is also no evidence that Mr Hilton failed to obtain approval from his manager for all future share or investment transactions for himself or his wife, and therefore failed to comply with the second requirement of the 2009 First and Final Warning Letter.

490 Mr McFarlane, in his closing written submissions at [204], relies on the fact that, as alleged in ASOC paragraph 20(c), Mr Hilton had engaged in further improper share trading as the basis for a contention that Mr Hilton failed to obtain approval from his manager for all future share or investment transactions for himself or his wife. As set out at [355] above, I have concluded that the only document capable of supporting the allegation in ASOC paragraph 20(c) is the PwC Insider Trading Report, which was issued on 15 May 2015. That report establishes that, on three occasions – the Tatts Group Transaction, the Lend Lease Transaction and the ResMed Transaction – Mr Hilton engaged in conduct which was in breach, or likely in breach, of IOOF’s trading policies. However, while the PwC Insider Trading Report concluded that each of these trades was in breach, or likely in breach, of IOOF’s trading policies, none of the trades reflected Mr Hilton taking advantage of, or trading off the effect of, a research report. In these circumstances, the fact that Mr Hilton engaged in these trades does not supply a sufficient foundation for any broader inference that Mr Hilton had not complied with the requirement in the 2009 First and Final Warning Letter concerning manager approval of future trades.

491 In relation to the third requirement of the 2009 First and Final Warning Letter, Mr McFarlane points in support of this allegation to the findings of Mr Urwin, as recorded in an email to himself on 7 April 2014, that Mr Hilton did not undertake Kaplan and eLearning training, having instructed other employees to do so on his behalf. I am not satisfied on the evidence that Mr Hilton’s failure to undertake Kaplan and eLearning training constituted a failure to undertake the types of training referred to in item 3 of the 2009 First and Final Warning Letter – that is, training concerning Chinese Walls, Insider Trading, Personal Trading, Code of Conduct and Conflicts of Interest. There is no evidence as to the content and subject matter of the Kaplan and eLearning training.

492 In addition, Mr McFarlane in his closing written submissions at [263], alleges various breaches by Mr Hilton of the 2009 First and Final Warning Letter which are either beyond the scope of the requirements in the 2009 First and Final Warning Letter or are not supported by any reference to evidence which would substantiate the allegations of breach.

493 In the circumstances, I am not satisfied on the evidence that Mr McFarlane has established non-compliance with the 2009 First and Final Warning Letter as alleged in ASOC paragraph 22(b).

#### ASOC paragraph 22(f) – Failure to notify ASIC

494 Mr McFarlane alleges at ASOC paragraph 22(f) that IOOF knew or ought to have known that ASIC had not been notified of the Historical Information, the March 2014 complaint, Mr Hilton’s failure to comply with his obligatory compliance training or that the Research team’s activities were not in accordance with RG 79. Insignia admits this allegation: FAD [22(f)].

495 On the admission of Insignia, it is not in dispute that IOOF did not disclose to ASIC:

(1) those aspects of the Historical Information the truth of which Mr McFarlane has established on the evidence;

(2) the March 2014 complaint;

(3) that Mr Hilton failed to comply with his obligatory compliance training; and

(4) IOOF’s activities were not in accordance with RG 79.

#### ASOC paragraph 22(h) – Conflicts of interest

496 Mr McFarlane, in ASOC paragraph 22(h), alleges that, while investigating the March 2014 complaint, IOOF knew or ought to have known that IOOF had failed to identify, record and control conflicts of interest. Insignia denies this allegation: FAD [22(h)].

497 In his closing written submissions, Mr McFarlane submitted that this pleading was established by facts previously identified “in particular on the question of inadequate resources”: at [230]. Doing the best that I can in the light of this global submission, I consider the following matters raised in Mr McFarlane’s closing submissions are potentially relevant to his plea at ASOC paragraph 22(h):

(1) The various incidents identified by Mr McFarlane in the course of his submissions which he alleges were tainted by conflicts of interest issues, most notably:

(a) the improper share trading engaged in by Mr Hilton which resulted in him receiving the 2009 First and Final Warning Letter (as alleged in ASOC paragraph 20(a) and (b)), and the subsequent instances of Mr Hilton’s improper share trading (as alleged in ASOC paragraph 20(c));

(b) the incidents of “impropriety” or “possible improprieties” within IOOF arising from information barrier breaches or conflicts of interest (as alleged in ASOC paragraph 20(c1));

(c) Mr Hilton or Mrs Hilton’s trading, insofar as that trading preceded the publication of research reports (as alleged in ASOC paragraph 20(c2));

(d) Mr Hilton’s failure to disclose a conflict of interest in relation to the Macquarie Transaction, which was executed between July to November 2008 (as alleged in ASOC paragraph 20 (c3)(iii));

(e) the ETC incident and the investigations in connection with that incident in relation to Mr Youds and Mr Malguri (as alleged in ASOC paragraph 20 (c4)-(c9));

(f) the ING Office Fund Issue; and

(g) the allegation of plagiarism in research reports (as alleged in ASOC paragraphs 17(d) and (e), and 22(a)), on the premise that, as senior counsel for Mr McFarlane contended, clear authorship of research reports is required in order for a client to know if the person presenting the report “has any conflicts of interest” (Mr Hodge KC, T 38.41-42).

(2) Schedule A to ASIC’s letter to IOOF dated 25 January 2016, which, as extracted at [367366(2)] above identified inadequacies in IOOF’s measures for identifying, evaluating, monitoring, avoiding and disclosing conflicts of interest.

(3) PwC’s Interim Report, which made various findings and recommendations from its review of the design of IOOF’s systems, processes and internal controls. PwC classified each finding as either “H”, “M” or “L”. Importantly, a finding classified as “H” was described as an “[e]ssential weakness in the design of internal controls which could seriously compromise the system of internal controls and should therefore be addressed as soon as possible”. The following observations by PwC, each of which were classified as Priority H, are of relevance to the allegation in ASOC paragraph 22(h):

(a) PwC observed that “Research was not physically segregated from other business units in the … office. Specifically, the security door restricting access into the area where Research sits is currently not activated during business hours”. PwC recommended that the Research and Portfolio Construction teams should be segregated from non-research activities to ensure that non-public information was not available to those outside of Research (see 1.7.3, Observation 1).

(b) PwC recommended the establishment of “quiet periods” and “Chinese Walls” during capital raisings and initial public offerings (**IPOs**). PwC stated that it had been unable to observe formal requirements to establish “Chinese Walls” between members of the deal team and members of Research when participating in an IPO, and that it had been unable to observe “quiet periods” whereby the distribution of research was ceased (see 1.7.3.1, Observation 3).

(c) PwC stated that research reports were being provided to external parties (that is outside of the dealer groups to whom Research provided services), and that these parties were historically approved by the Head of Research without approval from legal (see 1.7.3.2, Observation 6).

(d) PwC stated that it had observed limited oversight and challenge from the Risk team in respect of the Research team’s identification of risks and controls to mitigate these risks and, consequently, “the key risks associated with preparing research have not adequately been identified by Research”, including “all key risks as disclosed in RG 79”, and controls established (see 1.9.3.1, Observation 1).

(e) PwC stated that “Compliance” did not currently perform any risk-based thematic reviews or spot checks of the Research team (see 1.9.3.2, Observation 1).

(4) The PwC Final Report, which stated that, at the time of review: IOOF’s register of interests was a “work-in-progress”; that the register that was reviewed recorded information inconsistently, did not align with a particular template, and did not include two unidentified employees.

498 The substantive allegation in ASOC paragraph 22(h) is that, while investigating the March 2014 complaint, IOOF was aware that “IOOF had failed to identify, record and control conflicts of interest”. This is, effectively, an allegation of a systemic issue with IOOF’s identification, recording and control of conflicts of interest. Bearing this in mind, the incidents referred to in [497(1)] are insufficient to establish the sort of high level systemic allegation for which Mr McFarlane contends. It may be accepted that, for example, the ING Office Fund Issue is an example in which IOOF staff engaged in conduct that gave rise to a conflict of interest, but this alone will not suffice to establish that IOOF had a systemic problem with the management of conflicts of interest at the time that IOOF came to investigate the March 2014 complaint. Instead, the incidents, when viewed together, must be taken to demonstrate recurring and continuing issues with the management of conflicts of interest and controls. I consider that Mr McFarlane’s evidence falls short of establishing this for the following reasons:

(1) The disparateness of the incidents said to be tainted by conflicts issues is evident on the face of the incidents – there is a significant difference in the nature of a conflict of interest arising from trading in breach of a personal trading policy, and a theoretical conflict of interest issue arising from the non-attribution of research reports to JP Morgan.

(2) The fact that Mr and Mrs Hilton entered into trades preceding research reports is of no moment unless doing so constituted a breach of IOOF’s trading policies. As will be separately addressed at [580], Mr McFarlane has failed to establish any such breach.

(3) The instances of “impropriety” or “possible impropriety” to which the Court was taken by Mr McFarlane in the course of his submissions seeking to establish his plea at ASOC paragraph 20(c1) fall far short of establishing any systemic issue with the management of conflicts of interest. Indeed, no attempt was made by Mr McFarlane to identify those “improprieties” or “possible improprieties” that could be said to have arisen from a failure to manage conflicts of interest or information barrier breaches.

(4) It is also notable that the instances of “improper” share trading by Mr Hilton, insofar as they are established on the evidence, comprise conduct occurring prior to the date of the 2009 First and Final Warning Letter, and three subsequent transactions, being the purchase of shares by Mrs Hilton on 9 August 2011, the sale of shares in Lend Lease on 1 February 2012, and the purchase and sale of shares in ResMed Inc on 31 January 2013 and 1 February 2013 respectively. Similarly, the conduct giving rise to the ETC Incident occurred in March 2009 and the conduct giving rise to the ING Office Fund Issue occurred in December 2008. The Macquarie Transaction was executed between July to November 2008. It is not apparent how these incidents could, in any meaningful sense, establish a systemic issue in IOOF’s management of conflicts of interest at the time that IOOF was investigating the March 2014 complaint.

499 Nor am I satisfied that the commentary in the PwC Interim Report, the PwC Final Report, or Schedule A to ASIC’s letter dated 25 January 2016 is sufficient to establish that IOOF had a systemic issue in recording, monitoring and controlling conflicts of interest. The difficulty with Mr McFarlane’s reliance on the conclusions in the PwC Interim Report is that PwC’s findings and recommendations to which the Court was taken, which I have summarised at [497(3)] above, are not evidently connected to the incidents that Mr McFarlane has otherwise identified as evidencing IOOF’s failure to identify, record and control conflicts of interest. It is not at all apparent how a failure to physically segregate business units in IOOF’s office, or a failure to establish “Chinese walls” and “quiet periods” during IPOs, or permitting research reports to be provided to external parties, as identified by PwC, could be said to be related to any of the transactions Mr McFarlane alleges were tainted by conflicts of interest issues. In theory, PwC’s findings concerning the limited oversight and challenge by the Risk team of the Research team’s identification of risks and controls (see 1.9.3.1, Observation 1), and its finding that Compliance did not currently perform any risk-based thematic reviews or spot checks of the Research team (see 1.9.3.2, Observation 1), could have been related to any alleged failure by IOOF to appropriately manage conflicts of interest. However, the findings of PwC on these matters are expressed at a high level of generality, and do not at any stage refer to the adequacy of IOOF’s management of conflicts of interest.

500 Given the above, I consider that none of the passages in the PwC Interim Report to which I was taken record a finding capable of establishing that IOOF had failed to “identify, record and control conflicts of interest”, as Mr McFarlane pleads at ASOC paragraph 20(h).

501 The PwC Final Report similarly does not contain any finding capable of establishing that IOOF had failed to identify, record and control conflicts of interest. The passages of that report on which Mr McFarlane relies, which are set out at [497(4)], merely record imperfections in IOOF’s share registry, as opposed to any finding that IOOF has failed to identify, record and control conflicts of interest.

502 ASIC’s letter of 25 January 2016 does directly raise concerns about IOOF’s management of conflicts of interest in a manner relevant to the transactions otherwise identified by Mr McFarlane as having been tainted by conflicts of interest. The difficulty with Mr McFarlane’s reliance on this letter, however, is that ASIC’s findings are comprised entirely of high level conclusions on the basis of a review undertaken by it in 2016. It is convenient to set out ASIC’s findings with respect to IOOF’s management of conflicts of interest here:

ASICs review of IOOF’s management of conflicts of interest within its Research Advice Team identified the following inadequacies:

- Inadequate measures used to identify and evaluate potential or actual conflicts of interest that arise within its Research Advice Team (whether perceived, actual or potential). This includes inadequate documentation and record keeping of conflicts of interest, especially in relation to staff trading activities;

- Inadequate monitoring procedures in place to ensure that any non-compliance with IOOF’s conflicts management arrangements are identified and appropriately acted upon. This includes the lack of a detailed conflict policy governing the production, editing and dissemination of research reports;

- Inadequate arrangements to avoid conflicts, including poor internal team structures and failures to segregate duties. This is evident in the fact that the Research Advice Team in addition to providing research services also performs a number of nonresearch activities including, but not limited to, product recommendations and capital raisings for the broader IOOF Group;

- Inadequate avoidance of conflicts evidenced by staff placing themselves in a position where there is a material conflict between their own interest and those of their clients, such as preferential stock allocations to staff;

- Inadequate disclosures of conflicts of interest to ensure affected persons are sufficiently informed; and

- A general lack of awareness regarding conflicts of interest amongst the research staff.

503 None of the above conclusions are supported by more detailed factual findings set out elsewhere in the letter. Mr McFarlane has not independently proved the facts supporting the opinions expressed. It is not sufficient for Mr McFarlane to eschew proof of IOOF’s actual systems for identifying, recording and controlling conflicts of interest, and instead seek to rely merely on these conclusory statements to make good his plea at ASOC paragraph 22(h).

504 I find that Mr McFarlane has not established, on the evidence, the truth of the matters alleged in ASOC paragraph 22(h).

#### ASOC paragraph 22(i) – Inadequate internal controls concerning compliance risk

505 Mr McFarlane alleges, at ASOC paragraph 22(i), that while investigating the March 2014 complaint, IOOF knew or ought to have known that IOOF had inadequate internal controls to monitor and mitigate compliance risks arising within the Research team. This plea is denied by IOOF: FAD [22(i)].

506 Again, Mr McFarlane, in his closing written submissions, submitted that this pleading was established by facts previously identified “in particular on the question of inadequate resources”: at [230]. It is not entirely clear what evidence is relied on by Mr McFarlane in support of his plea at ASOC paragraph 22(i). I infer from submissions by Mr McFarlane’s senior counsel in oral closings that Mr McFarlane’s case is that the plea is supported by one or more of the conclusions in the PwC Interim Report set out at [497(3)] above. Doing the best that I can given Mr McFarlane’s global submissions, I consider that there are two findings in the PwC Interim Report of potential relevance to Mr McFarlane’s allegation at ASOC paragraph 22(i): firstly, PwC’s finding concerning the limited oversight and challenge by the Risk team of the Research team’s identification of risks and controls (see 1.9.3.1, Observation 1); and secondly, PwC’s finding that Compliance did not currently perform any risk-based thematic reviews or spot checks of the Research team (see 1.9.3.2, Observation 1).

507 I am not satisfied that any of the conclusions in the PwC Interim Report to which I have been taken provide a satisfactory evidentiary foundation for a conclusion that IOOF had inadequate internal controls to monitor and mitigate compliance risks arising within the Research team. As to PwC’s conclusions with respect to oversight by the Risk team and Compliance, it is useful to set out PwC’s findings in full. PwC’s finding at 1.9.3.1, Observation 1 was as follows:

A primary function of a Line 2 Risk team is challenging Line 1 in their risk identification and mitigation.

We observed limited oversight and challenge from the Risk team in respect of Research’s identification of risks and controls to mitigate these risks We do however acknowledge that Risk recently worked with Research to create to risk profile which was tabled to the July RCC.

As there has been limited oversight from the Risk team the key risks associated with preparing research have not adequately been identified by Research and appropriate controls to mitigate against those risks have not been identified and implemented. In addition Risk has not ensured that … all key risks as disclosed in RG79 have been identified and where relevant controls have been established to mitigate potential risks.

508 PwC’s finding at 1.9.3.2, Observation 1 was as follows:

During our review we identified that Compliance does not currently perform any risk-based thematic reviews or spot checks of Research to confirm compliance with key obligations.

Compliance and Risk have an Internal Controls review process in place to monitor management positive assurance over obligations identified within SWORD however this review is not currently being performed Additionally the obligations within SWORD have not been mapped to the new Head of Research and Portfolio Construction Fromdiscussion with management we noted that SWORD is currently migrating to OneSum and the risks and controls identified for the new Head of Research and Portfolio Construction are being signed off manually however this excludes the obligations in SWORD. At the time of our review there was no evidence to demonstrate all required Research positive assurance signoffs were being performed and monitored manually

Monitoring of controls designed to satisfy compliance obligations is critical to enforcing accountability for adherence to compliance obligations.

509 It is apparent that the above findings were also expressed at a high level of generality. It is to be recalled that these findings are recorded in a report published on 28 August 2015, that is, more than a year after IOOF received the March 2014 complaint. Given this, the generality of PwC’s findings makes it difficult to rely on those findings to establish a deficiency in IOOF’s controls for monitoring and mitigating compliance risks at the time that IOOF was investigating the March 2014 complaint. It is not apparent what is meant by the statement that PwC observed that the Risk team had “limited oversight” of the Research team’s identification of risks and controls. The basis for PwC’s conclusion that IOOF had not adequately identified risks for preparing research is also not identified. It is also not apparent what the reference to “key risks” in RG 79 is intended to capture. Nor is it apparent what temporal period was being referred to when PwC stated that “Compliance does not *currently* perform any risk-based thematic reviews” (emphasis added). I do not consider that findings expressed at this level of generality are capable of establishing a deficiency in IOOF’s internal controls for monitoring and mitigating compliance risk that prevailed at the time that IOOF was investigating the March 2014 complaint. Mr McFarlane has failed to adduce evidence of what IOOF’s internal controls actually were at that time, which is fatal to proof of his plea at ASOC paragraph 22(i).

510 I find, on the evidence, that Mr McFarlane has not established the truth of the matters alleged in ASOC paragraph 22(i).

#### ASOC paragraph 22(j) – IOOF’s Information Technology systems

511 Mr McFarlane alleges, at ASOC paragraph 22(j), that “while investigating the March 2014 complaint, IOOF knew or ought to have known that … IOOF had failed to adequately mitigate an inherent risk in its business (which was a feature of the Roll Up Model) namely that it employed manual or other work arounds or temporary patches to resolve incompatibility between Legacy IT systems in its various businesses and IOOF’s IT infrastructure”. These allegations are denied by IOOF: FAD [22(c)] and [22(j)].

512 The particulars to ASOC paragraph 22(j) are as follows:

For IOOF’s lack of investment in technology (paragraphs (c) and (j)), this was later noted in the papers for a Risk & Compliance Committee Meeting of 28 July 2014 where, in relation to technology, it was said: “We do not invest in new technology that will support / facilitate the development of new or improved products / services or delivery channels”…

513 The paper referred to is a report prepared by the Advice Division to the Risk and Compliance Committee dated 28 July 2014. The statement “[w]e do not invest in new technology….” is not a statement of fact about an existing state of affairs, but rather a “Risk Description” (as is evident from the heading under which it appears). The report lists potential risks to the business. The report assesses the likelihood of this risk eventuating as “40%-50%”. I do not accept that the statements in this report provide a basis on which Mr McFarlane can prove the truth of the matters alleged in ASOC paragraph 22(j).

514 Mr McFarlane in his closing written submissions at [231]-[232] relies upon two extracts of the PwC Interim Report to provide an evidentiary foundation to prove the truth of the matters alleged in ASOC paragraph 22(j). In summary, those extracts refer to the Research team not consistently applying “principles of model / spreadsheet governance” (see 1.8.3, Observation 1) and IOOF’s use of “multiple registers capturing differing information in relation to issues and breaches … [which] may limit management’s ability to form [a] consistent view of the detail of all breaches and incidents across the Group” (see 2.5.4, Observation 6). In respect of both matters, PwC offers recommendations for improvement. Both matters were classified as Priority “M”. Priority M matters were described as “[w]eaknesses which could compromise the design of internal control and should therefore be addressed but with a lower priority than those rated High”.

515 Mr McFarlane submits that these extracts of the PwC Interim Report provide a basis upon which I can infer that IOOF had failed to adequately mitigate an inherent risk of its business (which was a feature of the Roll Up Model) that employed manual and other work arounds or temporary patches to resolve incompatibility between legacy IT systems of its various businesses and IOOF’s IT infrastructure. I am not satisfied that any such inference should be drawn based on the PwC Interim Report. The report does not contain a finding that IOOF’s IT systems had been inadequate. I do not consider that the language used in the classification scheme in the PwC Interim Report provides a satisfactory evidentiary foundation for a conclusion that IOOF had inadequate IT systems to mitigate risk. In any case, the matters identified by Mr McFarlane were classified as Priority “M”, which meant that PwC considered that they were matters which *could* compromise the design of internal controls. This is far from a finding that IOOF had failed to mitigate a risk in its business arising from issues relating to its IT infrastructure. Read as a whole, I consider that the passages on which Mr McFarlane relies were merely suggesting improvements to IOOF’s processes to avoid or mitigate risk. The PwC Interim Report does not contain a finding that there existed incompatibility between legacy IT systems of IOOF’s various businesses and IOOF’s IT infrastructure. The report does not mention the Roll Up Model as being an inherent business risk.

516 I find, on the evidence, that Mr McFarlane has not established the truth of the matters alleged in ASOC paragraph 22(j).

#### ASOC paragraph 22(k) – Restructure of Research team

517 Mr McFarlane alleges, at ASOC paragraph 22(k) that, while investigating the March 2014 complaint, IOOF knew or ought to have known that the Research team was the subject of a review and restructure by IOOF’s executive management team. Insignia denies the allegation: FAD [22(k)]. Insignia’s submissions are, in summary, that:

(1) although a review and restructure occurred, it post-dated the investigation of the March 2014 complaint, which concluded in early April 2014;

(2) what led to the restructure was a significant merger between IOOF and a new company, SFGA, and “it was a process that was entirely connected with the integration of this new company that had come into the group” (Mr Owens SC, T 194.21-23); and

(3) the restructure of the Research team was publicly disclosed.

518 The “review and restructure” of the Research team, to which ASOC paragraph 22(k) refers, is further clarified upon a review of the particulars to that paragraph. The particulars refer to two sources: an article in the Sydney Morning Herald titled “Scandal-plagued IOOF Holdings launches internal review” on 24 June 2015; and the PwC Interim Report.

519 The Sydney Morning Herald article relevantly stated:

IOOF said it had reviewed its advice research division in 2014, leading to a restructure of the unit in March 2015. The review resulted in the appointment of a new group head of research and portfolio construction.

520 The PwC Interim Report dated 28 August 2015 (at the pinpoint identified in the particulars) relevantly stated:

The operation of Research was reviewed by executive management in 2014. Following this review a restructure of the team was announced in January 2015 and became effective in March 2015 *with the appointment of a new Group Head of Research and Portfolio Construction*. The new Group Head has undertaken an extensive review of the Research function which has included re-visiting Research’s business model, reviewing existing policies and procedures and how research is conducted and disseminated through the IOOF Group. At the time of the Interim Review, management’s review was still in progress however many initiatives are well progressed and a number close to complete. (emphasis added)

521 It is evident from the above references that the review and restructure to which ASOC paragraph 22(k) refers is the restructure which resulted in the appointment of Mr Drennan as the Group Head of Research and Portfolio Construction.

522 Mr McFarlane also relies upon the following internal IOOF documents:

(1) a “Recruitment Request”, which was prepared by Mr Hilton and dated July 2014, which stated that the “Group General Manager Dealerships has requested the Research service offering be moved towards an outsourced model where research reports are provided to advisers from a third party provide”;

(2) a memorandum outlining the business case for outsourcing research reports to a third party research provider, Lonsec, dated 21 October 2014. That memorandum stated that Mr Farrell, as Head of Dealerships, had requested Mr Hilton consider outsourcing managed fund research reports because such reports had been “increasingly commoditised and as the IOOF Group has continued its rapid growth via acquisition, it is likely to become increasingly difficult to cover the universe of managed funds within the group without a significant increase of research staff numbers and therefore the research cost base”;

(3) an email from Mr Farrell to, amongst others, Mr Kelaher on 12 January 2015 referring to the proposal to engage an external research provider to provide managed fund research; and

(4) a statement in the PwC Interim Report to the following effect:

We acknowledge management has appointed Lonsec as external research provider for foundation managed funds research (May2015) and is finalising the appointment of Morning Star as external research provider for the majority of equity research. This reduces the risk of non-research personnel having access to in-house research reports before they are released.

523 The substance of Mr McFarlane’s contention is that the above documents demonstrate that the impetus for the restructure of the Research team was distinct from the acquisition of SFGA.

524 Mr McFarlane’s submissions are misconceived. The documents on which he relies must be understood in context. That context has been set out in detail at [471] above. For present purposes, the key matters are these:

(1) On 16 May 2014, IOOF announced its acquisition of SFGA, a financial advice and wealth management business.

(2) Subsequently, an internal draft IOOF document dated December 2014 referred to the SFGA acquisition and stated that “as a result of this consolidation and growth it is necessary to re-assess the structure to meet the needs of the business”.

(3) On 9 February 2015 there was an integration of SFGA and IOOF’s Research team, with the appointment of Mr Drennan (who was formerly the Chief Investment Officer of SFGA) as the Group Head of Research and Portfolio Construction, reporting to Mr Farrell. Mr Hilton’s title was changed to Head of Advice Research, reporting to Mr Drennan. At the time of announcing Mr Drennan’s appointment, a message sent on behalf of Mr Kelaher referred to the acquisition of SFGA and stated that, following this acquisition, “the remainder of 2014 was spent better understanding the business, its people and their processes”, and that the leadership group had agreed on a “number of changes across our advice and shared services divisions, which now incorporates the SFGA business”.

(4) After the announcement of the SFGA acquisition but prior to the announcement of the integration of IOOF and SFGA’s Research teams, there had also been some discussion within IOOF about the outsourcing of certain functions of the Research team. However, this discussion was precipitated by advice from IOOF’s legal team that ASIC RG 79 stated that “where a licensee wishes to distribute research about its own products a clear conflict of interest arises”. This concern differed from the concern raised in the March 2014 complaint, which was the plagiarism of JP Morgan research reports due to inadequate resourcing.

525 I find, on the evidence, that the review and restructure of IOOF’s Research team, which resulted in the appointment of Mr Drennan as Group Head of Research and Portfolio Construction, was substantially caused by the decision to integrate the business of SFGA into IOOF. It is this restructure to which ASOC paragraph 22(k), when read in the context of the particulars to that paragraph, refers. I am not satisfied that this restructure was caused by the issues raised in the March 2014 complaint, or otherwise an admission that the prior arrangements in IOOF’s Research team had been unsatisfactory.

526 In any case, the only other material change to the functions of the Research team which could constitute a “restructure” was the decision to outsource certain of the Research team’s functions to a third party research provider, Lonsec. On the evidence, that change was responsive to a concern identified by IOOF’s legal team in relation to potential conflicts of interest arising from Research issuing reports in connection with its own products. I reject any contention by Mr McFarlane that that restructure involved some sort of admission that the prior arrangements had been unsatisfactory in some way that was revealed during the investigation of the March 2014 complaint.

527 Even on Mr McFarlane’s case, the impetus for the restructure of the Research team was only raised by Mr Farrell on 23 July 2014, and was implemented in February 2015. Necessarily then, the restructure of the Research team was only raised and implemented after Max Riaz made the March 2014 complaint and after the Summary & Action Plan was issued in early April 2014.

528 Notably, on Mr McFarlane’s case, IOOF was aware of the matters pleaded in ASOC paragraph 22(k) “while investigating the March 2014 complaint”: ASOC [22]. Mr McFarlane contends that IOOF was aware of these matters by between 25 March and 16 April 2014: ASOC [23].

529 Given the timing of the decision to outsource certain of the Research team’s functions to Lonsec, it cannot be said that IOOF knew or ought to have known, while investigating the March 2014 complaint, about the restructure of IOOF’s Research team.

530 I find, on the evidence, that Mr McFarlane has not established the truth of the matters alleged in ASOC paragraph 22(k).

### The Compromised Model Information

531 Mr McFarlane alleges, at ASOC paragraph 24, that “because of [IOOF’s] awareness of the Historical Information and the March 2014 Information, IOOF also knew or ought to have known, that its implementation of the Roll Up Model was compromised in a material way”. Mr McFarlane’s reference to the “Roll Up Model” is a reference to his allegation at ASOC paragraph 9 that, from 2008 and throughout the Relevant Period, IOOF had a strategy of seeking to grow in size and value:

(1) through its vertically integrated wealth management model for advice, platforms and funds management by combining IOOF’s own organic growth with value accretive acquisitions of complementary financial services businesses; and

(2) using IOOF’s existing infrastructure (including its Research team) to service both the pre-existing and newly acquired businesses and thereby rationalise duplication and improve efficiencies of its services and functions.

532 IOOF, in substance, admits that it had a Roll Up Model in the terms alleged by Mr McFarlane: FAD [9].

533 In his particulars to ASOC paragraph 24, Mr McFarlane alleges:

Together, the Historical Information and the March 2014 Information revealed that IOOF’s business had serious unresolved issues which adversely impacted matters of governance, compliance and operations in its shared services infrastructure which was an important feature of its Roll Up Model.

534 McFarlane relies upon the evidence of IOOF’s Managing Director, Mr Kelaher, to the Senate Committee on 7 July 2015 where Mr Kelaher stated:

Finally, in closing, I can speak a little bit about our acquisition strategy over the years. It has opened up tremendous long-term opportunities to our customers and our shareholders but – candidly – it has also thrown up many challenges in respect of: merging IT systems; internal policies and protocols; and most importantly, creating a single culture among staff coming from often diverse and formerly competitive organisations.

535 Section 16 of the *Parliamentary Privileges Act 1987* (Cth) (***PP Act***) relevantly provides:

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) …

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

536 Section 16 of the *PP Act* does not preclude Mr McFarlane from adducing evidence of Mr Kelaher’s statement to the Senate for the purposes of establishing what Mr Kelaher said as a matter of fact: *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 at [29] (Rares J), [148], [226]-[227] (Wigney J), [359], [365] (Abraham J). However, it was accepted by Mr McFarlane’s senior counsel that Mr Kelaher’s statement to the Senate Committee could not be relied on to prove the truth of the contents of that statement: Mr Hodge KC, T 10-11.46-1. Such a use of Mr Kelaher’s statement would constitute the tendering of evidence concerning proceedings in Parliament for the purpose of drawing or inviting the drawing of inferences or conclusions from part of those proceedings, contrary to s 16(3) of the *PP Act*.

537 In these circumstances, Mr McFarlane must prove the existence of the Compromised Model Information by proving the truth of the Historical Information and the March 2014 Information. Mr McFarlane submits, in his closing written submissions at [248], that the Court does not need to be satisfied that IOOF was aware of all of the Historical Information and March 2014 Information to conclude that there was sufficient information known to IOOF from which the Compromised Model Information could be discerned. Mr McFarlane alleges that, on the evidence, the Court can be satisfied that, during the Relevant Period, IOOF’s business had serious unresolved issues which adversely impacted matters of governance, compliance and operations in its shared services infrastructure which was an important feature of its Roll Up Model.

538 I do not accept that submission. Taken together, Mr McFarlane’s evidence and Insignia’s admissions establish that:

(1) on 27 May 2009, IOOF had issued to Mr Hilton the 2009 First and Final Warning Letter, and that letter was issued to Mr Hilton because Mr Hilton had engaged in improper share trading (ASOC [20(a)], [20(b)]);

(2) after the 2009 First and Final Warning Letter was issued, Mr Hilton engaged in conduct on three occasions which could be characterised as a breach of IOOF’s trading policies (ASOC [20(c)]);

(3) since about 2009, there had been multiple incidents within IOOF of impropriety or possible impropriety in breach of IOOF’s internal governance and compliance policies (ASOC [20(c1)]);

(4) Mr Hilton’s wife or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative coverage by research released by IOOF, however the significance of such conduct is not explained on the evidence (ASOC [20(c2)]);

(5) Mrs Hilton bought and sold Macquarie Convertible Preference Shares on 8 July 2008 and 13 November 2008 respectively in circumstances where Mr Hilton had published two positive reports on those shares on 9 July 2008 and 12 August 2008 and Mr Hilton “did not disclose a conflict of interest” (ASOC [20(c3)(iii)]]);

(6) in about 2009, there was an “incident” relating to ETC that involved IOOF staff, and which resulted in a first and final warning letter being issued to one employee, Mr Youds, for trading through his superannuation and CommSec, and a finding that another employee, Mr Malguri, engaged in trades “outside embargo parameters”, for which he was cautioned (ASOC [20(c4)]-[20(c6)], [20(c8)]-[20(c9)]);

(7) on 16 December 2013, a Bridges financial planner sent an email questioning recommendations made by IOOF’s Research team, and alleging that the Research team had been compromised, however Mr McFarlane has not sought to prove the truth of the allegations in the email (ASOC [20(c10)]);

(8) two Bridges financial planners were banned by ASIC in 2009 and 2011 respectively, and that one of those financial planners was also sentenced to a term of imprisonment (ASOC [20(c11)]);

(9) IOOF had at least 16 breaches of its own risk policies including unit pricing errors (ASOC [20(d)]);

(10) since the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model, and that IOOF had not notified the recipients of representations made in relation to its Buy-model of the overstatement of its performance (ASOC [17(b)], [22(a)], [22(d)]);

(11) Mr Hilton instructed Max Riaz to use Mr Hilton’s network password to sign-off on non-disclosure forms for capital transactions (ASOC [17(c)], [22(a)]);

(12) IOOF plagiarised third party research reports in circumstances where IOOF’s Research team was inadequately resourced and Mr Hilton had set impractical deadlines for research reports during reporting seasons, such conduct being contrary to RG 79 (ASOC [17(d)], [17(h)], [22(a)], [22(c)], [22(e)]);

(13) Mr Hilton had instructed a direct report to complete Kaplan and eLearning training on his behalf and, upon investigation, it was determined that because he had not undertaken this training, his status as a “responsible manager” was removed (ASOC [17(g)], [22(a)], [22(g)]); and

(14) IOOF had not disclosed to ASIC the Historical Information, the March 2014 complaint, that Mr Hilton failed to comply with his obligatory compliance training, and that IOOF’s activities were not in accordance with RG 79 (ASOC [22(f)]).

539 Superficially, the above findings constitute more than an isolated finding of misconduct or impropriety by an individual IOOF employee. Nonetheless, it is important to bear in mind three considerations. Firstly, the above findings relate to conduct ranging over an extended period – that is, from before May 2009 (when IOOF issued the 2009 First and Final Warning Letter) to 2014. It therefore does not immediately follow that the quantity of incidents at IOOF discloses a systemic issue in the governance, compliance and operations in IOOF’s shares services infrastructure.

540 Secondly, the impugned conduct is highly variable, comprising conduct that is readily characterised as misconduct (for example, improper share trading and plagiarism), other conduct more readily characterised as inadvertent (for example, unit pricing errors), and other conduct whose significance is not explained on the evidence (for example, the mere fact of Mr Hilton’s wife or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative coverage by research released by IOOF). Beyond the conclusions in Schedule A to ASIC’s letter to IOOF dated 25 January 2016, Mr McFarlane has not adduced admissible evidence which is capable of establishing a systemic link between these incidents of misconduct. Less so has Mr McFarlane established that the explanation for these incidents was IOOF’s strategy of seeking to grow in size and value through vertical integration and by using existing infrastructure to service existing and new businesses and thereby improve efficiencies being materially compromised.

541 Thirdly, the evidence does not support Mr McFarlane’s case that IOOF ought to have formed the opinion that IOOF’s strategy of seeking to grow in size and value through vertical integration and by using existing infrastructure to service existing and new businesses and thereby improve efficiencies was compromised in a material way. The proposition that IOOF’s growth and vertical integration strategy was materially compromised is difficult to reconcile with IOOF’s financial performance as disclosed in its annual reports during the Relevant Period.

542 IOOF derives most of its earnings from fees based on the level of FUMAS. The level of FUMAS is impacted principally by the net flows of funds (inflows less withdrawals) and the investment returns (i.e., returns achieved on the investment of FUMAS). Changes in domestic and/or global investment market conditions can lead to a decline in FUMAS adversely impacting the amount earnt in fees and charges. In addition, other financial indicators for IOOF’s business include net profits and dividends. The evidence discloses the following in respect of IOOF’s financial performance:

(1) IOOF’s FUMAS increased each financial year between 2009 to 2015, from $94.6 billion to $153.1 billion.

(2) IOOF’s underlying net profit after tax increased each financial year between 2009 and 2011 from $23.1 million (30 June 2009) to $111.5 million (30 June 2011). It dropped to $96.4 million the following year. It then increased between 2013 and 2015, from $108.8 million (30 June 2013) to $173.8 million (30 June 2015).

(3) Save for a slight decrease between the 2011 and 2012 financial years, the dividend payable to IOOF’s shareholders increased between 2009 to 2015, from 17 cents per share to 53 cents per share.

543 The annual reports tendered in evidence establish that IOOF was in a strong financial position at the relevant time, and there was no sign that its key indicators of FUMAS, net profit and dividends were impacted by the matters alleged by Mr McFarlane to constitute the Historical Information and the March 2014 Information.

544 I find, on the evidence, that Mr McFarlane has not established the truth of the matters alleged in ASOC paragraph 24.

## Further “Final Warning” Letter and December 2014 Complaint

545 Mr McFarlane alleges that the existence of the 2014 Final Warning Letter issued to Mr Hilton (extracted at [37] above) and the December 2014 complaint (which is summarised at [42] above) were “consistent with and reinforced” IOOF’s awareness of the Historical Information; the March 2014 Information and the Compromised Model Information: ASOC [31]. Mr McFarlane does not contend that this information was material: ASOC [33(a)-(c)].

546 Mr McFarlane alleges, and Insignia admits:

(1) that IOOF issued the 2014 Final Warning Letter to Mr Hilton: ASOC [26]; FAD [26];

(2) that by the time of issuing the 2014 Final Warning Letter, IOOF had concluded that Mr Hilton had engaged in conduct which warranted the issue of that letter: ASOC [27]; FAD [27];

(3) that IOOF was aware of the 2014 Final Warning Letter by 1 May 2014: ASOC [28]; FAD [28];

(4) that an employee of IOOF had made the December 2014 complaint: ASOC [29]; FAD [29]; and

(5) that IOOF was aware of the December 2014 Complaint for the purposes of r 19.12 of the ASX Listing Rules from on or about 22 December 2014: ASOC [30]; FAD [30].

547 It follows that the truth of the matters alleged in ASOC paragraphs 26, 27, 28, 29 and 30 is not in dispute. Nonetheless, Insignia denies that the 2014 Final Warning Letter and the December 2014 complaint were “consistent with and reinforced” IOOF’s awareness of the Historical Information; the March 2014 Information and the Compromised Model Information: FAD [31].

548 I accept that the 2014 Final Warning Letter relevantly referred to the following “allegations” made against Mr Hilton, which overlap with certain matters pleaded as comprising the March 2014 Information:

(1) “Sharing passwords for SWORD and the e-learning system”;

(2) “Instructing a direct report to complete Kaplan and e-learning training on your behalf”;

(3) “Plagiarising and incorrect sourcing of research data received from JP Morgan”; and

(4) “Misrepresenting outperformance data”.

549 I accept that the reference to these allegations tended to reinforce IOOF’s awareness of the following:

(1) that Mr Hilton had instructed Max Riaz to use Mr Hilton’s password to sign-off on non-disclosure forms for capital transactions (as pleaded at ASOC paragraphs 17(c) and 22(a));

(2) that Mr Hilton had directed a direct report to complete his Kaplan and eLearning training (as pleaded at ASOC paragraphs 17(g) and 22(a));

(3) that IOOF plagiarised third party research reports and distributed that research without attribution or taking the time to verify that the research was accurate and/or had a reasonable basis, and the inseparably related issues concerning the Research team’s under-resourcing, impractical deadlines set by Mr Hilton and the Research team’s compliance with RG 79 (as pleaded at ASOC paragraphs 17(d), 17(h), 22(a), 22(c) and 22(e)); and

(4) that IOOF had materially overstated the performance of its Buy-model (as pleaded at ASOC paragraphs 17(b), 22(a) and 22(d)).

550 Beyond this, it is not apparent to me how the 2014 Final Warning Letter was consistent with and reinforced any of the other matters pleaded as constituting the Historical Information, the March 2014 Information or the Compromised Model Information. Nor am I satisfied that the mere existence of the December 2014 complaint, whose allegations Mr McFarlane has not sought to independently prove in this proceeding, can be said to be consistent with and have reinforced IOOF’s awareness of the Historical Information, the March 2014 Information and the Compromised Model Information.

551 In any event, to the extent that I have concluded that Mr McFarlane has failed to establish the truth of a pleaded element of the Historical Information or the March 2014 Information, the 2014 Final Warning Letter and the December 2014 complaint cannot be relied on to independently substantiate those claims.

## Conclusions on truth of Alleged Material Information and date of IOOF’s awareness

552 For the reasons set out above, I am satisfied that IOOF was aware of the following matters:

(1) on 27 May 2009, IOOF had issued to Mr Hilton the 2009 First and Final Warning Letter, and that letter was issued to Mr Hilton because Mr Hilton had engaged in improper share trading (ASOC [20(a)], [20(b)]);

(2) after the 2009 First and Final Warning Letter was issued, Mr Hilton engaged in conduct on three occasions which could be characterised as a breach of IOOF’s trading policies (ASOC [20(c)]);

(3) since about 2009, there had been multiple incidents within IOOF of impropriety or possible impropriety in breach of IOOF’s internal governance and compliance policies (ASOC [20(c1)]);

(4) Mr Hilton’s wife or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative coverage by research released by IOOF (ASOC [20(c2)]);

(5) Mrs Hilton bought and sold Macquarie Convertible Preference Shares on 8 July 2008 and 13 November 2008 respectively in circumstances where Mr Hilton had published two positive reports on those shares on 9 July 2008 and 12 August 2008 and Mr Hilton “did not disclose a conflict of interest” (ASOC [20(c3)(iii)]]);

(6) in about 2009, there was an “incident” relating to ETC that involved IOOF staff, and which resulted in a first and final warning letter being issued to one employee for trading through his superannuation and CommSec, and a finding that another employee engaged in trades “outside embargo parameters” (ASOC [20(c4)]-[20(c6)], [20(c8)]-[20(c9)]);

(7) on 16 December 2013, a Bridges financial planner sent an email questioning recommendations made by IOOF’s Research team, and alleging that the Research team had been compromised (ASOC [20(c10)]);

(8) two Bridges financial planners were banned by ASIC in 2009 and 2011 respectively, and that one of those financial planners was also sentenced to a term of imprisonment (ASOC [20(c11)]);

(9) IOOF had at least 16 breaches of its own risk policies including unit pricing errors (ASOC [20(d)]);

(10) since the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model, and that IOOF had not notified the recipients of representations made in relation to its Buy-model of the overstatement of its performance (ASOC [17(b)], [22(a)], [22(d)]);

(11) Mr Hilton instructed Max Riaz to use Mr Hilton’s network password to sign-off on non-disclosure forms for capital transactions (ASOC [17(c)], [22(a)]);

(12) IOOF plagiarised third party research reports, in circumstances where IOOF’s Research team was inadequately resourced and Mr Hilton had set impractical deadlines for research reports during reporting seasons, such conduct being contrary to RG 79 (ASOC [17(d)], [17(h)], [22(a)], [22(c)], [22(e)]);

(13) Mr Hilton had instructed a direct report to complete Kaplan and eLearning training on his behalf and, upon investigation, it was determined that because he had not undertaken this training, his status as a “responsible manager” was removed (ASOC [17(g)], [22(a)], [22(g)]); and

(14) IOOF had not disclosed to ASIC the Historical Information, the March 2014 complaint, that Mr Hilton failed to comply with his obligatory compliance training, and that IOOF’s activities were not in accordance with RG 79 (ASOC [22(f)]).

553 Mr McFarlane alleges, at ASOC paragraphs 21, 23 and 25 that IOOF was aware of each of the components of the Alleged Material Information by:

(1) 25 March 2014, being the date that the IOOF Board received an “update” in relation to the March 2014 complaint; alternatively

(2) a date between 25 March 2014 and 16 April 2014; alternatively

(3) 16 April 2014.

554 In his closing written submissions, Mr McFarlane has alleged that IOOF was aware of all of the Alleged Material Information that was true during the Relevant Period (1 March 2014 to 7 July 2015): at [27(b)]. Mr McFarlane’s closing written submissions, in Part D.1, address the basis on which it is alleged that IOOF was aware of the Alleged Material Information, but do not clarify when IOOF was said to be aware of each of the components of the Alleged Material Information.

555 In the case of the Historical Information, Mr McFarlane contends that by the time of the March 2014 complaint, IOOF knew of the Historical Information. Mr McFarlane notes that, on 24 March 2014, Mr Urwin sent himself an email with the subject “Meeting to discuss PH progress” and which appeared to refer to the investigation in 2009, stating: “Outstanding warnings on file ‘Front Running’ and short selling CSL shares”. Further, in an email from Mr Urwin to Mr Vine dated 30 March 2015, Mr Urwin, referring to the “2014 investigation”, stated that he had “raised the previous matters with Danielle Corcoran as the behaviours of Peter Hilton were systemic and Peter was not exercising skill or diligence in his role”.

556 I am satisfied that Mr Urwin’s emails on 24 March 2014 and 30 March 2015 establish that IOOF either knew, or ought reasonably to have known, in 2014, of historical issues relating to the share trading of Mr Hilton and his wife. I am therefore satisfied that, in 2014, IOOF was “aware”, for the purposes of r 19.12 of the ASX Listing Rules, of those components of the Historical Information that Mr McFarlane has established to be true insofar as those components related to the conduct of Mr Hilton or his wife. Those components are the allegations in ASOC paragraphs 20(a), (b), (c), (c2) and (c3)(iii). Consistently with Mr McFarlane’s pleaded case, I find that IOOF was aware of each of these matters by 25 March 2014.

557 On the evidence before me, I also conclude that IOOF was aware of the Historical Information that has been established to be true, for the purposes of r 19.12 of the ASX Listing Rules, on or by the dates set out below:

(1) Given the generality of the allegation in ASOC paragraph 20(c1), it is artificial to pinpoint the precise date that IOOF was aware that there had been “multiple” incidents within IOOF of “impropriety” or “possible impropriety” in breach of IOOF’s internal governance and compliance policies. However, having regard to the incidents referred to in Mr McFarlane’s aide memoir dated 23 June 2023 and his closing written submissions at [96]-[117], and noting that those incidents were recorded in, amongst other things, IOOF’s breach registers, I am satisfied that IOOF was aware of “multiple” incidents of impropriety or possible impropriety within the company by at least 25 March 2014, as pleaded by Mr McFarlane.

(2) As to the allegations in ASOC paragraph 20(c4)-(c6), (c8)-(c9), IOOF was aware of the ETC incident and the matters concerning Mr Youds and Mr Malguri by the time of the 13 May 2009 Email, which was sent by Mr Urwin to Mr Riordan – both of whom were officers of IOOF within the meaning of r 19.12 of the ASX Listing Rules – and referred to those matters. Consistently with Mr McFarlane’s pleaded case, I find that IOOF was aware of each of these matters by 25 March 2014.

(3) As to the allegation in ASOC paragraph 20(c10), IOOF was aware of the email sent by the Bridges financial planner on the date it was sent – 16 December 2013. On the same day, that email was forwarded by Mr Farrell, an officer of IOOF within the meaning of r 19.12 of the ASX Listing Rules at the time, to Mr Kelaher, the Managing Director of IOOF, and Mr Mota. Consistently with Mr McFarlane’s pleaded case, I find that IOOF was aware of this matter by 25 March 2014.

(4) As to the allegation in ASOC paragraph 20(c11), Insignia admits that “from March 2014” it knew or ought to have known of the penalties imposed on the two Bridges financial planners: FAD paragraph 20(h). Consistently with Mr McFarlane’s pleaded case, I find that IOOF was aware of these matters by 25 March 2014.

(5) As to the allegation in ASOC paragraph 20(d), I am satisfied that IOOF was aware of at least 16 breaches of its own risk policies by 7 June 2013, being the last date recorded as the “date received” for any of the breach entries in the breach register dated 31 March 2014. Consistently with Mr McFarlane’s pleaded case, I find that IOOF was aware of each of these matters by 25 March 2014.

558 I am satisfied that IOOF was aware, for the purposes of r 19.12 of the ASX Listing Rules, of each of the components of the March 2014 Information which have been established to be true by the date of the Summary & Action Plan (8 April 2014).

559 The Summary & Action Plan was prepared by Ms Corcoran and Mr Urwin, who were both officers of IOOF within the meaning of r 19.12 of the ASX Listing Rules. It follows that IOOF must be taken to have been “aware” of the matters recorded in the Summary & Action Plan, for the purposes of r 19.12 of the ASX Listing Rules, from the time it was produced.

560 The Summary & Action Plan directly referred to each of the issues relating to misrepresentation of Buy-model numbers, Mr Hilton’s misuse of passwords, the plagiarism of Research reports, Mr Hilton’s failure to complete Kaplan and eLearning training, and the removal of Mr Hilton’s responsible manager status. I therefore find that IOOF was aware of each of these issues from the date of the Summary & Action Plan (8 April 2014).

561 The Summary & Action Plan did not refer to issues relating to the resourcing of the Research team or the deadlines set by Mr Hilton for the production of research reports. However, those issues were inextricably linked to the issue raised by Mr Riaz concerning the plagiarism of research reports. In circumstances where the Summary & Action Plan recorded concrete findings in respect of Mr Riaz’s allegations concerning plagiarism of research reports, I find that IOOF must have also been aware, or ought reasonably to have been aware, of the related issues of under-resourcing and impractical deadlines set by Mr Hilton by the date of the Summary & Action Plan.

562 The Summary & Action Plan did not refer to the fact that IOOF had not reported to ASIC the Historical Information, the March 2014 complaint, that Mr Hilton failed to comply with his obligatory compliance training, and that IOOF’s activities were not in accordance with RG 79. However, the officers of IOOF who prepared the Summary & Action Plan – Mr Urwin and Ms Corcoran – ought reasonably to have known that each of those matters had not been reported to ASIC at least by the time that the Summary & Action Plan was finalised.

563 It follows from the above that I am satisfied that IOOF was aware of the following components of the March 2014 Information by 8 April 2014:

(1) the matters alleged in ASOC paragraphs 17(b), 22(a) and 22(d), namely the issue relating to the overstatement of the performance of the Buy-model;

(2) the matters alleged in ASOC paragraphs 17(c) and 22(a), namely the issue relating to the usage of Mr Hilton’s network password;

(3) the matters alleged in ASOC paragraphs 17(d), 17(h), 22(a), 22(c) and 22(e), namely that IOOF plagiarised third party research reports in circumstances where IOOF’s Research team was inadequately resourced and Mr Hilton had set impractical deadlines for research reports during reporting seasons, such conduct being contrary to RG 79;

(4) the matters alleged in ASOC paragraphs 17(g), 22(a) and 22(g), namely that Mr Hilton had instructed a direct report to complete Kaplan and eLearning training on his behalf and, upon investigation, it was determined that because he had not undertaken this training, his status as a “responsible manager” was removed; and

(5) the matter alleged in ASOC paragraph 22(f), namely that IOOF had not disclosed to ASIC the Historical Information, the March 2014 complaint, that Mr Hilton failed to comply with his obligatory compliance training, and that IOOF’s activities were not in accordance with RG 79.

## Materiality

564 The resolution of the question of materiality depends on the application of commercial common sense: *Fortescue* at [482] and [511]; *GetSwift* at [1144], [1259]. In considering the information which Mr McFarlane alleges is material and should have been disclosed, I must assess that information in its full commercial context and by reference to the totality of relevant information: *Jubilee* at [87]-[90] and *Grant-Taylor (Trial)* at [96]-[101]. It follows that I must consider whether there is additional information beyond what Mr McFarlane pleads that has not been disclosed, and the impact of that additional information on the assessment of the information that Mr McFarlane alleges should have been disclosed: *Vocation* at [506]. I have set out at [330]-[544] above my assessment of whether Mr McFarlane has established the existence of the information that Mr McFarlane alleges should have been disclosed, as well as any contextual information that may be relevant to an assessment of the materiality of that information.

565 I now turn to consider the materiality of each of the pleaded components of the Alleged Material Information which I have found that Mr McFarlane has established the truth of on the evidence.

### ASOC paragraphs 20(a) and (b) – 2009 First and Final Warning Letter

566 I have found that IOOF was aware that Mr Hilton had engaged in improper share trading and this resulted in the 2009 First and Final Warning Letter, which was issued to Mr Hilton on 27 May 2009. However, it is important to note that the conclusion of the 2009 AWM Investigation, as recorded in the 13 May 2009 Email from Mr Urwin to Mr Riordan found that it had not been proved that Mr Hilton had engaged in illegal front running, and contained no other finding that Mr Hilton engaged in any other illegal activity.

567 The question then is whether it was material to inform the market in March 2014 of Mr Hilton’s “improper” share trading which had occurred before 19 May 2009 some five years earlier.

568 I do not accept that this information, on its own, would be likely to influence the decision of investors acting rationally to buy or sell shares in IOOF in 2014 in circumstances where it has not been established that IOOF was aware of any illegal conduct on the part of Mr Hilton. There is no rational basis to conclude that disclosure of Mr Hilton’s historical improper share trading before 19 May 2009 is likely to have had a material impact on the future earnings of IOOF or the value or price of IOOF shares. The improper share trading of Mr Hilton was historical and, in my opinion, was not material information which was required to be disclosed to the market in 2014.

### ASOC paragraph 20(c) – Improper share trading after 2009 First and Final Warning Letter

569 I have found that Mr McFarlane has established that IOOF was aware that Mr Hilton had continued to engage in improper share trading after receipt of the 2009 First and Final Warning Letter and before the time of the March 2014 complaint. The relevant evidence, which is summarised at [353] above, establishes that, on three occasions after the 2009 First and Final Warning Letter was issued – the Tatts Group Transaction, the Lend Lease Transaction, and the ResMed Transactoin – Mr Hilton engaged in conduct which was in breach, or likely in breach, of IOOF’s trading policies.

570 I do not accept that this information, on its own or in combination with the information that Mr Hilton had engaged in improper share trading prior to the 2009 First and Final Warning Letter, would be likely to influence the decision of investors acting rationally to buy or sell shares in IOOF. This is because, Mr McFarlane has not established that the Tatts Group Transaction, Lend Lease Transaction or ResMed Transaction amounted to anything more than breaches, or likely breaches, of IOOF’s trading policies. The PwC Insider Trading Report of 15 May 2015 which referred to each of these transactions did not contain any finding of illegal conduct on the part of Mr Hilton and stated that it had identified “no instances of Mr Hilton buying securities through either his or his wife’s accounts ahead of issuing a favourable research report in relation to the same security, or issuing a negative report and buying securities shortly after the price had moved”. Nor is there any other evidence that the Tatts Group Transaction, Lend Lease Transaction or ResMed Transactions were entered into to take advantage of a report issued by the Research team.

571 Further, there is no evidence that, by the time that the March 2014 complaint was received, there was an ongoing issue with Mr or Mrs Hilton’s trading activities of which IOOF was, or ought reasonably to have been, aware. The March 2014 complaint also did not raise concerns about Mr Hilton’s trading activity in 2009. In these circumstances, it is not apparent why the fact of the Tatts Group Transaction, Lend Lease Transaction and ResMed Transaction – even when viewed against the background of the 2009 First and Final Warning Letter – would have been regarded by investors as material to the share price of IOOF in 2014.

572 For the above reasons, I am not satisfied that an investor would consider that the fact of the Tatts Group Transaction, Lend Lease Transaction or ResMed Transaction would be likely to affect the earnings potential of IOOF or the risks associated with those earnings. That information was not material information which was required to be disclosed to the market during the Relevant Period.

### ASOC paragraph 20(c1) – Post-2009 improprieties and possible improprieties

573 I have found that Mr McFarlane has established that IOOF was aware that since 2009 there had been multiple incidents within IOOF of impropriety or possible impropriety arising from:

(1) information barrier breaches (ASOC paragraph 20(c1)(i))

(2) non-compliance with IOOF’s staff trading policy (ASOC paragraph 20(c1)(ii));

(3) IOOF staff taking placement allocations ahead of clients (ASOC paragraph 20(c1)(iii));

(4) failure to manage conflicts of interest (ASOC paragraph 20(c1)(iv));

(5) data integrity and cyber security failures (ASOC paragraph 20(c1)(v)); and

(6) failures of compliance oversight (ASOC paragraph 20(c1)(vi).

574 I am not, however, satisfied that Mr McFarlane has established that the above information constituted information material to the share price of IOOF.

575 The incident on which Mr McFarlane placed the greatest emphasis was the ING Office Fund Issue. I accept that this was a serious example of misconduct within IOOF. However, the incident occurred in December 2008. Mr McFarlane has not taken the Court to evidence which would explain why the fact of this incident would be material to investors in March 2014.

576 The remainder of the incidents relied on by Mr McFarlane are the incidents identified at a high level in his aide-memoir, his closing written submissions at [102]-[117], and ASIC’s letter of 25 January 2016. The description of these incidents does not permit a conclusion as to the significance of the individual breaches. Further, Mr McFarlane has not categorised the individual incidents by reference to the categories in ASOC paragraph 20(c1)(i)-(vi), leaving it to the Court to attempt to discern whether a significant pattern of improprieties emerges from the incidents relied on by Mr McFarlane. Mr McFarlane has also not led expert evidence to demonstrate that the total number of incidents identified is significantly greater than would be expected for a company of IOOF’s size. The only evidence of relevance to this point was a statement by a representative of ASIC at an IOOF board meeting on 25 May 2016 (two years after the March 2014 complaint) that IOOF had “slightly more breach reports than [its] peers” but that this may “be a good thing, as breaches are being uncovered and reported”. Such a general and equivocal statement cannot establish the materiality of the “improprieties” and “possible improprieties” identified by Mr McFarlane.

577 Given the above, I am not satisfied that Mr McFarlane has established the materiality of the improprieties or possible improprieties referred to in his aide-memoir, his closing written submissions at [102]-[117], and ASIC’s letter of 25 January 2016.

### ASOC paragraph 20(c2) – Buying and selling shares preceding research reports

578 I have found that Mr McFarlane has established that IOOF was aware that Mr Hilton’s wife, or Mr Hilton on behalf of his wife, bought and sold securities between 1995 and 2014 which preceded, respectively, positive or negative coverage by research released by IOOF.

579 I made this finding on the basis of the 25 trades listed in the December 2014 complaint set out at [383] above. As noted at [384] above, the December 2014 complaint’s description of the timing of each of these trades, the proximity of each of the trades to research reports being issued, and the characterisation of the research reports as being positive or negative was not contradicted by IOOF. Those facts, without more, do not, however, disclose impropriety by Mr Hilton. To establish the impropriety of the trades, Mr McFarlane seeks to rely, in his closing written submissions at [132], on an undated IOOF Personal Trading Policy, which Mr McFarlane asserts applied to Research staff before 9 April 2009. That policy relevantly provided:

(1) all staff were precluded from trading in securities for two calendar days from the time when the Research team issued a *new* buy recommendation report to the Bridges network, or *changed* an existing recommendation that may impact upon the market (cl 7.8); and

(2) members of the Research team were precluded from dealing in securities, which were the subject of *current* research within the Research team (cl 7.9).

580 Mr McFarlane submits that the 25 trades were clearly inconsistent with these restrictions. I am not satisfied that this is correct. Even assuming the IOOF Personal Trading Policy applied continuously between 1998 and 9 April 2009, that Policy restricted trading by staff in the case of new buy recommendations, changes in existing recommendations, and in securities which were the subject of current research. Mr Ung’s December 2014 complaint does not specify whether any of the 25 trades relied on by Mr McFarlane were made in respect of securities the subject of new buy recommendations, or changed recommendations, or current research. Mr McFarlane has not taken the Court to any other evidence to establish that the above trades constituted a breach of IOOF’s trading policies.

581 Further, it is notable that, of the 25 trades on which Mr McFarlane relies, the last dated trade occurred on 27 August 2008; that is more than 5 years before the commencement of the Relevant Period on 1 March 2014.

582 In the absence of evidence that the 25 trades constituted a breach of IOOF’s trading policies and given the historical nature of the trades, which span from 1998 to 2008, it is inconceivable that an investor during the Relevant Period (that is, 1 March 2014 to 7 July 2015), acting rationally, would regard information about the trades as consequential to their decision to buy or sell shares in IOOF. Information about the 25 trades was therefore not information which a reasonable person would expect to have a material effect on IOOF’s share price.

### ASOC paragraph 20(c3)(iii) – Macquarie Transaction

583 I have found that Mr McFarlane has established that IOOF was aware of the Macquarie Transaction, that is a transaction by which Mrs Hilton bought and sold Macquarie Convertible Preference Shares on 8 July 2008 and 13 November 2008 respectively in circumstances where Mr Hilton had published two positive reports on those shares on 9 July 2008 and 12 August 2008 and Mr Hilton “did not disclose a conflict of interest”.

584 However, as noted at [393] above, the Macquarie Transaction was investigated by Mr Carter, who concluded, on 31 March 2009, that Mr Hilton was unable to control the timing of the purchase of the shares, which was instead controlled by the timing of the initial public offering of the securities, and further stated that he did not believe that there had been any breach of the ASX market rules for front running. In the face of this conclusion, Mr McFarlane has not taken the Court to any evidence to establish the impropriety of the transaction beyond the fact that Mr Hilton did not disclose a conflict of interest. Given this, and the fact that the relevant conduct occurred in 2008, and was investigated in 2009, I am not satisfied that an investor, acting rationally, would consider that the Macquarie Transaction – when viewed in the context of the outcome of Mr Carter’s investigation – was consequential to their decision to buy or sell shares in IOOF during the Relevant Period. I find that this information would not have been regarded as material to the share price of IOOF during the Relevant Period.

### ASOC paragraph 20(c4) – Incident relating to ETC involving IOOF’s staff

585 Mr McFarlane, by his solicitors’ letter dated 19 June 2023, has confined these allegations to now only allege that in 2009 “there was an incident in relation to [ETC] involving IOOF staff”. That there was an incident, that the incident related to ETC and that the incident involved IOOF staff, could not on any sensible view be regarded as material information. This is the totality of the information that is said to be material and to have required disclosure. The information is at such a high level of generality that on no sensible or commercial view could the fact of “an incident” be information which is likely to have a material impact on the earnings of IOOF or the value or price of IOOF shares.

586 Mr McFarlane has now disavowed any allegation that the trades of Mr Hilton, Mr Youds or Mr Malguri in 2009 involved any element of illegality. In these circumstances, it is inconceivable that in March 2014 a rational investor would regard such information as having a material effect on the future earnings or the price or value of IOOF shares in 2014.

### ASOC paragraphs 20(c5)-(c6), (c8) – Investigation of Mr Youds

587 I have found that Mr McFarlane has established the truth of the matters alleged in ASOC paragraphs 20(c5), (c6) and (c8) – that is, that IOOF was aware of the ETC incident (being the incident referred to in ASOC paragraph 20(c4)), that there was an investigation by IOOF into that incident, that the investigation resulted in a first and final warning letter being issued to Mr Youds, and that ASIC was not notified of the ETC incident. I have found that, contrary to the allegation in ASOC paragraph 20(c7), there was no breach of RG 238 as that Regulatory Guide had not come into effect until three years after the ETC incident.

588 After investigating the ETC incident, on 13 May 2009, Mr Urwin concluded that it had not been proved that Mr Youds had price-sensitive information on the ETC trade. Mr Urwin made no other finding of illegality against Mr Youds. Mr Youds was issued a first and final warning letter for trading through his superannuation and CommSec account, as opposed to via Bridges.

589 On no sensible or commercial view could the disclosure of such information be material to IOOF’s future earnings or the price or value of IOOF shares in 2014.

### ASOC paragraph 20(c9) – Investigation of Mr Malguri

590 Insignia has admitted that IOOF investigated Mr Malguri for insider trading in 2009, concluded that the trades investigated were outside embargo parameters, and did not notify ASIC of the investigation.

591 However, the evidence, which I have summarised at [409]-[412] above, reveals that this matter involved Mr Malguri self-reporting to Mr Urwin that, up until 23 October 2008, he had made personal trades through a CommSec account in circumstances where a staff trading policy required that any staff trades must take place through Bridges stockbroking. Mr Urwin’s findings, as recorded in the 13 May 2009 Email sent to Mr Riordan, were that Mr Malguri engaged in these trades while he was unaware of the policy, and upon becoming aware of the policy, he ceased trading through his CommSec account. This information could not reasonably be said to be likely to be viewed by a rational investor as material to their decision to buy or sell shares of IOOF during the Relevant Period.

### ASOC paragraph 20(c10) – Email from Bridges financial planner

592 Insignia admits that, on 16 December 2013, a Bridges financial planner sent an email questioning recommendations made by the Research team and stated that “I can’t help but feel our Research team has finally been compromised!!” Mr McFarlane does not plead what he says the allegations in the email specifically relate to, or whether the allegations are true, and there has been no attempt by Mr McFarlane to prove that whatever underlay this complaint was a material problem.

593 Mr McFarlane instead submits that the email sent on 16 December 2013 from Stephen Lewis, a Bridges financial planner, has some significance because:

(1) Mr Lewis had also received special treatment by Mr Hilton, having received a bespoke stock report for Goodman PLUS on 23 January 2014 and having been one of the planners whom Mr Hilton had allowed to exit the IOF allocation after the unit price of the offer went below the offer price;

(2) Mr Hilton responded in some detail to Mr Lewis’ email on 16 December 2013; and

(3) Mr Farrell, the head of IOOF’s advice division and the person to whom Mr Hilton reported, then forwarded Mr Hilton’s response on 16 December 2013 to both IOOF’s Managing Director at the time, Mr Kelaher, and Insignia’s current CEO, Mr Renato Mota, who was a General Manager at the time. The substance of Mr McFarlane’s submission is that, if the email was innocuous, it would not have been forwarded by Mr Farrell to Mr Kelaher and Mr Mota.

594 As discussed at [124(11)] above, I accept Mr McFarlane’s submission that the forwarding of Mr Lewis’s email to Mr Kelaher and Mr Mota gives rise to an inference that Mr Farrell considered the allegations to be serious. However, the allegations themselves remain unsubstantiated. There is no evidence that Mr Mota or Mr Kelaher themselves regarded the allegations as serious. That the complaint was made by Mr Lewis, and Mr Hilton provided a detailed response to it, does not otherwise assist Mr McFarlane in establishing the materiality of the 16 December 2013 email.

595 Mr McFarlane also contends that the email has significance because it is an example of the sorts of issues later raised in Max Riaz’s March 2014 complaint. According to Mr McFarlane, the concern raised by Mr Lewis about the Research team recommending funds that had underperformed benchmarks was consistent with Max Riaz’s complaint about under-resourcing and a resulting inability to provide quality research.

596 There are two difficulties with this submission. Firstly, Mr McFarlane has not sought to establish the truth of the allegations in the email of 16 December 2013. In these circumstances, the 16 December 2013 email contains no more than allegations that the Research team was recommending underperforming funds, and the existence of such allegations cannot be said to support Max Riaz’s March 2014 complaint. Secondly, there is no evidence that any other financial planners shared the same view about the performance of IOOF’s Research team. In these circumstances, I consider that the email discloses no more than a grievance by a financial planner. On no sensible or commercial view could the disclosure of this information be material to IOOF’s future earnings or the price or value of IOOF shares in 2014.

### ASOC paragraph 20(c11) – Bridges financial planners banned by ASIC

597 Insignia has admitted that it knew that two Bridges financial planners were banned by ASIC in 2009 and 2011 respectively, and that one of those two was also sentenced to a term of imprisonment: FAD [20(h)]. I have found that the fact that the two planners had been banned by ASIC from providing financial services was generally available information and, consequently, its non-disclosure could not constitute a contravention under s 674 of the *Corporations Act*. I have, however, found that information that one of the planners had been imprisoned was not generally available information.

598 No evidence was led to establish when Mr Brown was sentenced to a term of imprisonment, but the particulars to FAD paragraph 20(h) allege that this occurred in November 2009.

599 I do not accept that the fact that a Bridges financial planner was imprisoned in 2009 is material information relevant to an assessment of IOOF’s future earnings in 2014 and the value or price of IOOF shares in 2014. This is particularly the case where there is no suggestion of any systemic or ongoing illegality or probity issue which required IOOF to disclose that information in March 2014.

### ASOC paragraph 20(d) – Unit pricing errors

600 I have found that Mr McFarlane has established on the evidence that IOOF had at least 16 breaches of its own risk policies including unit pricing errors, at least one or more of which were reported to APRA but not disclosed to the market.

601 I reject Mr McFarlane’s contention that the existence of at least 16 breaches of its own risk policies over the course of some five years, could on any sensible and commercial view be material to IOOF’s future earnings or the price or value of IOOF shares in 2014. The IOOF annual report for the financial year ending 30 June 2014 disclosed that the company had a market capitalisation of $1.9 billion; $121 billion in funds under its management and supervision; and 1,250 employees.

602 I do not accept that the fact that some of those incidents of breaches of IOOF’s risk policies included unit pricing errors means that that information is material. Mr McFarlane’s submissions as to the materiality of this information places reliance on a statement in IOOF’s 2015 annual report, which identified unit pricing errors as one of a number of “material risks” and went on to state:

Systems failures or errors in unit pricing of investments are issues affecting the broader funds management industry that may result in significant financial losses and brand damage to a number of financial services organisations. *A unit pricing error made by IOOF or its service providers could cause financial or reputation loss*. (emphasis added)

603 The above language in IOOF’s 2015 annual report is equivocal. IOOF merely states that a unit pricing error “could” cause financial or reputation loss. It is erroneous to reason, as Mr McFarlane presses, from the fact that IOOF acknowledged that a singular unit pricing error could cause financial or reputational loss to a conclusion that the unit pricing errors identified by Mr McFarlane were, in fact, material to the share price of IOOF. The evidence establishes that IOOF struck thousands of unit prices each month. In the absence of additional expert evidence from Mr McFarlane as to the materiality of these unit pricing incidents in the light of the total volume of trades struck by IOOF, I am not satisfied that the mere fact of these incidents is a matter material to an investor’s decision to buy or sell shares in IOOF.

604 Nor do I accept that the fact that some of those 16 breach incidents were reported to APRA but not disclosed to the market makes that information material. A sensible and commercial investor would not, in my view, expect IOOF to make disclosure to the market of each incident in which it reports a breach of its own risk policies to APRA.

605 For the above reasons, I reject Mr McFarlane’s submissions that the matters alleged in ASOC paragraph 20(d), and as established on the evidence, constituted information an investor, acting rationally, would regard as material to their decision to buy or sell IOOF shares during the Relevant Period.

### ASOC paragraphs 17(b), 22(a) and 22(d) – Buy-model

606 Insignia admits the substantial truth of the allegation that, since the 2009-10 financial year, IOOF had materially overstated the performance of its Buy-model, and that it had not notified the recipients of the Buy-model of any overstatement of the Buy-model’s performance.

607 The facts summarised at [442]-[447] above establish that:

(1) after being notified of Zach Riaz and Max Riaz’s concerns about the Buy-model, Mr Hilton had approved a change to the methodology used for calculating the Buy-model’s performance to address those concerns which was implemented prior to the start of FY14;

(2) the Buy-model’s performance figures had been historically used as a marketing tool to win business – however, the Buy-model was a hypothetical portfolio and not an actual fund;

(3) although there was initially some dispute internally within IOOF as to the correctness of the model relied on by Zach Riaz to impugn the accuracy of the figures of the Buy-model, it was ultimately determined in the Summary & Action Plan that the Buy-model figures had been incorrect since 2001; and

(4) ultimately, the Summary & Action Plan recorded that IOOF had determined that the Buy-model’s performance figures would no longer be produced. Although the Summary & Action Plan referred to the communication of IOOF’s findings about the Buy-model to “relevant parties”, there is no evidence that any such communication occurred.

608 In my opinion, the above is insufficient to establish the materiality of the information that IOOF had overstated the Buy-model’s performance figures. I make the following observations:

(1) At its highest, the facts suggest that IOOF failed to notify its network of financial advisors and dealers of issues concerning the accuracy of previous Buy-model performance figures released by IOOF. However, that alone is not sufficient to establish that disclosure of this information to the market would have been material to investors’ assessment of IOOF’s future earning potential.

(2) The evidence establishes that the Buy-model’s performance figures were used as a marketing tool. The evidence as to its importance as a marketing tool was, however, unsatisfactory. It is apparent that Max Riaz and Zach Riaz considered that the Buy-model’s performance figures was critical to winning work. Mr Hilton also appeared to accept that “planners would respond badly” to the news of the Buy-model’s performance figures being inaccurate. On the other hand, Mr Bigg’s view, as recorded in his email to Mr Urwin on 27 March 2014, was that the Buy-model performance was rarely presented at conferences. These competing assertions were framed at a high level of generality. They provide little assistance to the Court in assessing the likely impact of disclosure of the issues with the Buy-model’s performance figures on IOOF’s future earnings.

(3) Further, by the time of the March 2014 complaint, the Buy-model was no longer in use. That is to say, by that time, IOOF could not have been using the Buy-model to win business. In these circumstances, it is difficult to understand how the revelation, in March 2014, of IOOF’s previous overstatement of the Buy-model’s performance figures could be expected to affect IOOF’s future earnings.

(4) What is clear is that the Buy-model Portfolio was hypothetical, and any misrepresentation of the Buy-model’s performance figures did not constitute a misrepresentation of the performance of IOOF’s actual funds. No evidence was adduced to establish that any client had suffered loss by reason of the misrepresentation of the Buy-model performance figures.

609 In these circumstances, I am not satisfied that Mr McFarlane has established the materiality of the matters alleged at ASOC paragraphs 17(b), 22(a) and 22(d).

### ASOC paragraphs 17(c) and 22(a) – Password access

610 I have found on the evidence and admissions of Insignia that there had been breaches of password security within the Research team, including that Mr Hilton ordered an employee to use his password to sign off on non-disclosure forms for capital transactions.

611 Insignia submits that such information was not material to IOOF’s share price. I accept that submission. There is no evidence which would provide a basis for finding that there was a systemic problem with password security at IOOF. The pleaded allegation at ASOC paragraphs 17(c) and 22(a) is limited to a discrete piece of information involving the Head of Research, Mr Hilton, ordering an employee to use his password to sign off on non-disclosure forms for capital transactions. I do not accept that investors acting rationally would consider that the disclosure of this information would be material to IOOF’s future earnings or the price or value which an investor would pay for IOOF shares.

### ASOC paragraphs 17(d) and (h), 22(a), (c) and (e) – Plagiarism, resourcing and deadlines

612 On the basis of Insignia’s admissions and the evidence, the following matters are established:

(1) IOOF plagiarised third party research reports and distributed that research without attribution or taking the time to verify that the research was accurate and/or had a reasonable basis;

(2) the activities of the Research team were not in accordance with RG 79 in relation to research report providers, in particular Part C “Research quality, methodology and transparency”;

(3) IOOF’s Research team was inadequately resourced; and

(4) Mr Hilton set impractical deadlines for research reports during reporting seasons.

613 I am not satisfied that any of the above constituted information that a reasonable person would expect to have a material effect on IOOF’s share price. More particularly, I note the following:

(1) IOOF’s plagiarism of third party research reports was permitted pursuant to the JP Morgan Research Agreement. In these circumstances, the only issue that arose was IOOF’s compliance with RG 79, and in particular RG 79.33 and RG 79.91, which required research reports to be based on the Research team’s own assessment of the product, and required that each report reflect the views of the person taking responsibility for the report. However, the fact that Max Riaz was plagiarising, without thought, reports prepared by JP Morgan was only raised upon Max Riaz making the March 2014 complaint. After the complaint was made, it is apparent that IOOF investigated this allegation, with findings and recommendations for changes being made in the Summary & Action Plan dated April 2014 and a further analysis undertaken in the RG 79 Memorandum dated 12 May 2014. In the light of IOOF’s prompt response to this issue upon being notified of it, it is inconceivable that its prior non-compliance with RG 79 was a material issue that needed to be disclosed to the stock market.

(2) I accept that, by reason of RG 79, the adequacy of the resourcing of IOOF’s Research team was of heightened importance. Nonetheless, complaints, including meritorious ones, about inadequate resourcing and impractical deadlines are issues that arise from time to time in the workplace. It does not immediately follow that disclosure of IOOF’s under-resourcing issue, and its consequent non-compliance with RG 79, would have a material effect on the price or value of IOOF’s shares. In this case, Mr McFarlane has not adduced any expert evidence to establish how a resourcing deficiency of the kind alleged by Max Riaz could be regarded as material to a company the size of IOOF. Nor has Mr McFarlane taken the Court to other evidence that would support a conclusion that IOOF’s under-resourcing issue was material to its share price. Notably, in the present case, Mr McFarlane has not adduced any evidence that suggests that the Research team’s reports were deficient in their quality (notwithstanding that they had been plagiarised from JP Morgan). Mr McFarlane has also not adduced evidence that enables the Court to reach a conclusion as to the scale of the under-resourcing problem. As noted at [478] above, there is a conflict in the evidence as to the number of research reports Max Riaz was required to prepare each month. In any case, there is no evidence before the Court as to the appropriate workload of a research analyst. Further, the evidence that is available reveals that IOOF acted promptly to address the under-resourcing issue after it was raised by Max Riaz. Ultimately, upon Max Riaz raising the under-resourcing of the Research team in the March 2014 complaint, the matter was investigated and IOOF hired an additional research analyst by 10 April 2014, with Mr Hilton making a request for an additional research analyst to be hired on 16 April 2014. In these circumstances, it cannot be said that IOOF’s resourcing issue would be material to its share price.

### ASOC paragraphs 17(g), 22(a) and 22(g) – Kaplan and eLearning

614 I have found on the evidence and admissions of Insignia that Mr McFarlane has established the truth of the allegations in ASOC paragraphs 17(g), 22(a) and 22(g). The evidence establishes that IOOF was aware that Mr Hilton had instructed a direct report to complete Kaplan and eLearning training on his behalf. The evidence establishes that once IOOF became aware that Mr Hilton had not been maintaining and updating his knowledge by undertaking his Kaplan and eLearning training, IOOF removed him as one of its “responsible managers” noted on its Australian Financial Services License. There is no suggestion, at ASOC paragraphs 17(g) and 22(a), nor is there any evidence, that other employees of IOOF engaged in the same misconduct as Mr Hilton.

615 There is no evidence to suggest that, during the Relevant Period, IOOF did consider, or ought to have considered, that Mr Hilton’s conduct would be likely to result in regulatory enforcement action. Consistently with this view, no material action was ultimately taken by ASIC in respect of this conduct either during or after the conclusion of the Relevant Period. The most that can be said is that the fact of Mr Hilton’s misconduct attracted comment by ASIC in Schedule A to its letter of 25 January 2016. In that letter, ASIC stated that the incident suggested that “risk management was more a matter of form rather than one of substance” among the Research team’s staff.

616 A rational investor would not, in my view, expect IOOF to make disclosure to the market of Mr Hilton not maintaining and updating his knowledge by undertaking his Kaplan and eLearning training. Such information is not information which could realistically have had an effect on IOOF’s future earnings. It therefore was not material to the IOOF’s share price.

### ASOC paragraph 22(f) – Failure to notify ASIC

617 On the basis of Insignia’s admissions, I have concluded that IOOF did not disclose to ASIC those aspects of the Historical Information which have been established to be true, the March 2014 complaint, or the other matters referred to in ASOC paragraph 22(f)(iii)-(iv).

618 Mr McFarlane has not, in either his opening or closing written submissions, submitted to the Court whether each or any of the above matters were properly reportable to ASIC, and if so, on what basis. Mr McFarlane’s submissions merely identify that:

(1) in the 13 May 2009 email, Mr Urwin stated that the issues identified with respect to Mr Hilton, Mr Youds and Mr Malguri, as identified during the course of the 2009 AWM Investigation, were not disclosable because none of the issues were regarded as “systemic”;

(2) subsequently in an email to Mr Vine on 30 March 2015 concerning the investigation of the March 2014 complaint, Mr Urwin stated that he had raised “the previous matters” concerning Mr Hilton with Ms Corcoran “as the behaviours of Peter Hilton were systemic and Peter was not exercising skill or diligence in his role”;

(3) on 12 May 2015 a PwC Senior Manager, in the context of PwC’s work following the December 2014 complaint, inquired of Mr Riordan as to whether ASIC had been advised of the allegations made against Mr Hilton, and that Mr Riordan replied: “[I]t was discussed at the time and Rob [Urwin] and I agreed no ASX/ASIC notification was necessary.”

619 The above evidence is not a sufficient basis to conclude that any of the matters referred to in ASOC paragraph 22(f) were properly disclosable to ASIC. The Court has not been taken to any documents which disclose that IOOF considered that any of those matters ought to be disclosed to ASIC. Mr Urwin’s description of Mr Hilton’s conduct as “systemic” in his email of 30 March 2015 cannot fairly be read as an admission that he considered that Mr Hilton’s conduct was disclosable to ASIC.

620 In the above circumstances, I am not satisfied that Mr McFarlane has established the materiality of the matters alleged at ASOC paragraph 22(f).

### Materiality of totality of Alleged Material Information established on the evidence

621 Mr McFarlane contends that those components of the Alleged Material Information established to be true, at least in combination, had a material consequence for the market’s view about IOOF such that they were material. That submission rests on three propositions advanced by Mr McFarlane, namely that:

(1) IOOF’s value was dependent upon its reputation and important aspects of its reputation were its integrity (because it needed clients and planners to trust it with their money) and the effectiveness of its Roll Up Model;

(2) the matters constituting the Alleged Material Information were contrary to IOOF’s reputation, integrity, and the effectiveness of its Roll Up Model;

(3) when information that substantially corresponded to the Alleged Material Information was revealed to the public by Fairfax reports and Mr Kelaher’s senate testimony, IOOF’s share price fell substantially.

622 The third proposition is unsustainable. Mr McFarlane has failed to establish, or has not pressed, the truth of a number of components of the Alleged Material Information as pleaded in the ASOC. It is sufficient to note four particularly significant examples:

(1) Mr McFarlane no longer presses that there was an insider trading and/or market manipulation incident involving ETC (as alleged in ASOC paragraph 20(c4)) (**Insider Trading Allegation**);

(2) Mr McFarlane has not established that IOOF was aware that the failure to notify ASIC of the ETC incident was in breach of RG 238 (as alleged in ASOC paragraph 20(c7)) (**Failure to Notify Allegation**);

(3) Mr McFarlane has not established that IOOF was aware that IOOF had failed to adequately mitigate an inherent risk in its business (which was a feature of the Roll Up Model) namely that it employed manual or other work arounds or temporary patches to resolve incompatibility between legacy IT systems in its various businesses and IOOF’s IT infrastructure (as alleged in ASOC paragraph 22(j)) (**IT Systems Allegation**); and

(4) Mr McFarlane has not established the existence of the Compromised Model Information (as alleged in ASOC paragraph 24) (**Compromised Model Allegation**).

623 Each of the above allegations are serious. The Insider Trading Allegation is an allegation of criminal conduct within IOOF. The Failure to Notify Allegation is an allegation that IOOF failed to report to regulators such criminal conduct. The IT Systems Allegations and Compromised Model Allegations allege systemic deficiencies in IOOF. The potential effect of each of the above allegations on IOOF’s share price cannot be disregarded by the Court.

624 Mr McFarlane did not adduce expert evidence that sought to isolate the market reaction to individual components of the Alleged Material Information. Instead, Mr McFarlane’s expert, Mr Houston, gave evidence that his event study had not sought to distinguish the relative contribution of the individual components of the Alleged Material Information (Mr Houston, T 394-5.41-4).

625 In these circumstances, the Court cannot infer from the fall in IOOF’s share price following the publication of the Fairfax articles and Mr Kelaher’s Senate testimony that that fall was attributable specifically to the disclosure of those components of the Alleged Material Information that have been established to be true.

626 This then leaves Mr McFarlane’s contentions as to the relevance of the Alleged Material Information (insofar as it was true) to IOOF’s reputation, integrity and the effectiveness of its Roll Up Model, and the importance of those matters to IOOF’s share price.

627 For reasons previously addressed at [538]-[543], I do not accept that Mr McFarlane has established that there was a systemic issue with the effectiveness of IOOF’s Roll Up Model.

628 I have accepted Mr Houston’s evidence that, as a matter of financial theory, information that detracts from a company’s reputation may affect its share price. I have also accepted that the disclosures in this proceeding, which included the Alleged Material Information, had some negative bearing on IOOF’s reputation. But that is insufficient to establish the materiality of the Alleged Material Information that is true. Mr McFarlane has not led evidence to establish the extent to which the Alleged Material Information that is true would have affected IOOF’s reputation. Nor has he led evidence to establish how *that* reputational impact would affect the price of IOOF shares in that it would affect an investor’s assessment of IOOF’s future earning potential. Mr McFarlane has not supplied a sufficient evidentiary foundation for a conclusion that the Alleged Material Information that is true affected IOOF’s reputation in a manner that was material to its share price.

629 For the above reasons, I am not satisfied that those components of the Alleged Material Information established to be true, in combination, were material to IOOF’s share price.

## Conclusion on materiality

630 For the reasons which I have given above, I am not satisfied that Mr McFarlane has established the materiality, either individually or cumulatively, of those components of the Alleged Material Information which have been established to be true.

## Conclusion on whether IOOF contravened s 674 of the *Corporations Act*

631 For the reasons given above, Mr McFarlane has failed to establish that during the Relevant Period, IOOF contravened its obligations of continuous disclosure pursuant to s 674 of the *Corporations Act*.

## The exceptions to ASX Listing Rule 3.1

632 Insignia submits that, to the extent that the Court finds that any part of the Alleged Material Information had been established to be true and material, ASX Listing Rule 3.1A would apply, such that that information would not be required to be disclosed for two reasons:

(1) Firstly, Insignia contends that much of the Historical Information and March 2014 Information is comprised of information generated through investigations into employee complaints or possible misconduct or from the records of breach registers used to track operational issues arising from inside IOOF’s business. Insignia submits that this information constitutes “information generated for internal management purposes”, thus falling within the fourth category of information referred to in ASX Listing Rule 3.1A.1.

(2) Secondly, Insignia observes that certain categories of the pleaded Alleged Material Information are framed at a high level of generality. The categories of pleaded information said to meet this description are Mr McFarlane’s allegations that: the “Roll Up Model was compromised in a material way” (ASOC [24]); there was “inadequate resourcing (technological and human) of the Research team” (ASOC [22(c)]); and there was a “failure to identify, record and control conflicts of interest” (ASOC [22(h)]). Insignia contends that such information, if made out on the evidence, would not be “ripe” for disclosure as it would constitute information comprising “matters of supposition” or which was “insufficiently definite to warrant disclosure”, thus falling within the third category of information referred to in ASX Listing Rule 3.1A.1.

633 Mr McFarlane has not, in his closing written submissions, substantively addressed the application of Listing Rule 3.1A. In addressing this issue, Mr McFarlane’s closing written submissions (at [344]-[345]) go no further than to observe that the conditions of Listing Rule 3.1A were cumulative, and cite a passage of the ASX’s response in the *Review of ASX Listing Rules Guidance Note 8 Continuous Disclosure: Listing Rules 3.1-3.1B* (13 March 2013) at p 91 to the effect that “information” in Listing Rule 3.1 necessarily included matters of supposition and matters insufficiently definite to warrant disclosure. Mr McFarlane’s oral closing submissions did not further address the application of Listing Rule 3.1A. In his oral opening submissions, I understood senior counsel for Mr McFarlane to foreshadow that Mr McFarlane’s position in his closing submissions would be that, given the gravity of the Alleged Material Information – being information concerning IOOF’s systems for compliance and conflict management and the role of Mr Hilton as the Head of Research – the information could not be said to be information which a reasonable person would not expect to be disclosed (the third condition for the application of the Listing Rule 3.1A exception): Mr Hodge KC, T 124.11-21.

634 Ultimately, I have found that none of the pleaded components of the Alleged Material Information that Mr McFarlane has established to be true are material to the price and value of IOOF shares. As a consequence, it is unnecessary for me to consider the exceptions to ASX Listing Rule 3.1 contained in Listing Rule 3.1A.

# CONSIDERATION OF MISLEADING AND DECEPTIVE CONDUCT CASE

## Did IOOF engage in misleading and deceptive conduct?

635 Mr McFarlane contends that IOOF engaged in misleading or deceptive conduct by silence.

636 The representations on which Mr McFarlane relies are set out in ASOC Annexure A. Insignia has admitted that it made the representations pleaded in ASOC Annexure A: FAD [14]. The representations emphasised by Mr McFarlane in his closing written and oral submissions are as follows:

(1) a statement by IOOF in its interim financial report dated 25 February 2014 and its full year statutory accounts dated 22 August 2014 that:

[W]e seek to leverage a cost base which is largely fixed relative to the scale of our FUMAS.

The IOOF Group’s future FUMAS growth will be underpinned by organic and acquisition initiatives. Organic growth will be advanced through:

* increasing brand and product awareness to increase revenue;
* enhancing the adviser and fund member experience through continued technology development and experienced knowledgeable support staff;
* establishing skilled teams and robust analytical processes to enhance the prospect of achieving above benchmark performance in investment management; and
* continuous improvement in process efficiency to minimise operating costs.

(2) references to “IOOF’s integrated service offering” in a media release dated 25 February 2014, an investor presentation on the same day, and its Managing Director’s address to an annual general meeting on 25 November 2014;

(3) a reference, in an investor presentation dated 25 February 2014, to “[e]fficiencies through scale, synergies and continuing technology developments & enhancements”;

(4) a reference, in an investor presentation dated 16 May 2014, to IOOF’s “strategy of growth through value accretive acquisitions and its vertically integrated wealth management model”, and a further statement that “significant synergies” are expected through the “rationalisation of overlapping cost bases”, including by “centralising and consolidated shared services functions”;

(5) other references to IOOF’s strategy of growth through value accretive acquisitions in a media release dated 25 February 2014, an announcement dated 16 May 2014, an annual report to shareholders on 24 October 2014, and IOOF’s Chairman’s address to shareholders on 25 November 2014;

(6) a statement in an investor presentation dated 22 August 2014 in connection with IOOF’s outlook that “enhanced consumer and adviser confidence points to increasing fund inflows”; and

(7) a statement in IOOF’s Chairman’s address to shareholders on 25 November 2014 that “I am pleased to say that there is one thing which has not changed during these ten years – and that is our culture”.

637 The question is whether, having regard to those components of the Alleged Material Information which the Court has found to be true, IOOF engaged in misleading or deceptive conduct by making the above unqualified and optimistic statements about its value and growth based on its business model in failing to correct or qualify those statements.

638 Mr McFarlane’s misleading or deceptive conduct case is similar to his continuous disclose case in that Mr McFarlane relies on the same Alleged Material Information and the same overall circumstances to contend that IOOF engaged in misleading and deceptive conduct. The Court’s task is to consider, in context, whether IOOF’s conduct in making unqualified representations and not revealing the Alleged Material Information to the market during the Relevant Period, was misleading or deceptive. In oral closing submissions, senior counsel for Mr McFarlane accepted that the question of materiality of the Alleged Material Information was related to an assessment of whether a failure to disclose that information (or any part of that information) was misleading or deceptive: Mr Hodge KC, T 425.25-28.

639 Mr McFarlane submits that IOOF must have known that it had undisclosed problems with its culture, systems, governance and compliance during the Relevant Period. Mr McFarlane submits that these problems cannot be reconciled with IOOF’s above summarised unqualified statements to the market about its business model.

640 Mr McFarlane submits that IOOF’s statements, unqualified as they were by the Alleged Material Information during the Relevant Period, and when viewed in the full context, had a sufficient tendency to leave a person exposed to those statements into error, that is, to form an erroneous assumption or conclusion about IOOF’s business model such that they were misleading or deceptive or likely to mislead or deceive.

641 I am not satisfied, on the evidence, that IOOF has engaged in misleading or deceptive conduct by silence. I do not accept that IOOF has engaged in misleading or deceptive conduct by making the unqualified and optimistic statements about its value and growth based on its business model and failing to correct or qualify those statements by reference to those elements of the Alleged Material Information which I have found to be true. The evidence as a whole, does not rise to the level of establishing a problem with IOOF’s culture, systems, governance and compliance during the Relevant Period. Mr McFarlane has established that some components of the Alleged Material Information were true. Mr McFarlane has not established that there was any systemic issue with the business of IOOF which would render unqualified and optimistic statements about its value and growth based on its business model misleading or deceptive. The evidence establishes that IOOF’s strategy of seeking to grow in size and value through vertical integration and by using existing infrastructure to service existing and new business and thereby improve inefficiencies was a successful strategy. A review of IOOF’s financial performance, as disclosed by its annual reports demonstrates that the level of FUMAS, net profit and dividends, improved substantially after IOOF implemented the Roll Up Model.

642 I have set out at [542] above relevant evidence concerning IOOF’s financial performance between the financial years of 2009 and 2015. The evidence establishes that IOOF, having implemented the Roll Up Modelin 2008**,** was in a strong financial position. I do not accept, in the context of the evidence viewed as a whole, that IOOF’s conduct in making unqualified representations and not revealing the Alleged Material Information to the market during the Relevant Period, was misleading or deceptive.

## Did IOOF make statements that were false and/or without reasonable basis?

643 Mr McFarlane further contends that IOOF engaged in misleading or deceptive conduct by reason of statements made in media releases in the wake of the publication of the Fairfax articles. Those statements were:

(1) on 22 June 2015:

Following publication of a number of articles in the Fairfax media, it is appropriate for IOOF to note its strong compliance record and that it takes seriously any suggestion that its high standards are not being met in its different businesses.

…

All the issues raised [in Fairfax media articles], historic or recent, have been dealt with appropriately at the time; this includes, where relevant, thorough internal and board review, notifying industry regulators, ongoing review of compliance measures and controls, employee education and independent investigations[.]

(2) on 24 June 2015:

As noted in IOOF’s statement of 22 June 2015, the company is committed to ensuring it meets the highest standard of governance and compliance in its different businesses.

In accordance with this approach, IOOF has engaged PwC to immediately commence an independent review of the IOOF Group regulatory breach reporting policy and procedures and the control environment within our Research division. This will be a thorough review and it is our intention to inform ASIC and APRA of the outcomes.

…

Most of the matters raised in the Fairfax press are historic in nature and IOOF believes all these issues have been addressed, including where relevant, thorough internal and board review, notifying industry regulators, ongoing review of compliance measures and controls, employee education and independent investigations. These initiatives have, where necessary, led to enhancement of processes and procedures and sought to improve the client experience and meet expected standards of compliance.

644 Mr McFarlane, at ASOC paragraph 41, alleges that the above statements were false and/or, to the extent the statements were statements of opinion, they were made without a reasonable basis. The ASOC does not otherwise identify which aspects of the above statements were false or lacking a reasonable basis. Mr McFarlane’s closing written submissions at [399]-[402] appear to impugn a single representation, being the representation in the 22 June 2015 media release that the allegations the subject of the Fairfax articles had been “dealt with appropriately”. By implication, it may be that Mr McFarlane also impugns a representation in the 24 June 2015 media release that “all” of the issues raised in the Fairfax press “have been addressed” (together, the **Impugned Representations**). In this respect, Mr McFarlane makes three submissions:

(1) Firstly, Mr McFarlane observes that the Alleged Material Information had not been disclosed by IOOF. Mr McFarlane contends that, if information is material and is required to be disclosed, a company cannot escape liability for failing to disclose it by asserting that all underlying issues were later dealt with.

(2) Secondly, Mr McFarlane contends that the subject allegations had not been dealt with appropriately, noting that Mr Hilton was Head of the Research team until March 2015, despite not being considered fit and proper from April 2014.

(3) Thirdly, Mr McFarlane contends that the terms of reference for PwC’s review of the December 2014 complaint were too narrow, noting that, for the purposes of preparing the PwC Insider Trading Report, PwC only considered trades occurring within six years of Mr Ung’s allegations being received by IOOF. As noted in that report, the consequence of confining the review period in this way was that, of the 58 trades identified by Mr Ung in the December 2014 complaint, only one fell within the review period for PwC.

645 Consistently with the reasons of French CJ, Gummow, Hayne and Kiefel JJ in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 (***Forrest***) at [33], I do not consider it profitable to attempt to classify the Impugned Representations according to a taxonomy of fact and opinion. Instead, it is necessary to identify precisely what it is that the Impugned Representations conveyed to their intended audience. In *Forrest*, the plurality held that the intended audience of a company’s letters to the ASX and related media release could sufficiently be “identified as investors (both present and possible future investors) and perhaps, as some wider section of the commercial or business community”: at [36]. In this case, the Impugned Representations were also made in media releases. I will therefore proceed on the basis that the intended audience of the Impugned Representations was present and possible future investors in IOOF’s shares, as well as a wider section of the commercial or business community.

646 The Impugned Representations were that IOOF had “dealt with appropriately” (in the case of the 22 June 2015 media release), or “addressed” (in the case of the 24 June 2015 media release), all of the issues raised in the Fairfax articles. The Impugned Representations then both went on to identify what this included, stating that it involved, where relevant, “internal and board review, notifying industry regulators, ongoing review of compliance measures and controls, employee education and independent investigations”. The statements that IOOF had “appropriately” dealt with, or “addressed”, the issues raised in the Fairfax articles cannot be divorced from the summary of the steps taken by IOOF to deal with those issues. Those steps give content to the representation that IOOF had “appropriately” dealt with, or “addressed”, the relevant issues. Viewed in this context, it is apparent that, by the Impugned Representations, IOOF made a general claim to having “appropriately” dealt with, or “addressed”, the issues raised by the Fairfax media articles by reason of the investigative or remedial steps it had taken when viewed in their totality. The Impugned Representations were not a more precise claim about the nature or content of any one of the investigative or remedial steps it had taken.

647 I will now address each of Mr McFarlane’s contentions in turn.

648 Mr McFarlane is correct to contend that IOOF’s obligations under s 674 of the *Corporations Act* and ASX Listing Rule 3.1 are not avoided by an assertion that all underlying issues were later dealt with. However, Mr McFarlane has failed to articulate how such a contention is relevant to an assessment of the truth or falsity of the Impugned Representations.

649 Mr McFarlane’s contention that the Impugned Representations were false because Mr Hilton was not removed as Head of the Research team lacks merit. I have discussed, at [482] above, the regulatory background to IOOF’s finding, as recorded in the Summary & Action Plan, that Mr Hilton should have his responsible manager status removed because he “no longer qualifies as fit and proper”. As noted there, this was a reference to the removal of Mr Hilton’s status as a responsible manager on the financial services licence of IOOF, given his failure to complete his training requirements. IOOF did not, however, make a finding that Mr Hilton was not fit and proper to remain as Head of the Research team. Mr McFarlane did not dispute that, consistently with the recommendation of the Summary & Action Plan, IOOF ultimately did remove Mr Hilton as a responsible manager noted on its financial services license. IOOF’s conduct was in no way inconsistent with its representation that it had “appropriately” dealt with, or “addressed”, the issues raised in the Fairfax articles.

650 Mr McFarlane’s reliance on the allegedly narrow review period adopted in PwC’s review of the December 2014 complaint is also misconceived. The Impugned Representations did not convey that PwC’s review of the December 2014 complaint was comprehensive. Instead, as discussed above, the Impugned Representations conveyed a more general representation that IOOF had “appropriately” dealt with, or “addressed”, the issues raised in the Fairfax media articles, having regard to the totality of the investigative and remedial steps identified in the 22 June 2015 media release. The Impugned Representations cannot be established to be false merely by impugning the efficacy of one component of IOOF’s investigation of the matters raised in the Fairfax articles.

651 In any case, the PwC Insider Trading Report provided the following explanation for the limitations on the review period:

The review period was restricted to the six years prior to the employee allegations being received due to a potential limitation period in the Corporations Act 2001, and because Mr Hilton has previously been investigated on more than one occasion by IOOF for similar matters, including in 2009 where aspects of trading through his wife's account were reviewed.

652 The above explanation is cogent on its face. It is unremarkable for internal company investigations to be temporally limited, having regard to the application of limitation periods and previous investigations undertaken by the company. The review period applied in PwC’s review of the December 2014 complaint was unremarkable.

653 For these reasons, I reject Mr McFarlane’s contention that the scope of PwC’s review of the December 2014 complaint establishes that the Impugned Representations were false.

654 In circumstances where Mr McFarlane has not identified any other basis for his contention that the 22 and 24 June 2015 media releases were false or lacking a proper basis, I reject that contention.

## Conclusion on whether IOOF engaged in misleading or deceptive conduct

655 I am not satisfied on the evidence that Mr McFarlane has established that the statements made by IOOF on 22 and 24 June 2015 are misleading or deceptive.

# CAUSATION, LOSS AND DAMAGE

656 I have found that IOOF did not contravene s 674(2) of the *Corporations Act* by failing to disclose the Alleged Material Information to the market. I have also found that IOOF did not engage in misleading or deceptive conduct by silence. I have also found that IOOF’s conduct in making the statements on 22 and 24 June 2015 was not conduct which was misleading or deceptive. As a consequence, it is unnecessary for me to consider the questions of causation, loss and damage. Notwithstanding, after considering the evidence, I have come to the view that, even if Mr McFarlane were to establish that certain components of the Alleged Material Information were required to be disclosed to the market (which I have rejected), Mr McFarlane has, in any event, failed to adduce a sufficient evidentiary foundation to establish causation and loss, and quantify damages, with respect to that information. I am of this view for the reasons that follow.

657 In order to establish causation, Mr McFarlane relies upon “indirect market-based causation. Indirect market-based causation involves the following causation chain:

(1) non-disclosure of material information by the company;

(2) the listed price for the securities being inflated by such non-disclosure; and

(3) investors purchasing securities “on market” at the inflated price.

658 As to the measure of loss, Mr McFarlane relies on the “inflation-based measure”. As Beach J observed in *Myer* at [1503]:

[t]he inflation-based measure is, in basic terms, measured by reference to the price paid upon acquisition and the market price that would have prevailed absent the alleged contraventions assessed by reference to the level of share price inflation at various points in time identified by the relevant event studies.

659 Critical to Mr McFarlane’s reliance on market-based causation and the inflation-based measure of loss is the need to establish by evidence that there was share price inflation *caused by* the contravention: *Myer* at [1670].

660 Beach J explained the nature of such evidence in *Myer* at [662]-[664] as follows:

[662] An event study is an empirical technique that measures the effect of a particular “event”, such as the [actual] release of information to the ASX [i.e., the corrective disclosure], on the price of a company’s shares… ……

[663] The proportion of the share price movement on any particular day that is likely to have been due to the release of company specific news can be estimated by reference to the difference between the observed price movement and that which would have been expected in the absence of any company-specific news. The extent of movement in a share price beyond that which would have been expected on account of market-wide, sector specific and/or random influences can be described as the abnormal return.

[664] Where a statistically significant abnormal return arises on the day (or days) following the release of company specific information, it is reasonable to conclude that the relevant portion of the price movement that cannot be attributed to market-wide or sector specific influences was caused by the event of interest. Providing no other company specific news was released at the same or similar time, the abnormal return can be taken as a reliable estimate of the effect of the disclosure on the value of a company’s shares.

661 In the present case, Mr Houston has undertaken an event study by reference to the Fairfax articles published on 22 June 2015, and the subsequent disclosure in Mr Kelaher’s testimony to the Senate Committee on 7 July 2015, to determine the abnormal return figures for IOOF shares on the dates of those disclosures. I make three observations about that evidence.

662 Firstly, a critical component of Mr Houston’s event study evidence was his exercise in “matching up” the Alleged Material Information pleaded in the ASOC with the allegations in the Fairfax articles and Mr Kelaher’s statements during the Senate Committee hearing. That analysis was set out in Tables A2.1 and A2.2 of Houston Report 1 respectively. Mr Houston explained this exercise as follows in Houston Report 1 (at [262]-[263]):

Between 20 June 2015 and 22 June 2015, various items of the information of interest were published in media articles. I have reviewed the media articles that were published during this period and matched the items of information contained in these articles to the information of interest. Drawing on this matching analysis, I then assess the comparability of the information disclosed in the media articles and the information specified in the Amended Statement of Claim. …

Between 20 June 2015 and 22 June 2015, various items of the information of interest were published in media articles. I have reviewed the media articles that were published during this period and matched the items of information contained in these articles to the information of interest. Drawing on this matching analysis, I then assess the comparability of the information disclosed in the media articles and the information specified in the Amended Statement of Claim.

663 In Houston Report 1, Mr Houston ultimately concluded that, but for some differences in wording, the “information of interest” (that is, the pleaded Alleged Material Information) and the information disclosed to the market was the same in nature: at [268].

664 Secondly, it is evident from Mr Houston’s evidence that his assessment of the abnormal returns on the event days – 22 June 2015 and 7 July 2015 – necessarily relates to the totality of the information released on these days. In cross-examination, Mr Houston relevantly gave the following evidence:

Now, what we have here to bring it to the specifics of this is that I identified four items of new information, which perhaps I’m not explicit, but I say have the potential to be value relevant, to affect the value of the stock, and I think I give reasons as to why I formed that view for each of those items of information. Then I see a price response and I conclude that those items together caused that price response. I have not, and I’ve – well, I also should say that I’ve satisfied myself that those four items fall within the items of information that we started out with

What I’ve not been asked to do, and I haven’t done, is to distinguish the relative contribution of any of those four items, and that’s a separate exercise that there are ways to approach that. We have talked about that, but I’ve not – I was not asked to do that and I have not done that. (Mr Houston, T 394-5.41-4)

665 Thirly, as set out above at [224], Mr Houston ultimately also accepted that, in the event that the Court finds that certain allegations as disclosed to the public in June and July 2015 were not made out, his event study analysis could only serve as a starting point for assessing the price inflation of IOOF’s shares. He also accepted that if there was a matter disclosed in the Fairfax articles and identified in the ASOC that the Court ultimately found should not have formed part of the counterfactual disclosure, the presence of that matter would become “confounding news”. It is to be recalled that the experts agreed that, in the event that confounding news or information was present, the effect of that information would need to be removed from any calculation of the total abnormal return on IOOF’s share price.

666 Given the above, Insignia correctly submits that Mr Houston’s event study proceeded on an “all or nothing” basis. For his event study to have utility, the Court must be satisfied of two matters. Firstly, there must be a conformity between the allegations contained in the Fairfax articles and Mr Kelaher’s testimony during the Senate Committee hearing the Alleged Material Information (save for the matters identified by Mr Houston in Houston Report 1 at Table A2.3 as the Pleaded Information Without Event Days, which Mr Houston accepts were not disclosed in the Fairfax articles). Secondly, all of the Alleged Material Information (other than the Pleaded Information Without Event Days), insofar as that information was disclosed in the Fairfax articles and by Mr Kelaher’s testimony to the Senate Committee, must be established to be true. If either of these matters is not established, then Mr Houston’s event study will necessarily be invalid to prove indirect market-based causation and the inflation-based measure of loss.

667 In the course of the cross-examination of Mr Houston, Insignia exposed a material difference between the content of the Alleged Material Information, as pleaded in the ASOC, and the matters disclosed in the Fairfax articles. That difference is between the content of ASOC paragraph 17(b), which refers to IOOF’s material overstatement of the performance of IOOF’s “model portfolio [the Buy-model]”, and allegations in two Fairfax articles which Mr Houston considered to contain matching allegations. The first article, titled “Litany of wrongdoings at IOOF included insider trading by senior employee” dated 20 June 2015, stated that a “research corrective action plan” had highlighted “misrepresentation of outperformance numbers of funds”. The second article, titled “IOOF’s boiler room throws customers to the wolves” dated 20 June 2015, referred to a “misrepresentation of outperformance numbers”, and further stated that:

Performance figures are the heart and soul of a funds manager. They are used in presentations, in reports and to benchmark a fund against other funds, and are used by financial advisers to attract clients to the funds.

668 The cross-examination of Mr Houston focused on whether the reference to “outperformance numbers of funds” in the first article meant that the allegations in that article materially differed from the allegation in ASOC paragraph 17(b), which concerned the performance of IOOF’s model portfolio. In Table A2.1, Mr Houston treated the allegations in the first article and ASOC paragraph 17(b) as equivalent. Under cross-examination, Mr Houston did not accept that the language of the first article would be construed as referring to the performance numbers of an actual investment fund managed by IOOF (as distinct from a hypothetical portfolio). I found Mr Houston’s evidence unpersuasive for reasons set out at [288] and [326] above. In my opinion, a reference to a “fund” would ordinarily be understood to mean a reference to a fund under management by IOOF. There is a significant distinction between IOOF misrepresenting the performance of its model portfolio and misrepresenting the performance of its actual funds in which client money was invested. If IOOF had misrepresented the returns of its actual funds, depending on the circumstances, this may be a matter of grave concern to planners and clients. It is a quite different matter to have misrepresented the performance of a model portfolio. During an extended cross-examination on the topic, Mr Houston failed to acknowledge this difference. This disconformity between the nature of the allegation in ASOC paragraph 17(b) and the Fairfax articles means that I cannot be satisfied that the Alleged Material Information materially aligns with the disclosures in the Fairfax articles. The effect of this is that Mr Houston’s event study is invalid to prove indirect market-based causation between any component of the Alleged Material Information which, contrary to my conclusions, would have been required to be disclosed to the market and IOOF’s allegedly inflated share price.

669 Further, I have found that there are a number of allegations comprising the Alleged Material Information other than the Pleaded Information Without Event Days which have not been substantiated or are no longer pressed. I have set out the most notable examples of these findings at [622] above. The disconformity between the allegations in the Fairfax articles and Mr Kelaher’s Senate testimony on the one hand, and what Mr McFarlane has established to be true on the other hand, is a further reason that Mr Houston’s event study is invalid to prove indirect market-based causation.

670 Even if, contrary to my conclusions, Mr McFarlane were able to establish that a component of the Alleged Material Information would have been required to be disclosed to the market, and the failure to disclose that information caused IOOF’s share price to be inflated, and thus caused Mr McFarlane to suffer loss, Mr McFarlane has not supplied a sufficient evidentiary basis to assess damages. In his closing oral submissions, Mr McFarlane submitted that, in the event that only a subset of the pleaded Alleged Material Information was found by the Court to be required to be disclosed to the market, the Court would “have to do the best [it could] on the basis of the evidence” before it: Mr Hodge KC, T 515.4-5. I reject that submission. It is well-established that “mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can” and “[w]here precise evidence is not available the court must do the best it can”: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 (Mason CJ and Dawson J). However, the Court takes a stricter approach in assessing damages where an applicant has not adduced evidence that was apparently available to prove the loss: *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)* (2007) 157 FCR 564 at [36] (Black CJ and Jacobson J), referring to Hayne J’s reasons in *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10 at [38]. The circumstances engaging the Court’s obligation to do the best it can in assessing damages were relevantly stated by Allsop CJ, Middleton and Foster JJ in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [164] as follows:

The evidence brought by someone with an onus may be so inadequate in its totality, when the whole context is examined, that there can be said to be no rational foundation for any proper estimate. In other cases, the court is required to make its best estimate on the materials provided. The proper approach will, in any given case, be an evaluative one influenced by such considerations as the nature of the question, including its amenability to precise proof or assessment, the availability and control of evidence, and the onus of proof. Considerations such as the assessment of evidence according to the power of the party to adduce it will be important to such an evaluation

671 In the present case, Mr Houston’s evidence was that:

(1) he was not asked, and did not attempt, to identify the separate components of inflation that related to particular components of the Alleged Material Information (Mr Houston, T 394-5.41-4);

(2) in the event that only certain components of the Alleged Material Information were established to be true, his event study analysis could only serve as a starting point for assessing the price inflation of IOOF’s shares. Subsequent consideration would then need to be given to adjusting his estimate up or down having regard to which components of the Alleged Material Information were established (Mr Houston, T 325.35-8);

(3) if he were required to disentangle the components of the Alleged Material Information, he would need to apply the principles that inform the event study framework to an advised counterfactual. This would require subjective judgment and would be a difficult task. However, it was a task that “has been attempted and engaged with on other occasions”: Mr Houston, T 295.23-29.

672 From the above, it is apparent that it was open to Mr McFarlane to have asked Mr Houston to opine as to the extent that the individual components of the Alleged Material Information contributed to IOOF’s share price inflation. Mr McFarlane did not do so. It is also apparent that estimating the extent of share price inflation requires technical expertise founded on the principles of financial economics applied to the information available and the assumptions that the expert is asked to make. It is not a matter that the Court can undertake without the assistance of expert evidence. It follows that Mr McFarlane has not provided a rational foundation for any proper estimate of damages even if (contrary to my findings) he was able to establish a contravention of IOOF’s continuous disclosure or misleading and deceptive conduct obligations, causation and loss.

673 Given the above findings, and the “all or nothing” nature of Mr Houston’s evidence, I find that Mr Houston’s event study cannot be relied upon to prove indirect market-based causation and the inflation-based measure of loss, as well as to calculate that loss.

# CONCLUSION AND ANSWERS TO COMMON ISSUES AND QUESTIONS

674 On the basis of the findings that I have made, I express the following answers to the common issues and questions.

## Continuous disclosure case

675 Question 1: During the Relevant Period, was IOOF “aware” (within the meaning of ASX Listing Rule 19.12) of any of the following information:

(1) the Historical Information;

(2) the March 2014 Information; and/or

(3) the Compromised Model Information?

Answer 1: IOOF was “aware” of the following:

(1) the substantial truth of the information pleaded in ASOC paragraph 20(a);

(2) the substantial truth of the information pleaded in ASOC paragraph 20(b);

(3) the truth of the information pleaded in ASOC paragraph 20(c);

(4) the substantial truth of the information pleaded in ASOC paragraph 20(c1);

(5) the substantial truth of the information pleaded in ASOC paragraph 20(c2);

(6) the truth of the information pleaded in ASOC paragraph 20(c3(iii));

(7) the truth of part of the information pleaded in ASOC paragraph 20(c4) namely that in or about 2009 there was an incident in relation to the Malaysian entity, ETC, involving IOOF staff;

(8) the truth of the information pleaded in ASOC paragraph 20(c5)(i);

(9) the substantial truth of the information pleaded in ASOC paragraph 20(c5)(ii);

(10) the truth of the information pleaded in ASOC paragraph 20(c6);

(11) the truth of the information pleaded in ASOC paragraph 20(c8);

(12) the truth of the information pleaded in ASOC paragraph 20(c9);

(13) the truth of the information pleaded in ASOC paragraph 20(c10);

(14) the truth of the information pleaded in ASOC paragraph 20(c11);

(15) the truth of the information pleaded in ASOC paragraph 20(d);

(16) consistently with ASOC paragraph 22(a), the truth of the allegations in the March 2014 complaint pleaded at ASOC paragraphs 17(b), (c), (d), (g) and (h);

(17) the truth of the information pleaded in ASOC paragraph 22(c);

(18) the truth of the information pleaded in ASOC paragraph 22(d);

(19) the truth of the information pleaded in ASOC paragraph 22(e);

(20) the truth of the information pleaded in ASOC paragraph 22(f);

(21) the truth of the information pleaded in ASOC paragraph 22(g).

676 Question 2: If the answer to any part of question 1 is “yes”, when during the Relevant Period was Insignia aware of the Alleged Material Information?

Answer 2:

(1) of the Historical Information of which IOOF was aware, IOOF was aware of that information by 25 March 2014;

(2) of the March 2014 Information of which IOOF was aware, IOOF was aware of that information by 8 April 2014.

677 Question 3: Was IOOF, at any time during the Relevant Period, obliged pursuant to ASX Listing Rule 3.1 to tell the ASX of the Alleged Material Information (or any part thereof)?

Answer 3: No

678 Question 4: Did IOOF contravene s 674(2) of the *Corporations Act* during the Relevant Period?

Answer 4: No.

## Misleading or deceptive conduct case

679 Question 5: During the Relevant Period, did IOOF engage in misleading or deceptive conduct, in contravention of s 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and/or s 18 of the *ACL* by:

(1) failing to disclose the:

(a) Historical Information**;**

(b) March 2014 Information; and/or

(c) Compromised Model Information.

Answer 5(1): No.

(2) further or alternatively, making the statements that it did to the ASX as set out in Annexure A to the ASOC, unqualified by the:

(a) Historical Information;

(b) March 2014 Information; and/or

(c) Compromised Model Information?

Answer 5(2): No.

680 Question 6: If the answer to question 5 is “yes”, when during the Relevant Period did Insignia engage in that misleading or deceptive conduct?

Answer 6: Not applicable.

681 Question 7: Did IOOF make statements to the ASX on:

(1) 22 June 2015; and/or

(2) 24 June 2015;

that were:

(1) false; and/or

(2) without reasonable basis;

in contravention of s 1041H of the *Corporations Act,* s 12DA of the *ASIC Act* and/or s 18 of the *ACL*, as pleaded in paragraph 41 of the ASOC?

Answer 7: No.

## Causation, loss and damage

682 Question 8: During the Relevant Period, did any of the alleged contravening conduct by Insignia cause the market price for ordinary shares in Insignia to be greater than:

(1) their true value; and/or

(2) the market price that would have prevailed but for the alleged contravening conduct (or any part of it)?

Answer 8: No.

683 Question 9: If the answer to question 8 is “yes”, by how much was the market price for ordinary shares in Insignia greater than their true value and/or the market price that would have prevailed during the Relevant Period?

Answer 9: Not applicable.

# DISPOSITION

684 Mr McFarlane’s originating application will be dismissed. Costs will be reserved.

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| I certify that the preceding six hundred and eighty-four (684) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 20 December 2023