

FILED

21 MAY 2019



**THIRD CROSS-CLAIM**

**1<sup>ST</sup> TO 454<sup>TH</sup> CROSS-DEFENDANTS' DEFENCE  
TO THE  
STATEMENT OF CROSS-CLAIM**

**COURT DETAILS**

Court	Supreme Court
Division	Equity
List	Commercial
Registry	Sydney
Case number	2017/294069 & 2018/52431

**TITLE OF PROCEEDINGS**

**Proceeding 2017/294069**

First plaintiff	Haliburton Charles David Findlay
Second plaintiff	Marian Jennifer Denny Findlay
First defendant	DSHE Holdings Limited ACN 166 237 841 (receivers and managers appointed) (in liquidation)
Number of defendants	457

**~~Proceeding 2018/52431~~**

<del>First plaintiff</del>	<del>Epaminondas Mastoris</del>
<del>Second plaintiff</del>	<del>Lena Mastoris</del>
<del>First defendant</del>	<del>DSHE Holdings Limited ACN 166 237 841 (receivers and managers appointed) (in liquidation)</del>
<del>Number of defendants</del>	<del>457</del>

**TITLE OF THIS CROSS-CLAIM**

Cross-claimant	<b>Michael Thomas Potts</b> (Third Cross-Claimant on Third Cross-Claim / Third Defendant)
First cross-defendant	<b>David Robert White trading as Deloitte Touche Tohmatsu</b> <b>(ABN 74 490 121 060)</b>
Number of cross-defendants	454

**FILING DETAILS**

Filed for	<b>David Robert White trading as Deloitte Touche Tohmatsu (ABN 74 490 121 060) &amp; Ors listed in Schedule 1, 1<sup>st</sup> to 454<sup>th</sup> Cross-Defendants to the Third Cross-Claim</b>
Filed in relation to	Third Cross-Claim
Legal representative	Angela Pearsall, Clifford Chance
Legal representative reference	21-40668614 / 21-40675324
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## PLEADINGS AND PARTICULARS

### Note as to terminology and privilege

The 1<sup>st</sup> to 454<sup>th</sup> Cross-Defendants (**Deloitte**) plead to the Third Cross-Claim Statement of Cross-Claim filed 18 March 2019 (**Potts Class Action Cross-Claim**) as follows, adopting the definitions therein unless otherwise stated. This includes terms defined in the Plaintiffs' Further Amended Joint Statement of Claim (as further amended from time to time) (**Plaintiffs' Claim**), which have been adopted in the Potts Class Action Cross-Claim. Headings and subheadings adopted in the Potts Class Action Cross-Claim are repeated for ease of reference only.

Admissions made in this Defence are for the purpose of this proceeding only and not because of any or all of the Cross-Defendants know or believe those matters to be true or false.

Nothing in this Defence should be taken to amount to an express or implied waiver of any privilege against self-incrimination or privilege against self-exposure to penalty belonging to the Defendants (or any one of them) or to any of their partners, directors, officers or employees.

### The Parties

1. Deloitte admit paragraph 1.
2. Deloitte admit paragraph 2.
3. As to paragraph 3, Deloitte:
  - (a) say that they are (or were, as applicable) partners in an Australian partnership trading as Deloitte Touche Tohmatsu (**DTT**);
  - (b) say that the membership of DTT changed from time to time and, accordingly, do not admit that all named Cross-Defendants were partners at all material times;
  - (c) say that any conduct engaged in by any of the Cross-Defendants in respect of DTT's audits of DSSH's FY13 Financial Statements (i.e. the FY13 Audit) and DSH's FY14 Financial Statements (i.e. the FY14 Audit) and FY15 Financial Statements (i.e. the FY15 Audit) (together, the **DTT Engagements**) was conducted by them in the ordinary course of the business of DTT and/or with the authority of DTT's partners at the relevant time;

- (d) admit that, as partners of DTT, they carry on (or carried on, as applicable) business in Australia as providers of (amongst other things) accounting and auditing services, trading under the name "Deloitte Touche Tohmatsu"; and
- (e) note that in the interests of economy, in the balance of this Defence, Deloitte have not repeated the contentions in sub-paragraphs 3(a) to 3(d), but that the whole of this Defence is subject to Deloitte's position that the membership of DTT changed from time to time; and
- (f) otherwise, deny the paragraph.

4. Deloitte admit paragraph 4.

#### **The Retainers**

- 5. As to paragraph 5, Deloitte refer to paragraphs 376-378 of Deloitte's Defence to the Plaintiffs' Claim.
- 6. As to paragraph 6, Deloitte:
  - (a) repeat their responses to paragraphs 3 and 4;
  - (a) rely on the terms of the FY14 Retainer for their full meaning and effect; and
  - (b) otherwise, admit the paragraph.
- 7. As to paragraph 7, Deloitte:
  - (b) repeat their responses to paragraphs 3 and 4;
  - (c) rely on the terms of the FY15 Retainer for their full meaning and effect; and
  - (d) otherwise, admit the paragraph.
- 8. As to paragraph 8, Deloitte:
  - (a) repeat their response to subparagraph 6(b); and
  - (b) otherwise, do not admit the paragraph.
- 9. As to paragraph 9, Deloitte:
  - (a) repeat their response to subparagraph 7(b); and
  - (b) otherwise, do not admit the paragraph.
- 10. As to paragraph 10, Deloitte:
  - (a) repeat their responses to subparagraphs 6(b) and 7(b); and
  - (b) otherwise, admit the paragraph.

## **Accounting and Auditing Framework**

### *CA and Accounting Standards*

11. As to paragraph 11, Deloitte refer to and repeat paragraphs 111–134 of Deloitte's Defence to the Plaintiffs' Claim.
12. As to paragraph 12, Deloitte refer to and repeat paragraphs 389–409 of Deloitte's Defence to the Plaintiffs' Claim.
13. As to paragraph 13, Deloitte:
  - (a) rely on all applicable and relevant auditing standards issued by the Auditing and Assurance Standards Board (**AUASB**) for their full content and meaning to the extent that they were in force and in the form in which they existed at the time;
  - (b) say that ASA265 and all other applicable/relevant auditing standards issued by the AUASB include mandatory provisions and/or guidance according to their terms; and
  - (c) otherwise, do not admit the paragraph.
14. As to paragraph 14, Deloitte:
  - (a) repeat their response to paragraph 13; and
  - (b) otherwise, do not admit the paragraph.

## **Representations by Deloitte in respect of Inventory Obsolescence Provisions**

### *The FY14 Inventory Representations*

15. As to paragraph 15, Deloitte:
  - (a) repeat their response to paragraph 19; and
  - (b) otherwise, admit the paragraph.
16. As to paragraph 16, Deloitte:
  - (a) repeat their response to paragraph 19;
  - (b) rely on Deloitte's Audit strategy for Dick Smith Holdings for the financial year ending 29 June 2014 for its full content and meaning (**FY2014 Audit Strategy Presentation**); and
  - (c) otherwise, do not admit the paragraph.

## **Particulars**

*Deloitte presentation entitled "Audit Strategy Dick Smith Holdings; External Audit Strategy for the financial year ending 29 June 2014" dated January 2014*

17. As to paragraph 17, Deloitte:
  - (a) repeat their response to paragraph 19; and
  - (b) otherwise, admit the paragraph.
18. As to paragraph 18, Deloitte:
  - (a) repeat their response to paragraph 19; and
  - (b) otherwise, do not admit the paragraph.
19. As to paragraph 19, Deloitte:
  - (a) will rely upon the FY2014 FAC Report (which was dated 6 August 2014) and the further amended (and final) version of that report (which was dated 12 August 2014) given to the members of the FAC in person at the meeting on 12 August 2014 for their full content and meaning;
  - (b) will rely upon all of the facts, matters and circumstances concerning the parties' dealings in relation to the FY2014 Audit as to the content of any representation; and
  - (c) otherwise, deny the paragraph.

*The FY15 Inventory Representations*

20. As to paragraph 20, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, admit the paragraph.
21. As to paragraph 21, Deloitte:
  - (a) repeat their response to paragraph 23;
  - (b) rely on Deloitte's FY15 Audit Strategy Presentation for its full content and meaning; and
  - (c) otherwise, do not admit the paragraph.
22. As to paragraph 22, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, admit the paragraph.

23. As to paragraph 23, Deloitte:

- (a) will rely upon the FY2015 FAC Report for its full content and meaning;
- (b) will rely upon all of the facts, matters and circumstances concerning the parties' dealings in relation to the FY2015 Audit as to the content of any representation; and
- (c) otherwise, deny the paragraph.

*Deloitte Inventory Representations*

24. As to paragraph 24, Deloitte:

- (a) repeat their responses to paragraphs 19 and 23;
- (b) say that, at all material times, if they were conducting themselves in relation to a "financial service" within the meaning of s 1041H of the Corporations Act and/or "financial services" within the meaning of s 12DA of the ASIC Act (which in each case is denied), then that service was an "exempt service" within the meaning of the Corporations Regulations; and

**Particulars**

*Corporations Regulations, r 7.1.29*

*Corporations Act, s 766A(2)*

*ASIC Act, s 5(3)*

- (c) otherwise, deny the paragraph.

25. As to paragraph 25, Deloitte:

- (a) repeat their responses to paragraphs 19 and 23;
- (b) say that, at all material times, if they were conducting themselves in relation to "financial services" within the meaning of s 12DB of the ASIC Act (which in each case is denied), then that service was an "exempt service" within the meaning of the Corporations Regulations; and

**Particulars**

*Corporations Regulations, r 7.1.29*

*Corporations Act, s 766A(2)*

*ASIC Act, s 5(3)*

- (c) otherwise, deny the paragraph.

## **Misleading or Deceptive Conduct – Deloitte Inventory Representations**

*Allegation that Inventory Provisions did not comply with AASB 102*

26. As to paragraph 26, Deloitte:

- (a) refer to and repeat paragraphs 144–148, 150–151, 239 and 245 of Deloitte's Defence to the Plaintiffs' Claim; and
- (b) otherwise, do not admit the paragraph.

*Misleading conduct – the FY14 Inventory Representations*

27. As to paragraph 27, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, deny the paragraph.

28. As to paragraph 28, Deloitte refer to and repeat paragraphs 427–431 and 445–449 of Deloitte's Defence to the Plaintiffs' Claim.

29. As to paragraph 29, Deloitte:

- (a) repeat their responses to paragraphs 19, 24 and 26-28; and
- (b) otherwise, deny the paragraph.

30. As to paragraph 30, Deloitte:

- (a) repeat their response to paragraphs 19, 25-28; and
- (b) otherwise, deny the paragraph.

*Misleading conduct – the FY15 Inventory Representations*

31. As to paragraph 31, Deloitte:

- (a) repeat their response to paragraph 23; and
- (b) otherwise, deny the paragraph.

32. As to paragraph 32, Deloitte refer to and repeat paragraphs 456–460 of Deloitte's Defence to the Plaintiffs' Claim.

33. As to paragraph 33, Deloitte:

- (a) repeat their responses to paragraphs 23, 24, 26, 31-32; and
- (b) otherwise, deny the paragraph.

34. As to paragraph 34, Deloitte:

- (a) repeat their responses to paragraphs 23, 25, 26, 31-32; and
- (b) otherwise, deny the paragraph.

### **Representations by Deloitte in respect of Rebates**

#### *The FY14 Rebate Representations*

35. As to paragraph 35, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, admit the paragraph.

36. As to paragraph 36, Deloitte:

- (a) repeat their response to paragraph 19;
- (b) rely on Deloitte's FY2014 Audit Strategy Presentation and for its full content and meaning; and
- (c) otherwise, admit the paragraph.

37. As to paragraph 37, Deloitte:

- (a) repeat their responses to paragraphs 35 and 36; and
- (b) otherwise, do not admit the paragraph.

38. As to paragraph 38, Deloitte:

- (a) repeat their response to paragraph 19;
- (b) admit Deloitte requested DSH provide them information on the manner in which O&A rebates were recognised and treated in the accounts of DSH; and
- (c) otherwise, do not admit the paragraph.

39. As to paragraph 39, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, do not admit the paragraph.

40. As to paragraph 40, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, do not admit the paragraph.

41. As to paragraph 41, Deloitte:

- (a) repeat their response to paragraph 19; and



- (b) otherwise, deny the paragraph.

*The FY15 Rebate Representations*

- 42. As to paragraph 42, Deloitte repeat their response to paragraph 38.
- 43. As to paragraph 43, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, admit the paragraph.
- 44. As to paragraph 44, Deloitte:
  - (a) repeat their response to paragraph 23;
  - (b) rely on Deloitte's FY15 Audit Strategy Presentation for its full content and meaning; and
  - (c) otherwise, do not admit the paragraph.
- 45. As to paragraph 45, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, do not admit the paragraph.
- 46. As to paragraph 46, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, deny the paragraph.

*Deloitte Rebate Representations*

- 47. As to paragraph 47, Deloitte:
  - (a) repeat paragraphs 19, 23 and 24; and
  - (b) otherwise, deny the paragraph.
- 48. As to paragraph 48, Deloitte:
  - (a) repeat paragraphs 25, 41 and 46; and
  - (b) otherwise deny the paragraph.

**Misleading or Deceptive Conduct – Deloitte Rebate Representations**

*Misleading conduct – FY14 Rebate Representations*

- 49. As to paragraph 49, Deloitte:

- (a) refer to and repeat paragraphs 164–168, 173, 175, 177, 178, 179, 182–185, 187 and 240–241 of Deloitte's Defence to the Plaintiffs' Claim; and
  - (b) otherwise, do not admit the paragraph.
- 50. As to paragraph 50, Deloitte:
  - (a) repeat their response to paragraphs 19, 41 and 47–49; and
  - (b) otherwise, deny the paragraph.
- 51. As to paragraph 51, Deloitte refer to and repeat paragraphs 450–454 of Deloitte's Defence to the Plaintiffs' Claim.
- 52. As to paragraph 52, Deloitte:
  - (a) repeat their responses to paragraphs 19, 24, 41 and 47–50; and
  - (b) otherwise, deny the paragraph.
- 53. As to paragraph 53, Deloitte:
  - (a) repeat their response to paragraph 25 and 52; and
  - (b) otherwise, deny the paragraph.

*The FY15 Rebate Representations*

- 54. As to paragraph 54, Deloitte:
  - (a) refer to and repeat paragraphs 155–158, 174–175, 180–181, 187, and 246–247 of Deloitte's Defence to the Plaintiffs' Claim; and
  - (b) otherwise, do not admit the paragraph.
- 55. As to paragraph 55, Deloitte:
  - (a) repeat their response to paragraph 23; and
  - (b) otherwise, deny the paragraph.
- 56. As to paragraph 56, Deloitte refer to and repeat paragraphs 461–465 of Deloitte's Defence to the Plaintiffs' Claim.
- 57. As to paragraph 57, Deloitte:
  - (a) repeat their responses to paragraph 23, 24, 54 and 55; and
  - (b) otherwise, deny the paragraph.

58. As to paragraph 58, Deloitte:

- (a) repeat their responses to paragraph 23, 25, 54, 55; and
- (b) otherwise, deny the paragraph.

**Representations by Deloitte in respect of Warranty Sign On Liability**

59. Deloitte do not admit paragraph 59.

60. As to paragraph 60, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, do not admit the paragraph.

61. As to paragraph 61, Deloitte:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, admit the paragraph.

62. As to paragraph 62, Deloitte say:

- (a) repeat their response to paragraph 19; and
- (b) otherwise, do not admit the paragraph.

63. As to paragraph 63, Deloitte:

- (a) repeat their responses to paragraphs 4, 9-10, 12-14, 19 and 59-62; and
- (b) otherwise, deny the paragraph.

64. As to paragraph 64, Deloitte:

- (a) repeat their response to paragraphs 24 and 63; and
- (b) otherwise, deny the paragraph.

65. As to paragraph 65, Deloitte:

- (a) repeat their response to paragraphs 25 and 63; and
- (b) otherwise, deny the paragraph.

**Misleading or Deceptive Conduct – Warranty Sign on Liability Representations**

66. As to paragraph 66, Deloitte:

- (a) refer to and repeat paragraphs 193–201 and 239–241 of Deloitte's Defence to the Plaintiffs' Claim; and
- (b) otherwise, do not admit the paragraph.

67. As to paragraph 67, Deloitte refer to and repeat paragraphs 432–443 of Deloitte's Defence to the Plaintiffs' Claim.
68. As to paragraph 68, Deloitte:
- (a) repeat their response to paragraphs 66 and 67; and
  - (b) otherwise, deny the paragraph.
69. As to paragraph 69, Deloitte:
- (a) repeat their responses to paragraphs 19, 24, 66 and 67; and
  - (b) otherwise, deny the paragraph.
70. As to paragraph 70, Deloitte:
- (a) repeat their responses to paragraphs 19, 25, 66 and 67; and
  - (b) otherwise, deny the paragraph.

**Representations by Deloitte in respect of Onerous Lease Provision Release**

71. As to paragraph 71, Deloitte:
- (a) repeat their response to paragraph 19; and
  - (b) otherwise, do not admit the paragraph.
72. As to paragraph 72, Deloitte:
- (a) repeat their response to paragraph 19; and
  - (b) otherwise, admit the paragraph.
73. As to paragraph 73, Deloitte:
- (a) repeat their response to paragraph 19; and
  - (b) otherwise, admit the paragraph.
74. As to paragraph 74, Deloitte:
- (a) repeat their response to paragraph 19; and
  - (b) otherwise, deny the paragraph.
75. As to paragraph 75, Deloitte:
- (a) repeat their responses to paragraph 24 and 74; and
  - (c) otherwise, deny the paragraph.

76. As to paragraph 76, Deloitte:

- (a) repeat their responses to paragraphs 25 and 74; and
- (b) otherwise, deny the paragraph.

**Misleading or Deceptive Conduct – Onerous Lease Provision Representations**

77. As to paragraph 77, Deloitte:

- (a) refer to and repeat paragraphs 216–218 and 239–241 of Deloitte's Defence to the Plaintiffs' Claim; and
- (b) otherwise, do not admit the paragraph.

78. As to paragraph 78 Deloitte:

- (a) repeat paragraphs 75 and 76; and
- (b) otherwise, deny the paragraph.

79. As to paragraph 79, Deloitte:

- (a) repeat their responses to paragraphs 19, 24, 77 and 78; and
- (b) otherwise, deny the paragraph.

80. As to paragraph 80, Deloitte:

- (a) repeat their responses to paragraphs 19, 25, 77 and 78; and
- (b) otherwise, deny the paragraph.

**Deloitte Report Representations**

*Deloitte's FY13 Express Representations and Deloitte's FY13 Implied Representations*

81. As to paragraph 81, Deloitte refer to and repeat paragraphs 411–416 and 467–468 of Deloitte's Defence to the Plaintiffs' Claim.

*Deloitte's FY14 Financial Statements Representations*

82. As to paragraph 82, Deloitte

- (a) repeat their responses to paragraph 84; and
- (b) otherwise, deny the paragraph.

83. As to paragraph 83, Deloitte:

- (a) repeat their responses to paragraph 84;
- (b) rely on the FY14 Audit Report for its full content and meaning; and

- (c) otherwise, admit the paragraph.
84. As to paragraph 84, Deloitte:
- (a) repeat their response to paragraphs 19 and 83;
  - (b) say that, on 18 August 2014, each of Abboud and Potts provided a management representation letter to DTT dated 18 August 2014 as to matters concerning the FY14 Financial Statements (**FY14 Management Representation Letter**);
  - (c) say that, on 18 August 2014, each of Abboud and Potts gave a declaration pursuant to s 295A of the Corporations Act (**FY14 CEO / CFO Declaration and Assurance**) for the year ended 29 June 2014;
  - (d) say that, on 18 August 2014, the DSH Directors gave a declaration pursuant to s 295(5) of the Corporations Act as to the FY14 Financial Statements (**FY14 Directors' Declaration**);
  - (e) rely on the FY14 Management Representation Letter, the FY14 CEO / CFO Declaration and Assurance and the FY14 Directors Declaration for their full content and meaning;
  - (f) say that, after the giving of the FY14 Management Representation Letter, the FY14 CEO / CFO Declaration and Assurance and the FY14 Directors Declaration, the First Cross-Defendant (as lead auditor) signed the FY14 Audit Report, in his name and in the name of the DTT pursuant to s 324AB(3) of the Corporations Act;
  - (g) say that the FY14 Audit Report was divided into, relevantly, three sections: "Directors' Responsibility for the Financial Report"; "Auditor's Responsibility"; and "Opinion";
  - (h) say that under the heading "Directors' Responsibility for the Financial Report", the FY14 Audit Report stated that the directors of DSH were responsible for the preparation of the FY14 Financial Statements that gives a true and fair view in accordance with Australian Accounting Standards and the Corporations Act and for such internal control as the directors determine necessary to enable the preparation of the FY14 Financial Statements that gives a true and fair view and is free from material misstatement, whether due to fraud or error. In Note 2, the directors also stated, in accordance with AASB 101 that the consolidated financial statements comply with IFRS;

- (i) under the heading "Auditor's Responsibility", the FY14 Audit Report stated, *inter alia*, that:
  - (i) DTT's responsibility was to express an opinion on the financial report based on their audit. DTT conducted their audit in accordance with Australian Auditing Standards. Those standards required that DTT comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial report was free from material misstatement;
  - (ii) an audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial report. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial report, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to DSH's preparation of the financial report that gives a true and fair view, in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of DSH's internal control;
  - (iii) an audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the DSH directors, as well as evaluating the overall presentation of the financial report; and
  - (iv) DTT believed that the audit evidence that they had obtained was sufficient and appropriate to provide a basis for their audit opinion;
- (j) under the heading "Opinion", the FY14 Audit Report stated, *inter alia*, that in DTT's opinion:
  - (i) the FY14 Financial Statements was in accordance with the Corporations Act, including:
    - (1) giving a true and fair view of the consolidated entity's financial position as at 29 June 2014 and of its performance for the year ended on that date; and
    - (2) complying with Australian Accounting Standards and the Corporations Regulations; and

- (ii) the FY14 Financial Statements also complies with IFRS as disclosed in Note 2;
- (k) will rely at trial on the FY14 Audit Report and FY14 Financial Statements for their full content and meaning; and
- (l) otherwise, deny the paragraph.

*FY15 Financial Statements Representations*

85. As to paragraph 85, Deloitte:

- (a) repeat their response to paragraph 87; and
- (b) otherwise, deny the paragraph.

86. As to paragraph 86, Deloitte:

- (a) repeat their response to paragraph 87;
- (b) rely on the FY15 Audit Report for its full content and meaning; and
- (c) otherwise, admit the paragraph.

87. As to paragraph 87, Deloitte:

- (a) repeat their responses to paragraphs 23 and 86;
- (b) say that, on 17 August 2015, each of Abboud and Potts provided a management representation letter to DTT dated 17 August 2015 as to matters concerning the FY15 Financial Report (**FY15 Management Representation Letter**);
- (c) say that, on 17 August 2015, each of Abboud and Potts gave a declaration pursuant to s 295A of the Corporations Act (**FY15 CEO / CFO Declaration and Assurance**) for "the half year ended 28 December 2014" (which Deloitte says was intended to refer to the "year ended 28 June 2015");
- (d) say that, on 17 August 2015, the DSH Directors gave a declaration pursuant to s 295(5) of the Corporations Act as to the FY15 Financial Report (**FY15 Directors' Declaration**);
- (e) rely on the FY15 Management Representation Letter, FY15 CEO / CFO Declaration and Assurance and the FY15 Directors Declaration for their full content and meaning; and
- (f) say that, after the giving of the FY15 Management Representation Letter, the FY15 CEO / CFO Declaration and Assurance and the FY15 Directors



Declaration the First Cross-Defendant (as lead auditor) signed the FY15 Audit Report, in his name and in the name of DTT pursuant to s 324AB(3) of the Corporations Act;

- (g) say that the FY15 Audit Report was divided into, relevantly, three sections: "Directors' Responsibility for the Financial Report"; "Auditor's Responsibility"; and "Opinion";
- (h) say that under the heading "Directors' Responsibility for the Financial Report", the FY15 Audit Report stated that the directors of DSH were responsible for the preparation of the financial report that gives a true and fair view in accordance with Australian Accounting Standards and the Corporations Act and for such internal control as the directors determine necessary to enable the preparation of the financial report that gives a true and fair view and is free from material misstatement, whether due to fraud or error. In Note 2, the directors also stated, in accordance with AASB 101 that the consolidated financial statements comply with IFRS;
- (i) under the heading "Auditor's Responsibility", the FY15 Audit Report stated, *inter alia*, that:
  - (i) DTT's responsibility was to express an opinion on the financial report based on their audit. DTT conducted their audit in accordance with Australian Auditing Standards. Those standards required that DTT comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial report was free from material misstatement;
  - (ii) an audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial report. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial report, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to DSH's preparation of the financial report that gives a true and fair view, in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of DSH's internal control;

- (iii) an audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the DSH directors, as well as evaluating the overall presentation of the financial report; and
- (iv) DTT believed that the audit evidence that they had obtained was sufficient and appropriate to provide a basis for their audit opinion;
- (j) under the heading "Opinion", the FY15 Audit Report stated, *inter alia*, that in DTT's opinion:
  - (i) the FY15 Financial Report was in accordance with the Corporations Act, including:
    - (A) giving a true and fair view of the consolidated entity's financial position as at 28 June 2015 and of its performance for the year ended on that date; and
    - (B) complying with Australian Accounting Standards and the Corporations Regulations; and
  - (ii) the FY15 Financial Report also complies with IFRS as disclosed in Note 2;
- (k) will rely at trial on the FY15 Audit Report and FY15 Financial Report for their full content and meaning; and
- (l) otherwise, deny the paragraph.

*Deloitte Report Representations*

88. As to paragraph 88, Deloitte:

- (a) repeat their responses to paragraphs 24, 82-87; and
- (b) otherwise, deny the paragraph.

89. As to paragraph 89, Deloitte:

- (a) Repeat their response to paragraphs 25 and 82-87; and
- (b) otherwise, deny the paragraph.

## **Misleading or Deceptive Conduct – Deloitte Report Representations**

### *Misleading or Deceptive Conduct – Deloitte's FY13 Express Representations and Deloitte's FY13 Implied Representations*

90. As to paragraph 90, Deloitte refer to and repeat paragraphs 427–444 and 469–472 of Deloitte's Defence to the Plaintiffs' Claim.

### *Misleading or Deceptive Conduct – FY14 Audit Report Representation*

91. As to paragraph 91, Deloitte:
- (a) repeat their response to paragraphs 26, 27-28, 49, 50-51, 66, 68, 77, 78 and 84; and
  - (b) otherwise deny, the paragraph.
92. As to paragraph 92, Deloitte refer to and repeat paragraphs 445–455 and 479–484 of Deloitte's Defence to the Plaintiffs' Claim.
93. As to paragraph 93, Deloitte:
- (a) repeat their response to paragraphs 19, 24, 88, 91 and 92; and
  - (b) otherwise, deny the paragraph.
94. As to paragraph 94, Deloitte:
- (a) repeat their response to paragraph 19, 25, 88, 91 and 92; and
  - (b) otherwise, deny the paragraph.

### *Misleading or Deceptive Conduct – FY15 Audit Report Representation*

95. As to paragraph 95, Deloitte:
- (a) repeat their response to paragraphs 26 and 54; and
  - (b) otherwise, deny the paragraph.
96. As to paragraph 96, Deloitte refer to and repeat paragraphs 456–466 and 491–496 of Deloitte's Defence to the Plaintiffs' Claim.
97. As to paragraph 97, Deloitte:
- (a) repeat their responses to paragraphs 24, 95 and 96; and
  - (b) otherwise, deny the paragraph.
98. As to paragraph 98, Deloitte:
- (a) repeat their responses to paragraphs 25, 95 and 96; and

- (b) otherwise, deny the paragraph.

**Claim by Potts for damages**

99. Deloitte note paragraph 99.

*Claim by Potts in relation to the FY14 Financial Statements*

100. As to paragraph 100, Deloitte:

- (a) repeat their responses to paragraphs 15-19, 35, 37, 41, 59-63, 71-74, 81, 82-84; and
- (b) otherwise, do not admit the paragraph 100.

101. Deloitte do not admit paragraph 101.

102. As to paragraph 102, Deloitte:

- (a) repeat their responses to paragraphs 28-30, 51-53, 69-70, 79-80, 90 and 92-94;
- (b) refer to and repeat paragraphs 145-148, 150, 166-169, 182-187, 190-192, 201, 218, 240-241, 239-244, 285-303, 357-358, 360-365 of Deloitte's Defence to the Plaintiffs' Claim; and
- (c) otherwise, deny the paragraph.

*Claim by Potts in relation to the FY15 Financial Statements*

103. As to paragraph 103, Deloitte:

- (a) repeat their responses to paragraphs 20, 22-23, 43, 46 and 85-87; and
- (b) otherwise, do not admit the paragraph.

104. Deloitte do not admit paragraph 104.

105. As to paragraph 102 Deloitte:

- (a) repeat their responses to paragraphs 32-34, 56-58 and 96-98;
- (b) refer to and repeat paragraphs 145-148, 151, 159-162, 166-169, 182-187, 190-192, 245-250, 357-358 and 360-365 of Deloitte's Defence to the Plaintiffs' Claim; and
- (c) otherwise, deny the paragraph.

**Claim by Potts for equitable contribution**

106. Deloitte note paragraph 106.

*Coordinate liability – Claims in respect of FY14*

107. Deloitte admit paragraph 107.

108. Deloitte deny paragraph 108.

109. As to paragraph 109, Deloitte:

- (a) repeat their responses to paragraphs 24 and 92-93; and
- (b) otherwise, deny the paragraph.

110. As to paragraph 110, Deloitte:

- (a) repeat their responses to paragraphs 25 and 92-93; and
- (b) otherwise, deny the paragraph.

111. As to paragraph 111, Deloitte:

- (a) repeat paragraph 102; and
- (b) otherwise do not admit the paragraph.

112. Deloitte deny paragraph 112.

113. Deloitte deny paragraph 113.

114. As to paragraph 114, Deloitte refer to and repeat paragraphs 411–421, 427–455, 467–490, 503–508 and 512–515 of Deloitte's Defence to the Plaintiffs' Claim.

115. Deloitte deny paragraph 115.

116. Deloitte deny paragraph 116.

117. Deloitte deny paragraph 117.

*Coordinate liability – Claims in respect of FY15*

118. Deloitte admit paragraph 118.

119. Deloitte deny paragraph 119.

120. As to paragraph 120, Deloitte:

- (a) repeat their responses to paragraphs 19, 24 and 97; and
- (b) otherwise, deny the paragraph.

121. As to paragraph 121, Deloitte:

- (a) repeat their responses to paragraphs 19, 25 and 98; and
- (b) deny the paragraph.

- 122. Deloitte deny paragraph 122.
- 123. Deloitte deny paragraph 123.
- 124. Deloitte deny paragraph 124.
- 125. As to paragraph 125, Deloitte refer to and repeat paragraphs 411–515 of Deloitte's Defence to the Plaintiffs' Claim.
- 126. Deloitte deny paragraph 126.
- 127. Deloitte deny paragraph 127.
- 128. Deloitte deny paragraph 128.
- 129. Deloitte deny that Abboud is entitled to any of the relief claimed or at all.

### OTHER DEFENCES

In further or alternative answer to the whole of the Potts Class Action Cross-Claim, Deloitte plead as follows:

- 130. The FY13 Retainer, the FY14 Retainer and the FY15 Retainer (together, the **Retainers**) each provided that the DTT Engagements would be conducted on the basis that:
  - (a) the directors acknowledged and understood that they had the responsibility:
    - (i) for the preparation of, relevantly, the financial reports which were the subject of the Retainers ((i.e. relevantly, the FY13 Financial Statements, FY14 Financial Statements and FY15 Financial Statements, together, the **Financial Reports**) that gave a true and fair view in accordance with Australian Accounting Standards and the Corporations Act;
    - (ii) for such internal control as the directors determined was necessary to enable the preparation of the Financial Reports that are free from material misstatement, whether due to fraud or error; and
    - (iii) to provide Deloitte with:
      - (1) access to all information of which the directors and management were aware that was relevant to the preparation of the Financial Reports such as records, documentation and other matters;

- (2) additional information that Deloitte may request from the directors and management for the purpose of the Retainers; and
  - (3) unrestricted access to persons within the entity from whom Deloitte determined it necessary to obtain evidence;
- (b) DSSH or DSH (as relevant) was responsible for, amongst other things, providing Deloitte with accurate and complete information and all information that was relevant to the services to be provided under the Retainers.

### **Conduct of directors and management**

131. Deloitte refer to their paragraphs 44 and 45 of the Plaintiffs' Claim and their response thereto, and say that at all material times the directors of DSSH or DSH (as relevant) were responsible for the preparation and fair presentation of the Financial Reports in accordance with Accounting Standards (including the Australian Accounting Standards) and the Corporations Act, and such responsibility included establishing and maintaining internal control relevant to the preparation and fair presentation of the financial report that is free from material misstatement, whether due to fraud or error, selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

### **Particulars**

#### *Corporations Act Chapter 2M, Part 2M.3*

132. By letter dated 18 August 2014 (in connection with the consolidated financial statements of DSH and its controlled entities for the year ended 28 June 2014) (i.e. the FY14 CEO / CFO Declaration and Assurance) and by letter dated on or about 17 August 2015 (in connection with the consolidated financial statements of DSH and its controlled entities for the year ended 29 June 2015) (i.e. the FY15 CEO / CFO Declaration and Assurance), each of Abboud and Potts gave a declaration pursuant to s 295A of the Corporations Act (together, the **CEO / CFO Declarations and Assurances**):
- (a) which was provided to the Board prior to the Board approving DSH's financial statements;

(b) which included statements to the effect that, to the best of each of their knowledge:

- (i) the financial records of DSH had been properly maintained in accordance with s 286 of the Corporations Act;
- (ii) the financial statements and the accompanying notes complied with the appropriate accounting standards;
- (iii) the financial statements and accompanying notes gave a true and fair view of the financial position and performance of DSH for the financial year;
- (iv) DSH had complied with all other matters prescribed by the Corporations Regulations in relation to the financial statements and notes;
- (v) the financial report was founded on a sound system of risk management and internal compliance and control;
- (vi) DSH's risk management and internal compliance and control system was operating efficiently and effectively in all material aspects; and

(c) upon the entire terms of which Deloitte rely for their full content and meaning.

133. On 23 October 2013, 18 August 2014, and 17 August 2015, the directors of DSSH or DSH (as applicable) made a declaration in the FY13 Financial Statements (**FY13 Directors' Declarations**), FY14 Directors' Declaration and the FY15 Directors' Declaration (together, the **Directors' Declarations**):

(a) to the effect that:

- (i) in the directors' opinion, there were reasonable grounds to believe that DSH and the consolidated entity would be able to pay its debts as and when they became due and payable;
- (ii) in the directors' opinion, the financial statement and notes attached thereto were in accordance with the Corporations Act, including compliance with accounting standards and giving a true and fair view of the financial position and performance of DSSH or DSH (as relevant) and the consolidated entity; and
- (iii) in the directors' opinion, the financial statements and notes attached thereto were in compliance with the International Financial Reporting Standards as stated in Note 2 of the financial statements; and



- (b) upon the entire terms of which Deloitte rely for their full content and meaning.
134. By letter dated 23 October 2013 (in respect of the FY13 Audit) (**FY13 Management Representation Letter**), the FY14 Management Representation Letter and FY15 Management Representation Letter (together, the **Management Representation Letters**), Abboud and Fawaz or Abboud and Potts (as applicable) provided a representation letter to DTT (**Management Representation Letters**):
- (a) for the purpose of DTT expressing an opinion as to whether the relevant financial report gave a true and fair view in accordance with the Australian Accounting Standards and the Corporations Act;
  - (b) in which Abboud and Fawaz (in respect of FY2013) and Abboud and Potts (in respect of FY2014 and FY2015) each confirmed to DTT, among other matters, that:
    - (i) they had fulfilled their responsibilities as set out in the relevant audit engagement (as to which in particular see paragraph 130 above), for the preparation of the financial report in accordance with Australian Accounting Standards and the Corporations Act, in particular that the financial report gave a true and fair view in accordance therewith;
    - (ii) they had provided DTT with:
      - (1) access to all information of which they were aware was relevant to the preparation of the relevant financial report such as records, documentation and other matters;
      - (2) additional information DTT have requested from them for the purpose of the audit;
      - (3) unrestricted access to the persons within the entity from whom DTT determined it necessary to obtain audit evidence;
      - (4) all information required by the Corporations Act and all requested information, explanations and assistance for the purposes of the audit;
    - (iii) all transactions had been recorded in the accounting records and were reflected in the financial report;
    - (iv) they were responsible for the design, implementation and maintenance of internal control to prevent and detect fraud;

- (v) significant assumptions used by them in making accounting estimates, including those measured at fair value, were reasonable;
- (vi) the effects of uncorrected misstatements (in the case of the FY13 Audit and the FY14 Audit) or unadjusted misstatements and disclosure deficiencies (in the case of the FY15 Audit) were immaterial, individually and in aggregate, to the financial report as a whole, and a summary of such items was attached to the relevant representation letter;
- (vii) the selection and application of accounting policies as described in the notes in the financial report were appropriate;
- (viii) liabilities, both actual and contingent, had been properly recorded and, where appropriate, adequately disclosed in the financial report;
- (ix) they had communicated to DTT all deficiencies in internal control of which they were aware;
- (x) in respect of FY2014 and FY2015, they had considered the requirements of Accounting Standard AASB 136 *Impairment of Assets* when assessing the impairment of assets and in ensuring that no assets were stated in excess of their recoverable amount, and that they had communicated to DTT all indicators of impairment and where those existed, they had conducted appropriate impairment testing on the relevant asset;
- (xi) in respect of the FY2014 Audit and the FY2015 Audit, they had no plans to abandon lines of product or other plans or intentions that would result in any excess or obsolete inventory, and no inventory was stated in an amount in excess of net realisable value;
- (xii) in respect of the FY2014 Audit and the FY2015 Audit, where assets and liabilities were recorded at their fair value, the value attributed to these assets and liabilities was, in the opinion of directors and management, the fair value; and they were responsible for the reasonableness of any significant assumptions underlying the valuation, including consideration of whether they appropriately reflect their intent and ability to carry out specific courses of action;
- (xiii) (xiii) in respect of the FY 2014 Audit, they had raised a liability as at 29 June 2014 for management's best estimate of costs associated with

existing leases on underperforming stores prior to the actual lease expiration date, including outstanding penalties and make good costs; they were reviewing the performance of those stores on a regular basis and it was their intention to exit those stores within the next 12 months;

(xiv) in respect of the FY2014 Audit and the FY2015 Audit, DSH and its consolidated entities had not breached any covenants on its financing facility during any of the periods reported and did not expect to breach any covenants in future periods; and they had fully disclosed to DTT all covenants and information related to how they determined their compliance with the terms of the covenants;

(xv) in respect of the FY2014 Audit and the FY2015 Audit, they had performed a detailed review of the amount and nature of rebates received or owed from suppliers during the relevant year ended; the rebates recognised in this period had been appropriately recognised and presented in the financial statements in accordance with Australian Accounting Standards; in particular they confirmed that the O&A rebates recognised as receivables as at:

(A) in the case of the FY2014 Report, 29 June 2014 totalling \$16.9 million;

(B) in the case of the FY2015 Report, 28 June 2015 totalling \$32.5 million;

were recoverable in full from the vendors; in addition those amounts relate to additional support received from vendors to market or clear products in the relevant year ended and were not to be deferred and recognised in future periods;

(c) upon the entire terms of which Deloitte rely for their full content and meaning.

135. For the purposes of this defence to the Potts Class Action Cross-Claim only and without admission, Deloitte:

(a) repeat sections C2 to C10 of the Plaintiffs' Claim;

(b) say that, if the allegations in the Plaintiffs' Claim are made out, then each of Abboud and Potts knew the facts and matters asserted in sections C2 to C10 of the Plaintiffs' Claim;

- (c) say that if the allegations in the Plaintiffs' claim are made out, then by reason of the matters set out in subparagraph (a) or alternatively paragraph (b) above:
  - (i) the CEO/CFO Declarations and Assurances pleaded in paragraph 132;
  - (ii) the Directors Declarations pleaded in paragraph 133;
  - (iii) the Management Representation Letters pleaded in paragraph 134,
 were misleading or deceptive or likely to mislead or deceive;
- (d) say that each of the matters pleaded in subparagraph (a) above, or alternatively subparagraph (b) above:
  - (i) a matter that ought to have been disclosed to DTT pursuant to the terms of DTT's Retainers;
  - (ii) a matter of the type which Abboud and/or Potts and/or Fawaz (as relevant) represented had been disclosed to DTT in Management Representation Letters;
  - (iii) a matter of the type that a reasonable director or officer of a company in the position of Abboud or Potts or Fawaz (as relevant) would have disclosed to DTT;
  - (iv) a matter of the type that a reasonable auditor in the position of DTT would have expected would have been, in the circumstances, disclosed; and
- (e) say that neither Abboud nor Potts nor Fawaz (as relevant) disclosed any of the matters set out in subparagraph (a) above, or alternatively subparagraph (b) above to DTT:
  - (i) at the time Abboud and/or Potts and/or Fawaz (as relevant) became aware of each of those matters; or
  - (ii) alternatively, at a reasonable time after becoming aware of each of those matters; or
  - (iii) alternatively, at all.

136. If and to the extent Abboud or Potts is liable pursuant to the Plaintiffs' Claim in respect of loss caused to the Plaintiffs, then in light of:

- (a) the following allegations, if and to the extent they are made out:
  - (i) the Plaintiffs' allegations in the Plaintiffs' Claim against Abboud;

- (ii) the Plaintiffs' allegations in the Plaintiffs' Claim against Potts;
  - (iii) the Plaintiffs' allegations in the Plaintiffs' Claim against DSH;
  - (iv) the allegations made by the plaintiffs in Proceeding No 2017/81938 (the **Bank Case**) against Abboud;
  - (v) the allegations made by the plaintiffs in the Bank Case against Potts;
  - (vi) the allegations made by the plaintiff in Proceedings No 2017/81927 (the **Company Case**) against Abboud;
  - (vii) the allegations made by the plaintiff in the Company Case against Potts;
  - (viii) the allegations made by the plaintiff in the Company Case against Murray, Raine, Ishak, Tomlinson, Wavish and Cave (together, the **NEDs**);
- (b) further or alternatively the matters alleged in paragraphs 131 to 135;  
then Abboud and/or Potts and/or Fawaz and/or the NEDs (as applicable):
- (c) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, within the meaning of s 1041H of the Corporations Act, s 12DA of the ASIC Act and s 18 of the ACL; and
  - (d) breached his duty to DSSH and/or DSH to discharge his duties as a director and officer with reasonable care and diligence.

137. For the purposes of this defence, Deloitte:

- (a) say that the acts of Abboud and/or Potts and/or the other directors of DSSH or DSH at the relevant times (i.e. including the NEDs) (**Other Directors**) and/or Fawaz are attributable to DSSH or DSH (as relevant); and
- (b) in the premises of subparagraph (a), the contraventions of the individuals referred to in that subparagraph are contraventions of DSSH and DSH (as relevant).

### **Contributory negligence and mitigation**

138. If any of the Plaintiffs' allegations in the Plaintiffs' Claim are made out, and the Plaintiffs suffered loss thereby, then that loss was suffered by reason of the wrongdoing of Potts as set out in:

- (a) paragraph 136; and

(b) the Plaintiffs' Claim.

139. By reason of the matters set out in paragraph 138 above Deloitte's liability (if any) to Potts is to be reduced to the extent which the court considers just and equitable having regard to Potts' share in responsibility for the loss, as a result of the operation of s 1041I(1B) of the Corporations Act, s 12GF(1B) of the ASIC Act, and s 137B of the Competition and Consumer Act (**CCA**).

**Proportionate liability**

140. In respect of each claim alleged against Deloitte in the Potts Class Action Cross-Claim that is an apportionable claim for the purposes of s 34 of the CLA, s 1041L of the Corporations Act, s12GP of the ASIC Act and s87CB of the CCA (**Apportionable Claims**):

(a) if Deloitte is liable to Potts in respect of any of the Apportionable Claims, then for the reasons set out at paragraph 136 above, Abboud is a person whose acts or omissions caused the loss allegedly suffered by Potts which is the subject of the Potts Class Action Cross-Claim, and therefore:

- (i) Abboud is a "concurrent wrongdoer" within the meaning of s 34 of the CLA, s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 87CB of the CCA;
- (ii) Deloitte's liability (if any) to Potts is, by that reason, limited by s 35 of the CLA, s 1041N of the Corporations Act, 87CD of the CCA and s 12GR of the ASIC Act, to an amount reflecting that proportion of the damage or loss claimed that the Court considers is just having regard to the extent of Abboud's responsibility for that damage or loss;

(b) further or in the alternative, if Deloitte is liable to Potts in respect of any of the Apportionable Claims, then by reason of:

- (i) the matters alleged against the NEDs by the Plaintiff in the Company Case; and
- (ii) the matters stated in paragraph 133 and 135 above (in respect of the Directors' Declarations),

each of the Other Directors (as applicable) is a person whose acts or omissions caused the loss allegedly suffered by Potts which is the subject of the Potts Class Action Cross-Claim, and therefore:

- (iii) each of the Other Directors (as applicable) is a “concurrent wrongdoer” within the meaning of s 34 of the CLA, s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 87CB of the CCA;
  - (iv) Deloitte’s liability (if any) to Potts is, by that reason, limited by s 35 of the CLA, s 1041N of the Corporations Act, s 87CD of the CCA and s 12GR of the ASIC Act, to an amount reflecting that proportion of the damage or loss claimed that the Court considers is just having regard to the extent of the Other Directors’ (as applicable) responsibility for that damage or loss.
- (c) Further or in the alternative, if Deloitte is liable to Potts in respect of any of the Apportionable Claims that relate to FY2013, then by reason of the matters in paragraph 136 above, Fawaz is a person whose acts or omissions caused the loss allegedly suffered by Potts which is the subject of the Potts Class Action Cross-Claim, and therefore:
- (i) Fawaz is a “concurrent wrongdoer” within the meaning of s 34 of the CLA, s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 87CB of the ACL in respect of any loss suffered by Potts in relation to FY2013; and
  - (ii) Deloitte’s liability (if any) to Potts is, by that reason, limited by s 35 of the CLA, s 1041N of the Corporations Act, s 87CD of the CCA and s 12GR of the ASIC Act, to an amount reflecting that proportion of the damage or loss claimed that the Court considers is just having regard to the extent of Fawaz’s responsibility for that damage or loss.
- (d) Further or in the alternative, if Deloitte is liable to Potts in respect of any of the Apportionable Claims, then by reason of the matters in paragraph 136 and 137 above, DSSH and DSH are each a person whose acts or omissions caused the loss allegedly suffered by Potts which is the subject of the Potts Class Action Cross-Claim, and therefore:
- (i) DSH and DSSH (as relevant) is a “concurrent wrongdoer” within the meaning of s 34 of the CLA, s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 87CB of the CCA; and
  - (ii) Deloitte’s liability (if any) to Potts is, by that reason, limited by s 35 of the CLA, s 1041N of the Corporations Act, s 12GR of the ASIC Act, and s 87CD(1) of the CCA, to an amount reflecting that proportion of the

damage or loss claimed that the Court considers is just having regard to the extent of DSSH's or DSH's (as relevant) responsibility for that damage or loss.

**Limitation of liability – accountants' scheme / retainer**

141. In further or alternative answer to the Potts Class Action Cross-Claim, without admission and for the purposes of this defence only, Deloitte:

- (a) say that if, which is denied, Deloitte are liable for any of the loss alleged in the Potts Class Action Cross-Claim, that liability is limited in accordance with:
  - (i) the Institute of Chartered Accountants in Australia (NSW) Scheme approved under the *Professional Standards Act 1994* (NSW) (**Professional Standards Act**) commencing on 8 October 2007 (as extended);
  - (ii) the Institute of Chartered Accountants in Australia (Victoria) Scheme approved under the *Professional Standards Act 2003* (Vic) (**Professional Standards Act (Vic)**) commencing on 8 October 2007 (as extended);
  - (iii) the Institute of Chartered Accountants in Australia (NSW) Scheme approved under the Professional Standards Act commencing on 8 October 2013; or
  - (iv) the Institute of Chartered Accountants in Australia (VIC) Scheme approved under the Professional Standards Act (Vic) commencing on 8 October 2013;
  - (v) the Chartered Accountants Australia and New Zealand Professional Standards Scheme (NSW) (including as amended) approved under the Professional Standards Act commencing on 8 October 2014;
  - (vi) the Chartered Accountants Australia and New Zealand Professional Standards Scheme (Victoria) (including as amended) approved under the Professional Standards Act (Vic) commencing on 8 October 2014; and
- (b) say that, if and to the extent that the schemes pleaded in paragraph (a) above do not apply and Deloitte are liable for any loss alleged in the Potts Class Action Cross-Claim, that liability is limited in accordance with the Retainers, including but not limited to cl 12 of the Standard Terms and Conditions that form part of



the FY13 Retainer and cl 13 of the Standard Terms and Conditions that form part of the FY14 Retainer and the FY15 Retainer.

**Relief from liability – Corporations Act**

142. Further or in the alternative, in reliance on privilege against self-incrimination or privilege against exposure to penalty, Deloitte does not at this time assert a positive defence based on s 1317S (by reason of s 1041I(4)), or s 1318 of the Corporations Act but reserves their right to do so at an appropriate time.

**Civil Liability Act**

143. Further or in the alternative, in answer to the whole of the Potts Class Action Cross-Claim, Deloitte:
- (a) say that if (which is not admitted) the claims made by Potts in the Potts Class Action Cross-Claim are claims for harm resulting from negligence within the meaning of s 5A of the Civil Liability Act (**CLA**); then
  - (b) they say that, in respect of the claims in the Potts Class Action Cross-Claim, it is not appropriate for the scope of the Deloitte's liability to extend to the harm Potts allegedly suffered within the meaning of s 5D(1) of the CLA.
144. Further or in the alternative, in answer to the whole of the Potts Class Action Cross-Claim, Deloitte say that if (which is denied) any relevant risk of harm existed and was not insignificant in respect of the matters alleged in the Potts Class Action Cross-Claim, then in respect of all claims to which Part 1A of the CLA applies:
- (a) the risk of harm was obvious within the meaning of s 5F of the CLA;
  - (b) Potts is presumed to have been aware of the risk of harm, by reason of s 5G of the CLA; and
  - (c) the risk of harm was inherent, within the meaning of s 5I of the CLA.
145. Further or in the alternative, in performing the FY2013 Retainer, the FY2014 Retainer and the FY2015 Retainer, Deloitte acted in a manner that (at the time the services were provided) was widely accepted in Australia by peer professional opinion as competent professional practice within the meaning of s 5O(1) of the Civil Liability Act and accordingly are not liable for any loss or damage alleged in the Potts Class Action Cross-Claim.

## **SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Name

Angela Louise Pearsall, Clifford Chance

Capacity

Solicitor on the record

Date of signature

17 May 2019

## **PARTY DETAILS**

### **PLAINTIFFS TO PROCEEDING No. 2017/294069**

**Haliburton Charles David Findlay**, First Plaintiff

**Marian Jennifer Denny Findlay**, Second Plaintiff

### **PLAINTIFFS TO PROCEEDING No. 2018/52431**

**Epaminondas Mastoris**, First Plaintiff

**Lena Mastoris**, Second Plaintiff

### **DEFENDANTS TO PROCEEDINGS Nos. 2017/294069 and 2018/52431**

**DSHE Holdings Limited ACN 166 237 841 (receivers and managers appointed) (in liquidation)**, First Defendant / First Cross-Claimant

**Nicholas Abboud**, Second Defendant / Second Cross-Claimant

**Michael Potts**, Third Defendant / Third Cross-Claimant

**David Robert White & Ors (as listed in Schedule 1) t/as Deloitte Touche Tohmatsu (ABN 74 490 121 060)**,

4<sup>th</sup> to 457<sup>th</sup> Defendants / 4<sup>th</sup> to 454<sup>th</sup> Cross-Defendants

**SCHEDULE 1 – 2<sup>ND</sup> TO 454<sup>TH</sup> CROSS-DEFENDANTS**

<b>Cross-Defendant No.</b>	<b>Name</b>
2	Brett Douglas Streatfeild
3	Sneza Pelusi
4	James Patrick Hickey
5	Alastair Banks
6	Tara Cathy Hill
7	Paul Jeremy Klein
8	Frank Scott Farrall
9	Christopher Donald Noble
10	Alec Paul Bash Insky
11	George Nicholas Kyriakakis
12	Roan Rolles Fryer
13	Stuart Johnston
14	Kaylene O'Brien
15	Craig Patrick O'Hagan
16	Leanne Karamfiles
17	Neil Graham Smith
18	Demostanies Krallis
19	David John Lombe
20	Christian John Biermann
21	Jonathan Paul
22	Michael James Clarke
23	Roger Jeffrey
24	Rachel Andrea Foley-Lewis
25	Franco Claudio Santucci
26	Michelle Robyn Hartman
27	Matthew Christopher Saines
28	Francis Thomas
29	Robert Basker
30	Alan Eckstein
31	Donal Graham
32	Andrew Raymond Hill
33	Patrick Mclay
34	Paul Bernal Liggins
35	David Ocello
36	Paul Scott Holman
37	Paul Robert Wiebusch
38	Murray Peck
39	Julie Michelle Stanley
40	John Bland
41	Timothy Carberry
42	Alvaro Ramos

43	Graeme John Adams
44	Suzanne Archbold
45	Tim Richards
46	Timothy Geoffrey Maddock
47	Xenia Delaney
48	Reuben Saayman
49	Ronaldus Lambertus Van Beek
50	Liesbet Ann Julliette Spanjaard
51	Christophe John Richardson
52	Martin Harry Read
53	Mark Reuter
54	Stuart Thomas Ciocarelli
55	Paul Wayne Hockridge
56	Vikas Khanna
57	Paul Thomas Carr
58	Weng Yen Ching
59	Rodger Stewart Muir
60	Mark Cover
61	Robert Hillard
62	Michael John Lynn
63	Gaile Anthea Pearce
64	Isabelle Emilienne Lefevre
65	Phillip Andrew Roberts
66	Stuart Alexander Rodger
67	Paul Leonard Wensor
68	Claudio Cimetta
69	Simon Tarte
70	Stephen Charles Gustafson
71	Geoffrey William Cowen
72	Geoffrey Gill
73	Steven John Simionato
74	Jason John Handel
75	Declan O'Callaghan
76	Michael Andrew Kissane
77	Kurt Proctor-Parker
78	Richard Davies Wanstall
79	Johan Simon Duivenvoorde
80	Benjamin John Shields
81	John Meacock
82	Ian Michael Turner
83	David Harradine
84	Muhunthan Kanagaratnam
85	Marc Philipp

86	Kamlee Anne Coorey
87	Hugh William Mosley
88	Paul Masters
89	David Shane Egan
90	Alison Margaret Brown
91	Stavroula Papadatos
92	Damien Tampling
93	Alexandra Jane Spark
94	Monica Ellen Campigli
95	Craig Peter Mitchell
96	Robert John McConnel
97	Alyson Rodi
98	Andrew Charles Price
99	Mark Hadassin
100	Anthony James Robinson
101	Garry Ian Millhouse
102	Ashley Graham Miller
103	Craig Stephen Smith
104	Margaret Lynne Pezzullo
105	Adam Barringer
106	Campbell James Jackson
107	Jason Charles Crawford
108	Kevin Michael Russo
109	Adele Christine Watson
110	Neil Anthony Brown
111	Gordon James Thring
112	Brett William Greig
113	Steven James Shirtliff
114	Robert Donald Collie
115	Spyros Kotsopoulos
116	Austin John Scott
117	Jenny Lyn Wilson
118	Peter John Bars
119	Elizma Bolt
120	Stephen Thomas Harvey
121	Fiona Lea Cahill
122	Jonathan Mark Schneider
123	Michael McNulty
124	Katherine Louise Howard
125	Juliet Elizabeth Bourke
126	Peter Gerard Forrester
127	Carl Jonathan Gerrard
128	Jody Michelle Burton

129	Rachel Frances Smith
130	Peter Martin Rupp
131	Helen Elena Fisher
132	Geoffrey Ronald Sincock
133	Nicholas Harwood
134	John Clement Malcom Randall
135	Todd Kayle Fielding
136	Geoffrey Bruce Stalley
137	Russell Bradley Norman Mason
138	Paul Leon Rubinstein
139	Andrew Ignatius Muir
140	Lisa Barry
141	Alfred Alan Nehama
142	Michael Paul Stibbard
143	Paul Childers
144	Angelo Karelis
145	Sarah Caroline Woodhouse
146	Richard John Hughes
147	Christopher Robert Masterman
148	Robin Polson
149	Megan Joy Field
150	Christopher Guy Nunns
151	Clare Helen Harding
152	Simon Cook
153	Stephen Carl Tarling
154	Leslie Coleman
155	Samuel James Vorvverg
156	Helen Hamilton-James
157	Coert Grobbelaar Du Plessis
158	Stephen George Stavrou
159	Steven Christopher Cunico
160	Mark Ekkel
161	Soulla McFall
162	Leigh Matthew Pieroni
163	Mark Colin Woodley
164	Stephen James Healey
165	Sandeep Chadha
166	Margaret Clare Bower
167	Anna Victoria Crawford
168	Robert Howard Dowling
169	Greg Janes
170	Colin McKay Methven Scott
171	Richard Mark Simes

172	Dharmalingum Shunmugam Chithiray
173	Nicole Marie Vignaroli
174	John Giannakopoulos
175	Vaughan Neil Strawbridge
176	Judith Anne Donovan
177	Nicole Wakefield
178	Paula Teresa Capaldo
179	Michael Rath
180	Karen Rachel Stein
181	Brett Todd
182	Julian Craig Dolby
183	Robert Kim Arvai
184	Catherine Jane Hill
185	Richard Michael Thomas
186	Timothy John Gullifer
187	Peter James Pagonis
188	Michael Damon Cantwell
189	Joseph Frank Galea
190	Nicolette Louise Ivory
191	John Leotta
192	Darren James Hall
193	Stephen Huppert
194	Elma Von Vielligh-Louw
195	Michael Anthony Kennedy
196	Stuart James Alexander
197	Yi Mei Tsang
198	Christopher Wilson
199	Joshua David Tanchel
200	Tendal Sitenisiyo Mkwanzani
201	Richard Nigel Raphael
202	Jacqueline Ann Clarke
203	Rodney James Whitehead
204	Heather Park
205	John Lethbridge Greig
206	Adrian Charles O'Dea
207	Grant Cameron
208	Gregory Couttas
209	Steven Allan Hernyl
210	Gary John McLean
211	Jonathan Ma
212	Suzie Gough
213	Mark Douglas Ian Allsop
214	Jennifer Anne Exner



215	Ryan Quintin Hansen
216	Jamie Brian Hamilton
217	David Mark Hill
218	Jason Bruce Dunnachie
219	John Christopher McCourt
220	Gerhard Vorster
221	David John Boyd
222	Andrew Kingsley Johnstone-Burt
223	Dwayne Barrie Sleep
224	David Black
225	Gerard Michael Meade
226	Francis Patrick O'Toole
227	Tony Garrett
228	Danny Rezek
229	Mark Goldsmith
230	David Watkins
231	Patrick Broughan
232	Jeremy Drumm
233	Michael John Whyte
234	Mark Andrew Stretton
235	Weng Wee Ching
236	Robert Malcolm Spittle
237	Marisa Orbea
238	Frances Rita Borg
239	David Barrie Brown
240	David Sherwin McCloskey
241	Philip Walter Teale
242	Jan Hein Alexander Alpert
243	Katherine Anne Milesi
244	Kevin Kiazm Nevrous
245	Andrew Paul Annand
246	Carl Richard Harris
247	Philip Malcolm Moore Hardy
248	Derek Rodney Bryan
249	Gregory Gyorgy Janky
250	David John Redhill
251	Guillaume Johannes Swiegers
252	Peter Ronald Ryan
253	Brennan Ursula
254	Fiona Dawn Craig
255	Sarah Lane
256	George Stathos
257	Richard Adam Young

258	Marc Hofmann
259	Brad Joel Pollock
260	Mark Justin Kuzma
261	Warren Green
262	Stuart Osborne
263	Garry Lance Bourke
264	Andrew Vaughn Griffiths
265	Adam Powick
266	Margaret Dreyer
267	Timothy Bryce Norman
268	David McCarthy
269	Neil Pereira
270	Michael Robert Gastevich
271	Elizabeth Ann Brown
272	Lakshman Kumar Gunaratnam
273	Monish Paul
274	Alexander Collinson
275	Bruce John Williamson
276	Luke Bramwell Houghton
277	Aldrin Anthony De Zilva
278	Neil McLeod
279	Gerard Lucien Belleville
280	Michael Kaplan
281	Mark David Irving
282	Alison Lorna White
283	Haiderali Hussein
284	Martyn Charles Barrett Strickland
285	Caroline Jane Bennet
286	Christopher Robert Campbell
287	Gary Peter Doran
288	Mark Steven Wright
289	Peter Matruglio
290	John Koutsogiannis
291	Selvvyn Peter D'Souza
292	Keith William Skinner
293	Clive Charles Alan Mottershead
294	Karen Lynette Green
295	Jason Mark Thorne
296	Andrew Stuart Christopher Reid
297	Mark Richard Weaver
298	Matthew Robert Broadfoot
299	Michael Mauro De Palo
300	Peter Arthur Caldwell

301	Tracey Con Dous
302	Shelley Rae Nolan
303	Ian Grant Levi
304	Grant Arthur Hyde
305	Timothy Francis Nugent
306	Andrea Csontos
307	Geoffrey Colin Lamont
308	Christopher John Nicoloff
309	Craig Maxwell Bryan
310	Peter Madden
311	Jeremy Jurriaan Walton Cooper
312	Neil Robert Cussen
313	Robert Southern
314	Andy Peck
315	Colin Radford
316	Hendri Mentz
317	Robert Nguyen
318	Shinji Tsutsui
319	Philippa Simone Dexter
320	Timothy Fleming
321	Cynthia Hook
322	James Campbell Down
323	Kate McDonald
324	Stephen John Coakley
325	Keith Francis Jones
326	Serg Duchini
327	Stephen James Reid
328	Max Andreas Persson
329	Graham Mott
330	Anthony John Viel
331	David Joseph Murray
332	Richard Antony Jamieson
333	Bradley James Burt
334	Anthony Goroslav Buntic
335	Paul Gerard Fogarty
336	Jamie Christopher Gatt
337	Geoffrey Ian Roberts
338	Melissa Jayne Cabban
339	Matthew Fraser
340	Thomas Fredrick Viljoen
341	Julie Christine Crisp
342	Paul Bernard Riley
343	Salvatore Algeri

344	Ross Ian Jerrard
345	Avi Sharabi
346	Ian Geoffrey Sanders
347	Dale McCauley
348	Iain Maxwell Gerrard
349	David Hobbis
350	Scott Conrad Bailey
351	Stephen Gregory Brown
352	Ian Ross Harper
353	Shashi Vicknekumeran Sivayoganathan
354	Jowita Gartlan
355	Mark Ingham
356	Viswa Phani Kumar Padiseti
357	Ian Charles Thatcher
358	Ian Andrew Trevorah
359	Dennis Leslie Moth
360	Jacques Louis Van Rhyn
361	Paul Swinhoe
362	Greg Fitzgerald
363	Steven Alexander Hallam
364	Stuart Lynn Black
365	Stephen Woosnam
366	Andrew John Culley
367	Stephen James Ferris
368	Timothy Arbuckie
369	David Arnis Rumbens
370	Matthew James Williams
371	Jason Frederick Bender
372	Patrick Lane
373	Martin Paul Langridge
374	Caithlin Mary McCabe
375	Simon Alexander Wallace-Smith
376	Adrian Clyde Batty
377	Tapan Parekh
378	Masaaki Mark Nakamura
379	Roger Geoffrey McBain
380	Graeme John Hodge
381	Rick Shaw
382	Marina Ruth Stuart
383	Tom Christopher Imbesi
384	Eric Angelucci
385	Harvey Christophers
386	John Kingsley Rawson

387	Mark Richard Sercombe
388	Phillip Kravaritis
389	Gary Christie
390	Wayne Edward Walker
391	John Womack
392	Peter Grainger
393	Samantha Louise Lewis
394	Ashley Jonathon King
395	Peter Francis Williams
396	Alexander Aitken
397	Timothy Gordon Biggs
398	Ian McCall
399	Johannes Laubscher Venter
400	Roberto Dimonte
401	Alan Gordon Weeks
402	Ian John Breedon
403	Peter Michael Roberson
404	Michael David Nelson
405	Lindsay James Stanton
406	Craig Paul Johnson
407	Timothy Riordan
408	Anthony James Cipriano
409	Phil Hopwood
410	Dai-Trang Le Duncanson
411	David Jonathan Graham
412	Andre Spnovic
413	William Harold Wardrop
414	David Erskine Thompson
415	David Kyffin Willington
416	Stephen Mark Holdstock
417	Dean John Grandy
418	Harold Scott Payne
419	Jean-Marie Ab-Ghanem
420	Fraser Ross
421	Roberto Krizman
422	Caroline McGlashan
423	William Robert McAinsh
424	Osamu Uchimura
425	Glendon Moss Sanford
426	Simon James Lester
427	Stephen James Jones
428	Kristen Jay Wydell
429	John Guthrie Hood

430	Paul Martin Radici
431	Frank Klasic
432	Mark John Pittorino
433	David Anthony Cooper
434	Matthew Sheerin
435	Tony Brain
436	Henry John Kidd
437	Matt Gerald Tengu Whitesky Kuperholz
438	Gordon Pattison
439	Branko Panich
440	Julian Christopher Cheng
441	David William Pring
442	Peter Andre Jovic
443	Craig Goldberg
444	Bruce Robert Dungey
445	Dean Robert Edward Kingsley
446	David Alan Watson
447	Bernard Spencer Gild
448	Graham John Newton
449	Dwight Murray Hooper
450	Michael Rosendorfer
451	Richard Roy Porter
452	John George Azarias
453	Donna Maree Carey
454	Christopher Paul Cass