



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST

No. S E 01227 01227  
Filed on: 22/11/2023 02:04 PM

**B E T W E E N**

**ROBERT LAIRD KILAH**

First Plaintiff

-and-

**BRENDAN FRANCIS SINNAMON**

Second Plaintiff

-and-

**MEDIBANK PRIVATE LIMITED (ACN 080 890 259)**

Defendant

**DEFENCE**

---

Date of Document:	22 November 2023	Solicitors Code:	8469
Filed on behalf of:	The Defendant		
Prepared by:	King & Wood Mallesons Level 27, Collins Arch 447 Collins Street, Melbourne, VIC 3000	Telephone:	+61 3 9643 4000
		Ref:	MLS/AE 6020084264
		Email:	<a href="mailto:moira.saville@au.kwm.com">moira.saville@au.kwm.com</a> <a href="mailto:amanda.engels@au.kwm.com">amanda.engels@au.kwm.com</a>

---

Unless otherwise stated, a defined term in this Defence has the same meaning assigned to it in the statement of claim indorsed on the plaintiffs' Consolidated Writ dated 3 October 2023 (**CSOC**).

Headings and sub-headings in the CSOC have been replicated in this Defence. The Defendant (**Medibank**) does not make any admissions by the use of these headings.

In answer to the CSOC, Medibank says as follows:

**A. INTRODUCTION**

**A1. The plaintiffs and Group Members**

1. As to paragraph 1, it:

- (a) admits that the plaintiffs purport to bring the proceeding on behalf of those persons identified in the paragraph;

- (b) does not admit the existence of persons described in paragraph 1(a)(ii) of the CSOC;
- (c) does not admit that the proceeding is validly commenced by the plaintiffs as a group proceeding pursuant to Part 4A of the *Supreme Court Act* on behalf of the persons described in paragraph 1(a)(ii) of the CSOC;
- (d) denies that the plaintiffs and the persons on behalf of whom the plaintiffs purport to bring the proceeding suffered loss or damage by or resulting from the conduct alleged in the CSOC;
- (e) repeats and relies upon paragraphs 2 and 3 of this Defence; and
- (f) otherwise does not know and therefore does not admit the allegations in the paragraph.

2. As to paragraph 2, it:

- (a) says that a Robert Laird Kilah purchased 2,686 shares in Medibank which settled on 13 July 2021, and did not dispose of such shares in the Relevant Period; and
- (b) otherwise does not admit the allegations in the paragraph.

3. As to paragraph 3, it:

- (a) says that a Brendan Francis Sinnamon purchased:
  - (i) 900 shares in Medibank which settled on 28 October 2021;
  - (ii) 700 shares in Medibank which settled on 19 November 2021; and
  - (iii) 165 shares in Medibank which settled on 28 January 2022,and did not dispose of such shares during the Relevant Period;
- (b) says that a Brendan Francis Sinnamon:
  - (i) purchased 150 shares in Medibank which settled on 26 August 2019; and
  - (ii) sold 150 shares in Medibank which settled on 3 January 2020; and
- (c) otherwise does not admit the allegations in the paragraph.

4. As to paragraph 4, it:

- (a) repeats and relies upon paragraph 1 of this Defence;
- (b) admits that more than seven persons acquired MPL Shares in the Relevant Period; and

(c) otherwise does not admit the allegations in the paragraph.

**A2. Medibank**

5. It admits the allegations in paragraph 5.

6. As to paragraph 6, it admits the allegations in the paragraph, save that the Australian Company Number of Australian Health Management Group Pty Limited is ACN 003 683 298.

**A3. Directors and other officers of Medibank**

7. As to paragraph 7, it:

(a) save to say that Elizabeth Alexander AO was appointed Chairman of the Board of Medibank on 19 March 2013, admits sub-paragraph (a);

(b) save to say that Elizabeth Alexander AO was a member of the Audit and Risk Management Committee from 7 November 2008, admits sub-paragraph (b); and

(c) otherwise admits the allegations in the paragraph.

8. It admits paragraph 8.

9. It admits paragraph 9.

10. As to paragraph 10, it:

(a) save to say that David Koczkar was Chief Operating Officer Medibank from 1 May 2014 to 16 May 2016, admits the allegations in sub-paragraph (a);

(b) denies the allegations in sub-paragraph (c) and says that from 14 September 2016 to 16 May 2021 David Koczkar was the Group Executive – Chief Customer Officer of Medibank; and

(c) otherwise admits the allegations in the paragraph.

11. It admits paragraph 11.

12. It admits paragraph 12.

13. Save to say that Gerald Dalbosco is Gerard Dalbosco, it admits paragraph 13.

14. It admits paragraph 14.

15. It admits paragraph 15.

16. As to paragraph 16, it:

(a) admits sub-paragraphs (a) and (c); and

(b) denies sub-paragraph (b) and says that Linda Bardo Nicholls was a member of the Risk Management Committee from 1 June 2022 to the end of the Relevant Period.

17. As to paragraph 17:

(a) save to say that Peter Hodgett was a non-executive director of Medibank from 21 June 2013 to 18 November 2021;

(b) it otherwise admits the allegations in the paragraph.

18. It admits paragraph 18.

19. It admits paragraph 19.

20. As to paragraph 20, it:

(a) denies sub-paragraph (a) and says that Mark Rogers was the Group Executive – Chief Financial Officer of Medibank from 3 January 2017 to 21 June 2021;

(b) denies sub-paragraph (b) and says that Mark Rogers was the Group Executive – Chief Financial Officer & Group Strategy of Medibank from 22 June 2021 to the end of the Relevant Period; and

(c) admits sub-paragraph (c).

21. It admits paragraph 21.

22. Save to say that Rob Deeming was Group Executive – Customer & Brands of Medibank from 22 June 2021 to 30 July 2023, it admits paragraph 22.

23. Save to say that John Goodall was Group Executive – Technology & Operations of Medibank from December 2016 to the end of the Relevant Period, it admits paragraph 23.

24. It admits paragraph 24.

## **B. MEDIBANK'S BUSINESS AND THE CONTEXT IN WHICH IT OPERATED**

### **B1. Medibank's business**

25. As to paragraph 25, it:

(a) admits that Medibank was registered under the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) from 1 July 2015;

(b) in the premises of sub-paragraph (a) of this Defence, admits the allegation in sub-paragraph (b) of the CSOC;

- (c) admits the allegation in sub-paragraph (c) of the CSOC and says that during the Relevant Period Medibank, through the Medibank fund:
  - (i) underwrote and distributed private health insurance policies under the “Medibank”, “ahm” and “ahm health insurance” brands; and
  - (ii) provided private health insurance to holders of private health insurance policies;
- (d) says that during the Relevant Period Medibank was a leading private health insurer in Australia; and
- (e) otherwise denies the allegations in the paragraph.

26. As to paragraph 26, it:

- (a) says that, in the course of customers applying for health insurance policies, from time to time Medibank obtained:
  - (i) the customer’s full name and gender, date of birth, address, telephone numbers, email addresses, Medicare number, and/or personal banking details; and
  - (ii) in relation to Overseas Students Health Cover policies only, the customer’s passport details;
- (b) says that Medibank, in considering or processing claims made by customers, obtained from time to time details of customers’ medical procedures, health services, codes associated with diagnoses and procedures and/or hospital admissions;
- (c) says that some of the information identified in sub-paragraphs (a) and (b) above, met the definition of one or more of “identification information”, “personal information” or “health information” (and therefore “sensitive information”) within the meaning of the *Privacy Act 1988* (Cth); and
- (d) otherwise denies the allegations in the paragraph.

**B2. Cyber-attack risks faced by Medibank**

27. As to paragraph 27, it:

- (a) repeats and relies upon paragraph 26 of this Defence;

(b) repeats and relies upon paragraphs 81, 83, 85 and 87 of this Defence and admits that at all times in the Relevant Period there was a risk that Medibank may be a target of cyber attacks; and

(c) otherwise denies the allegation in the paragraph.

28. As to paragraph 28, it:

(a) repeats and relies upon paragraph 26 of this Defence; and

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

29. As to paragraph 29, it:

(a) repeats and relies upon paragraphs 26 and 27 of this Defence;

(b) admits that at all times in the Relevant Period Medibank knew that there was a risk that it may be a target of cyber attacks; and

(c) otherwise denies the allegations in the paragraph.

**B3. The relevant regulatory landscape with respect to the collection, storage and processing of Personal and Sensitive Data and Health Claims Information**

*B3.1 The Privacy Act and the Australian Privacy Principles*

30. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 30.

31. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 31.

32. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 32.

33. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 33.

34. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 34.

35. Save that it says that it will rely on the full text and effect of the Privacy Act, it admits the allegations in paragraph 35.

36. Paragraph 36 does not contain any allegations against it, and therefore it does not plead to the paragraph.

*B3.2 Australian Prudential Regulation Authority Prudential Standards*

37. As to paragraph 37, it:

- (a) admits the allegations in the paragraph with respect to the Relevant Period;
- (b) relies on the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) for its full force and effect; and
- (c) otherwise says the time period is not identified with any precision and therefore it does not admit the allegations.

38. It admits paragraph 38.

39. It admits paragraph 39.

40. It admits paragraph 40.

41. It admits paragraph 41.

42. It admits paragraph 42.

43. As to paragraph 43, it:

- (a) repeats and relies upon paragraph 25(a) and (b) of this Defence;
- (b) admits that Medibank was an “APRA-regulated entity” within the meaning of CPS 234 during the Relevant Period;
- (c) says that Medibank was an “APRA-regulated institution” within the meaning of CPS 220 during the Relevant Period;
- (d) denies that ahm was a “private health insurer” within the meaning of the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth); and
- (e) otherwise denies the allegations in the paragraph.

44. As to paragraph 44, it:

- (a) repeats and relies upon paragraphs 37, 40, 42 and 43 of this Defence;
- (b) admits the allegations insofar as the allegations are made in respect of Medibank; and
- (c) otherwise denies the allegations in the paragraph.

45. As to paragraph 45, it:

- (a) says that, during the Relevant Period, the term “ensure” in CPS 234 when used in relation to the responsibility of the board, meant to take all reasonable steps and

make all reasonable enquiries as are appropriate for a board so that the board can determine, to the best of its knowledge, that the stated matter has been properly addressed;

### **Particulars**

Prudential Standard CPS 234, paragraph 7.

Prudential Standard HPS 001, paragraph 5.

(b) relies on CPS 234 for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

46. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 46.

47. As to paragraph 47, it:

(a) repeats and relies upon paragraph 40 of this Defence;

(b) relies on CPS 234 for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

48. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 48.

49. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 49.

50. As to paragraph 50, it:

(a) repeats and relies upon paragraph 40 of this Defence;

(b) relies on CPS 234 for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

51. As to paragraph 51, it:

(a) repeats and relies upon paragraph 40 of this Defence;

(b) relies on CPS 234 for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

52. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 52.

53. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 53.
54. As to paragraph 54, it:
- (a) repeats and relies upon paragraph 40 of this Defence;
  - (b) relies on CPS 234 for its full text and effect; and
  - (c) otherwise admits the allegations in the paragraph.
55. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 55.
56. As to paragraph 56, it:
- (a) repeats and relies upon paragraph 45(a) of this Defence;
  - (b) relies on CPS 234 for its full text and effect; and
  - (c) otherwise admits the allegations in the paragraph.
57. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 57.
58. As to paragraph 58, it:
- (a) repeats and relies upon paragraphs 40 and 45(a) of this Defence;
  - (b) relies on CPS 234 for its full text and effect; and
  - (c) otherwise admits the allegations in the paragraph.
59. As to paragraph 59, it:
- (a) repeats and relies upon paragraph 45(a) of this Defence;
  - (b) relies on CPS 234 for its full text and effect; and
  - (c) otherwise admits the allegations in the paragraph.
60. Save that it says that it will rely on the full text and effect of CPS 234, it admits the allegations in paragraph 60.
61. As to paragraph 61, it:
- (a) repeats and relies upon paragraph 43 of this Defence and says that CPS 220 applies to an APRA-regulated institution;
  - (b) denies that CPS 220 applies to an APRA-regulated entity;

- (c) says further that, during the Relevant Period, the term “ensure” in CPS 220 when used in relation to the responsibility of the board, meant to take all reasonable steps and make all reasonable enquiries as are appropriate for a board so that the board can determine, to the best of its knowledge, that the stated matter had been properly addressed;

**Particulars**

Prudential Standard CPS 220, paragraph 6.

Prudential Standard HPS 001, paragraph 5.

- (d) relies on CPS 220 for its full text and effect; and
- (e) otherwise admits the allegations in the paragraph.

62. As to paragraph 62, it:

- (a) repeats and relies upon paragraph 43 of this Defence and says that CPS 220 applies to an APRA-regulated institution;
- (b) denies that CPS 220 applies to an APRA-regulated entity;
- (c) relies on CPS 220 for its full text and effect; and
- (d) otherwise admits the allegations in the paragraph.

63. As to paragraph 63, it:

- (a) repeats and relies upon paragraph 43 of this Defence and says that CPS 220 applies to an APRA-regulated institution;
- (b) denies that CPS 220 applies to an APRA-regulated entity;
- (c) relies on CPS 220 for its full text and effect; and
- (d) otherwise admits the allegations in the paragraph.

64. As to paragraph 64, it:

- (a) repeats and relies upon paragraph 43 of this Defence and says that CPS 220 applies to an APRA-regulated institution;
- (b) denies that CPS 220 applies to an APRA-regulated entity;
- (c) relies on CPS 220 for its full text and effect; and
- (d) otherwise admits the allegations in the paragraph.

*B3.3 Medibank's Essential Cyber Security Requirements*

65. As to paragraph 65, it:

- (a) repeats and relies upon paragraphs 25 to 64 of this Defence; and
- (b) otherwise denies the allegations in the paragraph.

66. As to paragraph 66, it:

- (a) repeats and relies upon paragraphs 25 to 64 of this Defence; and
- (b) otherwise denies the allegations in the paragraph.

67. Paragraph 67 does not contain any allegations against it, and therefore it does not plead to the paragraph.

*B3.4 Office of the Australian Information Commissioner & the Australian Prudential Regulation Authority*

68. As to paragraph 68, it:

- (a) repeats and relies upon paragraph 26 of this Defence;
- (b) says that the functions of the Information Commissioner are as stated in s 27 of the Privacy Act;
- (c) relies on the Privacy Act for its full text and effect; and
- (d) otherwise admits the allegations in the paragraph.

69. As to paragraph 69:

- (a) it repeats and relies upon paragraph 68 of this Defence;
- (b) it admits the allegations in sub-paragraphs (a) and (b);
- (c) as to sub-paragraph (c), it:
  - (i) says that the Information Commissioner's power pursuant to s 40(2) of the Privacy Act is in respect of the interference with the privacy of an individual or a breach of Australian Privacy Principle 1; and
  - (ii) otherwise admits the allegations in the sub-paragraph;
- (d) as to sub-paragraph (d), it:
  - (i) says that pursuant to s 52(1)(b)(iii) of the Privacy Act, the Information Commissioner has the power, after investigating a complaint, to find the complaint substantiated and make a determination, including a declaration

that the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;

- (ii) relies on the Privacy Act for its full text and effect; and
- (iii) otherwise admits the allegations in the sub-paragraph.

70. As to paragraph 70, it:

- (a) repeats and relies upon paragraphs 6, 25, 43 and 44 of this Defence;
- (b) relies on the *Private Health Insurance (Prudential Supervision) Act 2015* (Cth) for its full text and effect; and
- (c) otherwise admits the allegations in the paragraph.

*B3.5 Risks posed by enforcement or other regulatory action*

71. As to paragraph 71, it:

- (a) repeats and relies upon paragraph 43 of this Defence;
- (b) says that the paragraph is vague and embarrassing and does not allege a material fact relevant to any cause of action alleged by the plaintiffs and is therefore liable to be struck out; and
- (c) under cover of the above objections, denies the allegations in the paragraph.

72. As to paragraph 72, it:

- (a) repeats and relies upon paragraphs 68 to 70 of this Defence;
- (b) says that the paragraph is vague and embarrassing and does not allege a material fact relevant to any cause of action alleged by the plaintiffs and is therefore liable to be struck out; and
- (c) under cover of those objections, denies the allegations in the paragraph.

73. As to paragraph 73, it:

- (a) repeats and relies upon paragraphs 27, 65, 93, 95, 97, 99, 103, 105, 107, 109, 111 and 113 of this Defence;
- (b) says that the paragraph is vague and embarrassing and does not allege a material fact relevant to any cause of action alleged by the plaintiffs and is therefore liable to be struck out; and

(c) under cover of those objections, denies the allegations in the paragraph.

**C. 2022 DATA BREACH**

74. It admits paragraph 74.

75. It admits the allegation in paragraph 75 and says further that:

(a) at a date prior to 12 October 2022, access credentials to Medibank’s network used by a third-party IT service provider were obtained by an unauthorised third party **(Threat Actor)**;

(b) the Threat Actor used those compromised credentials to access Medibank’s network through a misconfigured firewall which did not require an additional digital security certificate.

**Particulars**

- A. At the time the Threat Actor accessed Medibank’s network, Medibank was using Palo Alto Networks’ firewall appliances.
- B. GlobalProtect is Palo Alto Networks’ remote access solution which provides a virtual private network (**VPN**) connection to devices.
- C. The GlobalProtect firewalls contain authentication settings which define how users can authenticate from an external network to Medibank’s network through the GlobalProtect VPN.
- D. The ‘Client Authentication’ configuration in the GlobalProtect firewalls contains settings, including a setting called “Allow Authentication with User Credentials OR Client Certificate” which has the following options:
  - “No (User Credentials AND Client Certificate Required)”
  - “Yes (User Credentials OR Client Certificate Required)”
- E. At or around the time of access by the Threat Actor, the “Allow Authentication with User Credentials OR Client Certificate” setting was misconfigured “Yes (User Credentials OR Client Certificate Required)”, which meant that the Threat Actor was able to access Medibank’s network using the credentials. The “Allow Authentication

with User Credentials OR Client Certificate” setting should have been configured “No (User Credentials AND Client Certificate Required)”, which would have required the Threat Actor to have both user credentials (being username and password) and a Medibank digital security certificate to access Medibank’s network through the GlobalProtect VPN.

76. It admits paragraph 76 with respect to the Threat Actor.

77. It admits paragraph 77 with respect to the Threat Actor.

78. It admits paragraph 78 with respect to the Threat Actor.

79. It admits paragraph 79 with respect to the Threat Actor.

#### **D. MEDIBANK’S REPRESENTATIONS TO THE MARKET**

##### **D1. Medibank’s statements**

###### *D1.1 Medibank’s 2016 statements*

80. It admits paragraph 80.

81. As to paragraph 81, it:

- (a) says that the FY16 Financial Report contained the following statement at page 6:  
*“Medibank may be affected by cyber-attacks or failure in critical data, processes or systems. IT controls are continually under review and are protected through the use of detective, preventative and response tools”;*
- (b) relies on the FY16 Financial Report for its full text and effect; and
- (c) otherwise admits the allegations in the paragraph.

82. It admits paragraph 82.

83. As to paragraph 83, it:

- (a) relies on the 2016 Annual Report for its full text and effect; and
- (b) otherwise admits the allegations in the paragraph.

###### *D1.2 Medibank’s 2017 statements*

84. It admits paragraph 84.

85. As to paragraph 85, it:

- (a) relies on the FY17 Financial Report for its full text and effect; and

(b) otherwise admits the allegations in the paragraph.

86. It admits paragraph 86.

87. As to paragraph 87, it:

(a) relies on the 2017 Annual Report for its full text and effect; and

(b) otherwise admits the allegations in the paragraph.

#### *D1.3 Medibank's 2018 statements*

88. It admits paragraph 88.

89. As to paragraph 89, it:

(a) says that the FY18 Financial Report contained the following statements under the heading "*Material business risks*" at page 9:

(i) "*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*";

(ii) "*Regulatory compliance Failure to comply with regulatory requirements*";

(b) relies on the FY18 Financial Report for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

90. It admits paragraph 90.

91. As to paragraph 91, it:

(a) says that the 2018 Annual Report contained the following statements under the heading "*Material business risks*" at page 24:

(i) "*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*";

(ii) "*Regulatory compliance Failure to comply with regulatory requirements*";

(b) relies on the 2018 Annual Report for its full text and effect; and

(c) otherwise admits the allegations in the paragraph.

#### *D1.4 Medibank's 2019 statements*

92. It admits paragraph 92.

93. As to paragraph 93, it denies the allegations in the paragraph and:

(a) says the FY19 Financial Report contained the following statement under the heading "*Material business risks*" at page 9:

*“Medibank has established risk management policies and procedures for identifying, assessing, monitoring and reporting operational risks and controls. This includes the important areas of information security, technology, business continuity, outsourcing, fraud and people risks. Management of operational risk is overseen by divisional risk committees, the Executive Risk Committee and the Board’s Risk Management Committee”;*

- (b) says that the FY19 Financial Report also contained the following statements under the heading *“Material business risks”* at page 9:
  - (i) *“Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events.”;* and
  - (ii) *“Regulatory compliance Failure to comply with regulatory requirements”;*  
and
- (c) relies on the FY19 Financial Report for its full text and effect.

94. It admits paragraph 94.

95. As to paragraph 95, it:

- (a) admits the allegations in the paragraph;
- (b) says that the 2019 Annual Report contained the following statements under the heading *“Material business risks”* at page 28:
  - (i) *“Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events.”;* and
  - (ii) *“Regulatory compliance Failure to comply with regulatory requirements”;*  
and
- (c) relies on the 2019 Annual Report for its full text and effect.

#### *D1.5 Medibank’s 2020 statements*

96. It admits paragraph 96.

97. As to paragraph 97, it:

- (a) admits the allegations in the paragraph;

(b) says that the FY20 Financial Report contained the following statements under the heading “*Material business risks*”:

(i) at page 8: “*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events.*”;

and

(ii) at page 9: “*Regulatory compliance Failure to comply with regulatory requirements*”; and

(c) relies on the FY20 Financial Report for its full text and effect.

98. It admits paragraph 98.

99. As to paragraph 99, it:

(a) admits the allegations in the paragraph;

(b) says that the 2020 Annual Report contained the following statements under the heading “*Material business risks*”:

(i) at page 28: “*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events.*”;

and

(ii) at page 29: “*Regulatory compliance Failure to comply with regulatory requirements*”; and

(c) relies on the 2020 Annual Report for its full text and effect.

100. It admits paragraph 100.

101. As to paragraph 101, it:

(a) relies on the 2020 Sustainability Report for its full text and effect; and

(b) otherwise admits the allegations in the paragraph.

#### *D1.6 Medibank’s 2021 statements*

102. It admits paragraph 102.

103. As to paragraph 103, it:

(a) admits the allegations in the paragraph;

(b) says that the FY21 Financial Report contained the following statements under the heading “*Material business risks*”:

(i) at page 8: “*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*”;  
and

(ii) at page 9: “*Regulatory compliance Failure to comply with regulatory requirements*”; and

(c) relies on the FY21 Financial Report for its full text and effect.

104. It admits paragraph 104.

105. As to paragraph 105, it:

(a) admits the allegations in the paragraph;

(b) says that the 2021 Annual Report contained the following statements under the heading “*Material business risks*”:

(i) at page 28: “*Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*”;  
and

(ii) at page 29: “*Regulatory compliance Failure to comply with regulatory requirements*”; and

(c) relies on the 2021 Annual Report for its full text and effect.

106. It admits paragraph 106.

107. As to paragraph 107, it:

(a) admits sub-paragraphs (a) to (f) and (h) to (p);

(b) admits sub-paragraph (g) save that it says that the initial words of the statement were “*How we store and use information*” and not “*How we store and use personal information*”;

(c) says that the 2021 Sustainability Report also contained the following statements:

(i) at page 20:

## Information security and data breaches

	FY21	FY20	FY19	FY18
Total number of information security breaches or other cybersecurity incidents*	1	3	1	3
Total number of data breaches**	0	0	1	0
Total number of notifiable data breaches**	1	3	2	3
Total amount of fines/penalties paid in relation to information security breaches or other cybersecurity incident	0	0	0	0

### NIST guidance used

\* An occurrence that actually or potentially jeopardises the confidentiality, integrity, or availability of an information system or that constitutes a violation or imminent threat of violating security policies, security procedures, or acceptable use policies.

\*\* An incident that involves sensitive, protected, or confidential information being copied, transmitted, viewed, stolen, or used by an individual unauthorised to do so. Exposed information may include credit card numbers, personal health information, customer data, company trade secrets, or matters of national security.

Notifiable data breaches (NDB) have been reportable to the Privacy Commissioner under the Privacy Act since 2018. These are privacy breaches that cause or are likely to result in serious harm to one or more individuals. Some NDB events also amount to information security incidents under CPS234.

(ii) at page 62: *“Risk description...Operational The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events”*; and

(iii) at page 63: *“Risk description...Regulatory compliance Failure to comply with regulatory requirements”*; and

(d) relies on the 2021 Sustainability Report for its full text and effect.

### D1.7 Medibank’s 2022 statements

108. It admits paragraph 108.

109. As to paragraph 109, it:

(a) admits the allegations in the paragraph;

(b) says that the FY22 Financial Report contained the following statement under the heading *“Material business risks”* at page 8:

(i) *“Operational (including regulatory compliance) The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events.”*; and

(c) relies on the FY22 Financial Report for its full text and effect.

110. It admits paragraph 110.

111. As to paragraph 111, it:

(a) admits the allegations in the paragraph;

(b) says that the 2022 Annual Report contained the following statement under the heading “*Material business risks*” at page 28:

(i) “*Operational (including regulatory compliance) The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*”; and

(c) relies on the 2022 Annual Report for its full text and effect.

112. It admits paragraph 112.

113. As to paragraph 113, it:

(a) admits sub-paragraphs (a) to (h) and (j) to (s);

(b) says that the 2022 Sustainability Report contained the following statements under the heading “*Material business risks*”:

(i) at page 66: “*Operational (including regulatory compliance) The risk of financial loss resulting from inadequate or failed internal processes, people and systems or from external events*”;

(ii) at page 67: “*Emerging risks (including ESG risks) - Heightened cyber risk associated with the geopolitical environment*”;

(iii) at page 69: “*We continue strengthening our privacy and data security foundations to ensure we can adapt and rapidly respond to changing and increasingly complex digital/cyber environments*”;

(iv) at page 70: “*Over the next 12 months we’ll be reviewing our existing security model to identify opportunities to further enhance our existing security model to identify opportunities to further enhance how we keep our customers’ data secure and private, and secure our systems and processes as we continue to grow as a health company*”;

(v) at page 71: “*Of the five notable data breaches we reported this year, two were in relation to unauthorised access to a customer’s health insurance online account by a potential third party (fraud syndicate) both likely due to compromised customer credentials. Two were due to human error in processing account changes and one incident involved an employee who*

*inadvertently disclosed an employee’s personal information to another employee”;*

(vi) at page 71:

Information security and data breaches  

	FY22	FY21	FY20	FY19
Total number of information security or other cybersecurity incidents*	0	1	3	1
Total number of cybersecurity data breaches**	0	0	0	1
Total number of notifiable privacy data breaches***	5	1	3	2
Total amount of fines/penalties paid in relation to information security breaches or other cybersecurity incidents	0	0	0	0

**NIST guidance used**

\* An occurrence that actually or potentially jeopardises the confidentiality, integrity, or availability of an information system or that constitutes a violation or imminent threat of violating security policies, security procedures, or acceptable use policies.

\*\* An incident that involves a security breach or cybersecurity incident involving sensitive, protected or confidential information being copied, transmitted, stolen, disclosed to, or used by a malicious party without authority to do so. Exposed information may include credit card numbers, personal health information, customer data, company trade secrets, or matters of national security.

\*\*\* An incident that involves sensitive or personal information being accessed or disclosed by an individual unauthorised to do so and meets the relevant regulatory thresholds for reporting. Exposed information may include credit card numbers, personal health information or customer data. Notifiable privacy data breaches (NDB) have been reportable to the Privacy Commissioner under the Privacy Act since 2018. These are privacy breaches that are likely to result in serious harm to one or more individuals. Some NDB events also amount to information security incidents under APRA Prudential Standard CPS234.

(c) otherwise denies the allegations in the paragraph.

**D1.8 Medibank’s statements in its Privacy Policies**

114. It admits paragraph 114.

115. It admits paragraph 115.

116. It admits paragraph 116 and says that the Privacy Web Text was published throughout the Relevant Period.

117. As to paragraph 117, it:

(a) says that the Privacy Web Text stated:

(i) *“We are bound by laws governing how we collect and use your personal information including the Privacy Act 1988 (Cth) and other State and Territory laws such as the Health Records Act 2001 (Vic), Health Records (Privacy and Access) Act 1997 (ACT), the Health Records and Information Privacy Act 2002 (NSW), and the Health Information Privacy Code 1994 in New Zealand ...”;*

(ii) *“How we hold your personal information We aim to store your information securely and have a range of security controls in place (including physical, technical and procedural safeguards) designed to protect your personal*

*information. Our employees and contractors regularly receive targeted privacy training. We take reasonable steps to make sure that the personal information about you - that we collect, use and disclose - is accurate, complete, up to date and relevant.”;*

(iii) *“When and how we dispose of your personal information We seek to keep your personal information for only as long as it is required in order to provide you with products and services or to legitimately comply with our business and legal obligations and requirements. When it is no longer needed for these purposes, we may destroy or permanently de-identify this personal information ...”;*

(iv) *“De-identifying your information Where both possible and in our view - appropriate, where using your personal information, we will seek to de-identify it, so that your identity is not readily ascertainable from the de-identified information or from triangulating your de-identified information with other sources of information.”; and*

(b) otherwise denies the allegations in the paragraph.

## **D2. Medibank’s Representations**

### *D2.1 Medibank’s CPS 234 Compliance Representation*

118. As to paragraph 118, it:

- (a) repeats and relies upon paragraphs 100, 101 and 150 of this Defence;
- (b) says that it represented only that its information systems and management procedures led it to hold the opinion that it was compliant with CPS 234 and that it had a reasonable basis for that opinion; and
- (c) denies the allegations in the paragraph.

### *D2.2 Medibank’s Cyber Security Representations*

119. As to paragraph 119, it:

- (a) repeats and relies upon paragraphs 80 to 101 and 121 to 124 of this Defence; and
- (b) denies the allegations in the paragraph.

120. As to paragraph 120, it:

- (a) repeats and relies upon paragraphs 100 to 113, 119 and 121 to 124 of this Defence; and
- (b) denies the allegations in the paragraph.

121. As to paragraph 121, it:

- (a) repeats and relies upon paragraphs 27, 65, 80 to 113 and 150 of this Defence;
- (b) denies the allegations in the paragraph; and
- (c) says that if the representation in the terms alleged at paragraph 121 of the CSOC was made (which is denied), any such representation was a statement of opinion that Medibank had a reasonable basis for holding.

#### *D2.3 Medibank's Appropriate Access Representation*

122. As to paragraph 122, it:

- (a) repeats and relies upon paragraphs 65, 80 to 113 and 150 of this Defence;
- (b) denies the allegations in the paragraph; and
- (c) says that if the representation in the terms alleged at paragraph 122 of the CSOC was made (which is denied), any such representation was a representation of opinion that Medibank had a reasonable basis for holding.

#### *D2.4 Medibank's Standards Consistency Representation*

123. As to paragraph 123, it:

- (a) repeats and relies upon paragraphs 80 to 113 and 150 of this Defence;
- (b) denies the allegations in the paragraph; and
- (c) says that if the representation in the terms alleged at paragraph 123 of the CSOC was made (which is denied), any such representation was a representation of opinion that Medibank had a reasonable basis for holding.

#### *D2.5 Medibank's Privacy Laws Compliance Representation*

124. As to paragraph 124, it:

- (a) repeats and relies upon paragraphs 65, 80 to 113 and 150 of this Defence;
- (b) denies the allegations in the paragraph; and

- (c) says that if the representation in the terms alleged at paragraph 124 of the CSOC was made (which is denied), any such representation was a representation of opinion that Medibank had a reasonable basis for holding.

*D2.6 Continuing representations*

125. As to paragraph 125, it:

- (a) repeats and relies upon paragraphs 118 to 124 of this Defence;
- (b) says that the allegation that “Medibank did not qualify or contradict” Medibank’s CPS 234 Compliance Representation, Medibank’s Cyber Security Representations, Medibank’s Appropriate Access Representation, Medibank’s Standards Consistency Representation or Medibank’s Privacy Laws Compliance Representation is embarrassing because the alleged representations could not have been qualified or contradicted from a date prior to the date on which they are alleged to have been made;
- (c) says that if each of Medibank’s CPS 234 Compliance Representation, Medibank’s Cyber Security Representations, Medibank’s Appropriate Access Representation, Medibank’s Standards Consistency Representation or Medibank’s Privacy Laws Compliance Representation were made in the terms alleged (which is denied), Medibank also made each of the statements at:
  - (i) paragraphs 83(a), 85(a), 87(a), 101(g), 101(h), 107(i), 107(j) and 113(g) of the CSOC; and
  - (ii) paragraphs 81(a), 93(a), 93(b), 95(b), 97(b), 99(b), 103(b), 105(b), 107(c), 109(b), 111(b) and 113(b) of this Defence;
- (d) says that if each of Medibank’s CPS 234 Compliance Representation, Medibank’s Cyber Security Representations, Medibank’s Appropriate Access Representation, Medibank’s Standards Consistency Representation or Medibank’s Privacy Laws Compliance Representation were made in the terms alleged (which is denied), the statements at paragraphs 80 to 113 of the CSOC were point in time disclosures; and
- (e) denies the allegations in the paragraph.

126. As to paragraph 126, it:
- (a) repeats and relies upon paragraphs 118 to 125 of this Defence;
  - (b) says that the allegation that each of the CPS 234 Compliance Representation, Medibank's Cyber Security Representations, Medibank's Appropriate Access Representation, Medibank's Standards Consistency Representation and Medibank's Privacy Laws Compliance Representation were "continuing representations" is embarrassing in that it does not identify the basis upon which each representation is said to be "continuing"; and
  - (c) under cover of the objection in sub-paragraph (b) above, denies the allegations in the paragraph.

**E. THE TRUE POSITION**

127. As to paragraph 127, it:
- (a) repeats and relies upon paragraphs 27, 65, 66, 75 and 143(b) of this Defence;
  - (b) by reason of paragraph 75 of this Defence, admits that it did not have multifactor authentication in the terms alleged in paragraph 127(c) of the CSOC appropriately configured on the GlobalProtect VPN firewall during the period between on or around 12 March 2021 and 15 October 2022; and
  - (c) otherwise denies the allegations in the paragraph.
128. As to paragraph 128, it:
- (a) repeats and relies upon paragraph 127 of this Defence; and
  - (b) denies the allegations in the paragraph.
129. As to paragraph 129, it:
- (a) repeats and relies upon paragraphs 127 and 128 of this Defence; and
  - (b) denies the allegations in the paragraph.
130. As to paragraph 130, it:
- (a) repeats and relies upon paragraph 127 to 129 of this Defence; and
  - (b) denies the allegations in the paragraph.
131. As to paragraph 131, it:
- (a) repeats and relies upon paragraph 128 of this Defence; and

(b) denies the allegations in the paragraph.

**F. MISLEADING OR DECEPTIVE CONDUCT**

132. As to paragraph 132, it:

(a) repeats and relies upon paragraphs 118 to 126 of this Defence;

(b) admits that, to the extent that the alleged representations pleaded at paragraphs 118, 121, 122, 123 and 124 of the CSOC were made (which is denied), the making of those representations was conduct engaged in by Medibank:

(i) in relation to financial products within the meaning of s 1041H(1) of the Corporations Act;

(ii) in trade or commerce in relation to financial services within the meaning of s 12DA of the ASIC Act; and/or

(iii) in trade or commerce within the meaning of s 18 of the ACL; and

(c) otherwise denies the allegations in the paragraph.

**F1. Medibank's CPS 234 Compliance Representation**

133. As to paragraph 133, it:

(a) repeats and relies upon paragraphs 118, 125 to 127 and 148 of this Defence; and

(b) denies the allegations in the paragraph.

134. As to paragraph 134, it:

(a) repeats and relies upon paragraphs 132 and 133 of this Defence; and

(b) denies the allegations in the paragraph.

**F2. Medibank's Cyber Security Representations Contravention**

135. As to paragraph 135, it:

(a) repeats and relies upon paragraphs 119 to 121 and 125 to 131 of this Defence; and

(b) denies the allegations in the paragraph.

136. As to paragraph 136, it:

(a) repeats and relies upon paragraphs 132 and 135 of this Defence; and

(b) denies the allegations in the paragraph.

### **F3. Medibank's Appropriate Access Representation Contravention**

137. As to paragraph 137, it:

- (a) repeats and relies upon paragraphs 119 to 120, 122 and 125 to 131 of this Defence; and
- (b) denies the allegations in the paragraph.

138. As to paragraph 138, it:

- (a) repeats and relies upon paragraphs 132 and 137 of this Defence; and
- (b) denies the allegations in the paragraph.

### **F4. Medibank's Standards Consistency Representation Contravention**

139. As to paragraph 139, it:

- (a) repeats and relies upon paragraphs 119 to 120, 123 and 125 to 131 of this Defence; and
- (b) denies the allegations in the paragraph.

140. As to paragraph 140, it:

- (a) repeats and relies upon paragraphs 132 and 139 of this Defence; and
- (b) denies the allegations in the paragraph.

### **F5. Medibank's Privacy Laws Compliance Representation Contravention**

141. As to paragraph 141, it:

- (a) repeats and relies upon paragraphs 119 to 120 and 124 to 131 of this Defence; and
- (b) denies the allegations in the paragraph.

142. As to paragraph 142, it:

- (a) repeats and relies upon paragraphs 132 and 141 of this Defence; and
- (b) denies the allegations in the paragraph.

## **G. CONTINUOUS DISCLOSURE CONTRAVENTIONS**

### **G1. MFA Information**

143. As to paragraph 143, it:

- (a) repeats and relies upon paragraphs 75 and 127 of this Defence;
- (b) admits that between on or around 12 March 2021 and 15 October 2022 it had a misconfigured firewall which did not require an additional digital security certificate

for users accessing Medibank's network through the GlobalProtect VPN (**VPN Access Misconfiguration**);

#### **Particulars**

Medibank repeats and relies upon the particulars sub-joined to paragraph 75 of this Defence.

- (c) says that other than in respect of the VPN Access Misconfiguration, it had multifactor authentication in the terms alleged in paragraph 127(c) of the CSOC for all persons with access to its network and otherwise denies the allegations in the paragraph.

#### **G2. Lack of Network Control System Information**

144. It denies paragraph 144.

#### **G3. The Cyber Security Failure and Compliance Deficiencies Information**

145. As to paragraph 145, it:

- (a) repeats and relies upon paragraphs 127 to 131 of this Defence; and  
(b) denies the allegations in the paragraph.

#### **G4. The Cyber Security Standards Non-Compliance Information**

146. As to paragraph 146, it:

- (a) repeats and relies upon paragraph 145 of this Defence; and  
(b) denies the allegations in the paragraph.

#### **G5. The Cyber Attack Vulnerability Information**

147. As to paragraph 147, it:

- (a) repeats and relies upon paragraph 145 of this Defence; and  
(b) denies the allegations in the paragraph.

#### **G6. Breach of CPS 234 Information**

148. As to paragraph 148, it:

- (a) repeats and relies upon paragraphs 40 and 143 to 147 of this Defence; and  
(b) denies the allegations in the paragraph.

#### **G7. Contravention of s 674(2) of the Corporations Act**

149. As to paragraph 149, it:

(a) says that at all times in the Relevant Period, ASX Listing Rule 3.1 provided:

*“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.”;* and

(b) says further that at all times in the Relevant Period, ASX Listing Rule 3.1A provided:

*“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 the 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.”;*

(c) relies on s 111AP(1), s 674(1) and s 674(2) of the Corporations Act and ASX Listing Rules 3.1 and 3.1A for their full text and effect; and

(d) otherwise admits the allegations in the paragraph.

150. As to paragraph 150, it denies the allegations and says further that:

(a) it repeats and relies upon paragraphs 143 to 149 of this Defence;

- (b) the allegation is deficient and embarrassing as it does not identify who within Medibank is alleged ought reasonably to have come into possession of the Material Information by at least the beginning of the Relevant Period;
- (c) at all times during the Relevant Period, Medibank had in place systems to report on its information systems and compliance (**Ongoing Monitoring Process**);

#### **Particulars**

By the beginning of the Relevant Period and during the Relevant Period, the Risk Management Committee received bi-annual Technology Health Reports (**Technology Health Reports**).

- (d) at all times during the Relevant Period, Medibank had in place an annual process for reviewing its information systems, including for the purpose of compliance with CPS 234 (**Annual Audit Process**);

#### **Particulars**

- A. The Annual Audit Process for the years ending 30 June 2019, 30 June 2020, 30 June 2021 and 30 June 2022 included the following process being undertaken in each of those years:
  - (i) An **Internal Audit Plan** was approved by the Audit Committee;
  - (ii) The Internal Audit Plan included proposed **Internal Audit Projects** planned for each financial year period;
  - (iii) The findings of each Internal Audit Project was reported to the Audit Committee and the Risk Management Committee by provision of the Internal Audit Project Reports.
- B. By the beginning of the Relevant Period and during the Relevant Period, the following **Internal Audit Project Reports** in relation to information security were reported to the Audit Committee and the Risk Management Committee:

- (i) Internal Audit of Information Security – Penetration Testing and Security Incident Response dated May 2019;
  - (ii) Technology and Assurance Health Solutions Report dated February 2020;
  - (iii) Information Security – Compliance with CPS 234 dated May 2020;
  - (iv) Information Security –Internal Audit dated August 2021;
  - (v) Information Security – “Essential Eight” Cyber Strategies Controls dated July 2022; and
  - (vi) Third Party Information Security Controls (CPS 234) dated July 2022.
- (e) in addition to the Annual Audit Process, at all times during the Relevant Period, Medibank conducted a bi-annual refresh of the Internal Audit Plan (**Rolling Internal Audit Planning**); and

#### **Particulars**

The purpose of the Rolling Internal Audit Planning process was for the Audit Committee to reconsider the Internal Audit Plan every half year, confirm that Internal Audit Projects scheduled in the next half year remained priorities and identify Internal Audit Projects for the half year thereafter.

- (f) in addition to the Ongoing Monitoring Process, Annual Audit Process and Rolling Internal Audit Planning process, in August 2022 Medibank obtained an independent limited assurance report on the design, description and operating effectiveness of controls;

#### **Particulars**

The report was prepared by PwC for use by Medibank and APRA for the purpose of Medibank meeting its reporting obligations to APRA (**Tripartite**

**Report**). The Tripartite Report was reported to the Risk Management Committee.

- (g) as to sub-paragraph 150(a):
  - (i) repeats and relies upon paragraph 143 of this Defence;
  - (ii) it denies that any information identifying the existence of the VPN Access Misconfiguration or what the plaintiffs define as the MFA Information, or any information from which the existence of the VPN Access Misconfiguration or the MFA Information might have been deduced, constitutes information that ought reasonably to have come into the possession of an officer of Medibank in the course of the performance of their duties as an officer of Medibank by the beginning of the Relevant Period;

#### **Particulars**

Medibank repeats and relies upon the particulars sub-joined to sub-paragraphs (c) to (f) above, and the Technology Health Reports, the Internal Audit Project Reports and Tripartite Report referred to therein.

No information identifying the existence of the VPN Access Misconfiguration, or the MFA Information, or from which the existence of the VPN Access Misconfiguration or the MFA Information might have been deduced, came into the possession of the Audit Committee or the Risk Management Committee by the beginning of the Relevant Period in the course of the Ongoing Monitoring Process, the Annual Audit Process, the Rolling Internal Audit Planning, the Tripartite Report or otherwise.

- (iii) says that if (which is denied) any information identifying the existence of the VPN Access Misconfiguration or the MFA Information, or any information from which the existence of the VPN Access Misconfiguration or the MFA Information might have been deduced, is information that ought reasonably

to have come into the possession of an officer of Medibank in the course of the performance of their duties as an officer of Medibank by the beginning of the Relevant Period, then within the meaning of ASX Listing Rule 3.1A:

- (A) the information was generated for the internal management purposes of Medibank;
- (B) the information was confidential; and
- (C) a reasonable person would not expect the information to be disclosed,

and consequently the exception in ASX Listing Rule 3.1A applies; and

(iv) it otherwise denies the allegations in sub-paragraph 150(a);

(h) as to sub-paragraphs 150(b) to (f):

(i) denies that such information existed and ought reasonably to have come into the possession of an officer of Medibank, in the course of the performance of their duties as an officer of Medibank by the beginning of the Relevant Period; and

(ii) says that if (which is denied) such information existed and ought reasonably to have come into the possession of an officer of Medibank, in the course of the performance of their duties as an officer of Medibank by the beginning of the Relevant Period, then within the meaning of ASX Listing Rule 3.1A:

- (A) the information was generated for the internal management purposes of Medibank;
- (B) the information was confidential; and
- (C) a reasonable person would not expect the information to be disclosed,

and consequently the exception in ASX Listing Rule 3.1A applies.

### **Particulars**

Medibank repeats and relies upon the particulars sub-joined to sub-paragraphs (c) to (f) above, and the Technology Health Reports, the Internal Audit Project Reports and Tripartite Report referred to therein.

The alleged Material Information listed at sub-paragraphs 150(b) to (f) of the CSOC did not come into the possession of the Audit Committee or the Risk Management Committee by the beginning of the Relevant Period in the course of the Ongoing Monitoring Process, the Annual Audit Process, the Rolling Internal Audit Planning, the Tripartite Report or otherwise.

151. As to paragraph 151, it:

- (a) repeats and relies upon paragraphs 143 to 149 of this Defence;
- (b) says that at all times in the Relevant Period, ASX Listing Rule 19.12 gave the expression “aware” the following meaning:

*“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.”;*

- (c) denies that Medibank was aware of the alleged Material Information and repeats and relies upon paragraph 150 of this Defence; and
- (d) otherwise denies the allegations in the paragraph.

152. As to paragraph 152, it:

- (a) repeats and relies upon paragraphs 149 to 151 of this Defence; and
- (b) denies the allegations in the paragraph.

153. As to paragraph 153, it:

- (a) repeats and relies upon paragraphs 149 to 152 of this Defence; and
- (b) denies the allegations in the paragraph.

154. As to paragraph 154, it:

- (a) repeats and relies upon paragraphs 27 and 149 to 153 of this Defence; and
- (b) otherwise admits that the alleged Material Information was not generally available throughout the Relevant Period within the meaning of s 674(2)(c) of the Corporations Act.

155. As to paragraph 155, it:
- (a) repeats and relies upon paragraphs 149 to 154 of this Defence; and
  - (b) denies the allegations in the paragraph.
156. As to paragraph 156, it:
- (a) repeats and relies upon paragraphs 149 to 155 of this Defence; and
  - (b) denies the allegations in the paragraph.
157. As to paragraph 157, it:
- (a) repeats and relies upon paragraphs 149 to 156 of this Defence; and
  - (b) denies the allegations in the paragraph.
158. As to paragraph 158, it:
- (a) repeats and relies upon paragraphs 27 and 149 to 157 of this Defence; and
  - (b) admits that it did not notify the ASX of the alleged Material Information during the Relevant Period.
159. As to paragraph 159, it:
- (a) repeats and relies upon paragraphs 149 to 158 of this Defence; and
  - (b) denies the allegations in the paragraph.

**Contravention of section 674A(2) of the Corporations Act**

160. It admits paragraph 160.
161. As to paragraph 161, it:
- (a) repeats and relies upon paragraphs 149(a) and 149(b) of this Defence;
  - (b) relies on s 111AP(1), s 674A(1) and s 674A(2) of the Corporations Act and ASX Listing Rules 3.1 and 3.1A for their full text and effect; and
  - (c) otherwise admits the allegations in the paragraph.
162. As to paragraph 162, it repeats and relies upon paragraphs 150 to 152 of this Defence.
163. As to paragraph 163, it:
- (a) repeats and relies upon paragraphs 150 to 153 of this Defence; and
  - (b) denies the allegations in the paragraph.
164. As to paragraph 164, it:
- (a) repeats and relies upon paragraphs 150, 154 and 162 to 163 of this Defence; and

(b) denies the allegations in the paragraph.

165. As to paragraph 165, it:

(a) repeats and relies upon paragraphs 150 and 162 to 164 of this Defence; and

(b) denies the allegations in the paragraph.

166. As to paragraph 166, it:

(a) repeats and relies upon paragraphs 150 and 162 to 165 of this Defence; and

(b) denies the allegations in the paragraph.

167. As to paragraph 167, it repeats and relies upon paragraph 158 of this Defence.

168. As to paragraph 168, it:

(a) repeats and relies upon paragraphs 150, 154 and 162 to 167 of this Defence; and

(b) denies the allegations in the paragraph.

## **H. RELEVANT ANNOUNCEMENTS BY MEDIBANK, TRADING HALTS AND CHANGES IN THE SHARE PRICE**

### **H1. Announcements and trading halts**

169. It admits paragraph 169.

170. It admits paragraph 170.

171. Save that it says that it will rely on the full text and effect of the 13 October Announcement, it admits paragraph 171.

172. It admits paragraph 172.

173. Save that it says that it will rely on the full text and effect of the 17 October Announcement, it admits paragraph 173.

174. It admits paragraph 174.

175. It admits paragraph 175.

176. It admits paragraph 176.

177. Save that it says that it will rely on the full text and effect of the 19 October Announcement, it admits paragraph 177.

178. It admits paragraph 178.

179. Save that it says that it will rely on the full text and effect of the 20 October Announcement, it admits paragraph 179.

180. It admits paragraph 180.
181. It admits paragraph 181.
182. Save that it says that it will rely on the full text and effect of the 25 October Announcement, it admits paragraph 182.
183. As to paragraph 183, it admits the allegations in the paragraph, save that the announcement published to the ASX was entitled "*Medibank cybercrime, business and FY23 outlook update*".
184. Save that it says that it will rely on the full text and effect of the 26 October Announcement, it admits paragraph 184.

## **H2. Impact of the announcements**

185. As to paragraph 185, it:
- (a) repeats and relies upon paragraphs 174, 176 and 183 of this Defence; and
  - (b) otherwise, denies the allegations in the paragraph.

### **I. CONTRAVENING CONDUCT CAUSED LOSS**

#### **I1. Market-based causation**

##### *I1.1 MPL Shares*

186. As to paragraph 186, it:
- (a) repeats and relies upon paragraphs 1, 5 and 149 to 151 of this Defence;
  - (b) says that the allegation in sub-paragraphs (b) and (c) are vague and embarrassing;  
and
  - (c) under cover of the objection in sub-paragraph (b) above, denies the allegations in the paragraph.
187. As to paragraph 187, it:
- (a) repeats and relies upon paragraphs 134, 136, 138, 140, 142, 159 and 168 of this Defence; and
  - (b) denies the allegations in the paragraph.
188. As to paragraph 188, it:
- (a) repeats and relies upon paragraph 159 to 168, 134 to 142 and 187 of this Defence;  
and

(b) denies the allegations in the paragraph.

189. As to paragraph 189, it:

(a) repeats and relies upon paragraphs 185 to 188 of this Defence; and

(b) denies the allegations in the paragraph.

#### *11.2 MPL Equity Swaps*

190. As to paragraph 190, it:

(a) repeats and relies upon paragraphs 1 and 186 of this Defence; and

(b) does not know and therefore does not admit the allegations in the paragraph.

191. As to paragraph 191, it:

(a) repeats and relies upon paragraphs 186 to 190 of this Defence; and

(b) denies the allegations in the paragraph.

### **12. Reliance**

192. As to paragraph 192, it:

(a) repeats and relies upon paragraphs 1, 134 to 142, 150, 159 to 168 and 187 of this Defence; and

(b) denies the allegations in the paragraph.

193. As to paragraph 193, it:

(a) repeats and relies upon paragraphs 1, 134 to 142, 150, 159 to 168, 187 and 190 to 191 of this Defence; and

(b) denies the allegations in the paragraph.

### **13. Loss or damage suffered by the plaintiffs and Group Members**

194. As to paragraph 194, it:

(a) repeats and relies upon paragraphs 186 to 193 of this Defence;

(b) says that, if (which is denied) Medibank engaged in the Continuous Disclosure Contraventions and/or the Misleading Conduct Contraventions, the matters pleaded at paragraphs 186 to 191 of the CSOC would not, even if established, constitute any causal nexus sufficient to support a claim for compensation pursuant to any of ss 1041I or 1317HA of the Corporations Act, s 12GF of the ASIC Act or s 236 of the ACL; and

(c) denies the allegations in the paragraph.

194A. In the alternative to paragraph 194 of this Defence, if Medibank engaged in the Continuous Disclosure Contraventions and/or the Misleading Conduct Contraventions (which is denied), it:

(a) says that to the extent that any Group Member disposed of any MPL Shares:

(i) at any time:

(A) during the Relevant Period; or

(B) alternatively, after 10 September 2020 and prior to the end of the Relevant Period; or

(C) alternatively, after 25 August 2021 and prior to the end of the Relevant Period; or

(D) alternatively, after 17 September 2021 and prior to the end of the Relevant Period; or

(E) alternatively, after 18 August 2022 and prior to the end of the Relevant Period; or

(F) alternatively, after 15 September 2022 and prior to the end of the Relevant Period;

(ii) any loss suffered through that disposal was not caused by and did not result from any contravention alleged in the CSOC; and

(iii) any gain realised through that disposal (including by disposal of MPL Shares for more than their alleged “true value”) must be accounted for in determining any loss or damage alleged by a Group Member; and

(b) denies that the plaintiffs and/or any Group Member have suffered loss to the extent that the plaintiffs and/or Group Member (whether through hedging, derivative or securities lending arrangements or otherwise):

(i) did not assume full economic exposure in respect of MPL Shares acquired during the Relevant Period; and/or

(ii) reduced their economic exposure in respect of MPL Shares acquired during the Relevant Period; and

- (c) denies that the plaintiffs and/or Group Members have suffered loss resulting from the conduct of Medibank insofar as the plaintiffs and/or Group Members did not rely on any representation or conduct of Medibank.

194B. Further, or in the alternative to paragraphs 194 and 194A of this Defence:

- (a) if Medibank has engaged in the Continuous Disclosure Contraventions (which is denied), it says:
  - (i) throughout the Relevant Period, Medibank acted honestly;
  - (ii) in all the circumstances of the case, it ought fairly be excused for any such contravention;
  - (iii) in the premises of sub-paragraphs (a)(i) and (a)(ii) above, the Court should relieve Medibank wholly, or alternatively partly, for any such liability;

**Particulars**

A. Sections 674, 674A and 1317S of the Corporations Act.

B. Medibank will seek similar relief in respect of Group Members' claims at the time that the individual claims of Group Members are pleaded.

- (b) if Medibank has engaged in the Continuous Disclosure Contraventions (which is denied) and is not relieved from liability under s 1317S of the Corporations Act, in determining whether and, if so, how to exercise a discretion to make an order for compensation in respect of a given plaintiff and/or Group Member under s 1317HA(1) or s 1325 of the Corporations Act, the Court should, *inter alia*, have regard to:
  - (i) whether, in deciding to purchase MPL Shares, the plaintiffs and/or Group Member (or their advisor or representative) relied directly or indirectly on any representation or conduct of Medibank; and
  - (ii) whether, in deciding to purchase MPL Shares, the plaintiffs and/or Group Member (or their advisor or representative) formed an opinion as to whether the purchase was at an under-value, an over-value or a fair value and the basis upon which that opinion was formed (including any analysis

considered or conducted by or on behalf of the plaintiffs and/or Group Members);

(c) if Medibank has contravened s 1041H(1) of the Corporations Act (which is denied), it says:

- (i) throughout the Relevant Period, Medibank acted honestly;
- (ii) in all the circumstances of the case, it ought fairly be excused for any such contravention; and
- (iii) in the premises of sub-paragraphs (b)(i) and (b)(ii) above, the Court should relieve Medibank wholly, or alternatively partly, for any such liability;

#### **Particulars**

A. Sections 1317S(2)(b) and 1041I(4) of the Corporations Act.

B. Medibank will seek similar relief in respect of Group Members' claims at the time that the individual claims of Group Members are pleaded.

(d) if:

- (i) Medibank has engaged in the Misleading Conduct Contraventions (which is denied); and
- (ii) a plaintiff and/or Group Member suffered economic loss:
  - (A) partly as a result of that conduct (which is denied); and
  - (B) partly as a result of failure of the plaintiff and/or Group Member to take reasonable care,

the amount that a plaintiff and/or Group Member may recover must be reduced in accordance with s 1041I(1B) of the Corporations Act, s 12GF(1B) of the ASIC Act and s 137B of the *Competition and Consumer Act 2010* (Cth);

(e) further to sub-paragraph (d) above, any plaintiff and/or Group Member who purchased MPL Shares in the Relevant Period without forming a reasonable opinion (or taking advice) as to whether the purchase was at an over-value, an under-value or a fair value, failed to take reasonable care.

**J. COMMON QUESTIONS OF LAW OR FACT**

195. Medibank does not admit that the questions in paragraph 195 of the CSOC amount to or involve common issues of fact or law or that, to the extent that any such questions are common, that they are common to the plaintiffs and any or all Group Members.
196. In answer to the whole of the CSOC, Medibank denies any entitlement of the plaintiffs and Group Members to the relief claimed or at all.
197. Medibank says, in respect of the entire CSOC, that, to the extent that particulars contain allegations of fact travelling beyond the pleaded allegations themselves, the plaintiffs may not rely upon them and Medibank does not plead to them.

Dated: **22 November 2023**

**N YOUNG KC**

**N P DE YOUNG KC**

**J A FINDLAY**

**A MARTYN**



.....  
**King & Wood Mallesons**  
Solicitors for the Defendant