

### STATEMENT OF CLAIM

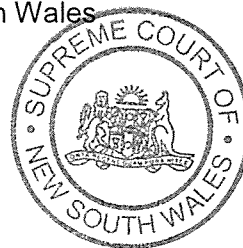
#### COURT DETAILS

Court Supreme Court of New South Wales  
Division Equity  
Registry Sydney  
Case number 2016/0371729

FILED

19 MAY 2017

MS



#### TITLE OF PROCEEDINGS

First plaintiff **Zig Zag Railway Co-op Ltd**  
Second plaintiff Zig Zag Railway Reserve Trust  
Defendant **John Mulally t/as John Mulally & Associates**

#### FILING DETAILS

Filed for **Zig Zag Railway Co-op Ltd**, first plaintiff  
Legal representative Michael Fitzgerald, MJF Legal Pty Ltd  
Legal representative reference 1136  
Contact name and telephone Michael Fitzgerald, tel: 02 9283 2500  
Contact email m\_fitz@bigpond.com

#### TYPE OF CLAIM

Breach of Contract; Breach of Fiduciary Duty; Legal Profession Act 2004 (NSW); Legal Profession Uniform Law.

This matter has been listed before the Court

on 27/6/17

at .....

Clerk of the Court

**RELIEF CLAIMED**

1. An ORDER pursuant to s 472(1) of the *Legal Profession Uniform Law (NSW) (LP Uniform Law)*, or alternatively the inherent jurisdiction of the Court, that the defendant give to the plaintiffs a Bill of Costs (itemising all costs and disbursements) in relation to legal services provided by the defendant to the plaintiffs, or one or other of them, during the period from 1 July 2014 to 21 September 2016.
  
2. An ORDER pursuant to s 472(1) of the LP Uniform Law, or alternatively the inherent jurisdiction of the Court, that the defendant produce to the plaintiffs' legal representative, Mr Michael John Fitzgerald, solicitor, the plaintiffs' files:
  - (a) in relation to legal services provided by the defendant to the plaintiffs, or one or other of them, during the period from 1 July 2014 to 21 September 2016; or
  - (b) in relation to legal services provide by the defendant to the plaintiffs, or one or other of them, during the period from 1 July 2015 to 21 September 2016.
  
3. A DECLARATION that, in the circumstances which occurred during the period from 1 July 2014 up to and including 30 June 2015:
  - (a) The defendant did not have professional indemnity insurance from LawCover providing insurance coverage for the period from 1 July 2014 to 30 June 2015;
  - (b) The Council of the Law Society could not issue the defendant a current local practising certificate (pursuant to s 406 of the Legal Profession Act 2004 (NSW));
  - (c) The defendant did not hold a current local practising certificate within the meaning of s 6 of the Legal Profession Act 2004 (NSW);
  - (d) The defendant was not an Australian Legal Practitioner within the meaning of s 6 of the Legal Profession Act 2004 (NSW), in that the defendant was not an Australian lawyer who did not hold a current local practising certificate;
  - (e) The defendant engaged in legal practice in New South Wales, in contravention of s 14(1) of the Legal Profession Act 2004 (NSW);
  - (f) Pursuant to s 14(4) of the Legal Profession Act 2004 (NSW), the defendant is not entitled to recover any amount, and must repay any amount received, in respect of legal services provided by the defendant to the plaintiffs in respect of the period from 1 July 2014 up to and including 30 June 2015;
  - (g) Pursuant to s 14(5) of the Legal Profession Act 2004 (NSW), the plaintiffs, or one or other of them, are entitled to recover from the defendant as a debt due the amount received by the defendant from the plaintiffs in respect of the legal services

provided by the defendant to the plaintiffs during the period from 1 July 2014 up to and including 30 June 2015;

- (h) The plaintiffs are entitled to recover from the defendant as a debt due for the period from 1 July 2014 up to and including 30 June 2015 the sum of \$103,842.61.
4. An ORDER, pursuant to s 14(5) of the Legal Profession Act 2004 (NSW), that the defendant pay to the plaintiffs as a debt the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiffs during the period from 1 July 2014 up to and including 30 June 2015.
5. Judgment in favour of the plaintiffs against the defendant in respect of the period from 1 July 2014 to 30 June 2015, pursuant to s 14(5) of the Legal Profession Act 2004 (NSW), in the sum of \$103,842.61.
6. A DECLARATION that, in the circumstances which occurred during the period from 1 July 2015 up to and including 2 November 2016:
- (a) The defendant was not a qualified entity within the meaning of s 6(1) of the LP Uniform Law;
- (b) The defendant engaged in legal practice in New South Wales, in contravention of s 10(1) of the LP Uniform Law;
- (c) Pursuant to s 10(2) of the LP Uniform Law the defendant is not entitled to recover any amount, and must repay any amount received, in respect of legal services provided by the defendant to the plaintiffs in respect of the period from 1 July 2015 up to and including 2 November 2016;
- (d) Pursuant to s 10(2) of the LP Uniform Law the plaintiffs, or one or other of them, are entitled to recover from the defendant as a debt the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiff during the period from 1 July 2015 up to and including 2 November 2016;
- (e) The plaintiffs are entitled to recover from the defendant as a debt due for the period from 1 July 2015 up to and including 2 November 2016 the sum of \$89,690.03.
7. An ORDER, pursuant to s 10(2) of the LP Uniform Law, that the defendant pay to the plaintiffs as a debt the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiffs during the period from 1 July 2015 up to and including 2 November 2016.
8. A DECLARATION that, in the circumstances which occurred during the period from 1 July 2015 up to and including 2 November 2016:

- (a) the defendant was not a qualified entity within the meaning of s 6(1) of the LP Uniform Law;
  - (b) the defendant engaged in legal practice in New South Wales, in contravention of s 10(1) of the LP Uniform Law;
  - (c) pursuant to s 10(2) of the LP Uniform Law the defendant is not entitled to recover any amount, and must repay any amount received, in respect of legal services provided by the defendant to the plaintiffs in respect of the period from 1 July 2015 up to and including 2 November 2016;
  - (d) pursuant to s 10(2) of the LP Uniform Law the plaintiffs, or one or other of them, are entitled to recover from the defendant as a debt the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiff during the period from 1 July 2015 up to and including 2 November 2016.
9. An ORDER, pursuant to s 10(2) of the LP Uniform Law, that the defendant pay to the plaintiffs as a debt the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiffs during the period from 1 July 2015 up to and including 2 November 2016.
10. A DECLARATION that the Costs Agreement purportedly signed, and dated, on 1 July 2014 was not contractually binding, and was not brought into existence until sometime after 30 June 2015, and in all likelihood on or shortly before 22 September 2016.
11. In the alternative to 5 above, a DECLARATION, in respect of the Costs Agreement made between the first plaintiff and the defendant dated 1 July 2014 (**Costs Agreement**), that:
  - (a) the defendant engaged in conduct in contravention of s 324(1), (4), (5) and (6) of the *Legal Profession Act 2004* (NSW) (**LP Act**);
  - (b) as a consequence of the defendant's contravention of s 324(4), (5) and (6) of the LP Act, the defendant is not entitled to recover any amount in respect of the provision of legal services in the matter to which the Costs Agreement related, and must repay any amount received in respect of those services to the first plaintiff, pursuant to s 327(3) of the LP Act;
  - (c) as a consequence of the defendant's contravention of s 324(1) of the LP Act, the defendant is not entitled to recover any amount in respect of the provision of legal services in the matter to which the Costs Agreement related, and must repay any

amount received in respect of those services to the first plaintiff, pursuant to s 327(4) of the LP Act; and

- (d) as a consequence of the defendant's contravention of s 324(4), (5) and (6) of the LP Act, the defendant is not entitled to recover the whole or any part of the uplift fee, pursuant to s 327(3A) of the LPA.
12. An ORDER, pursuant to s 327(3) and (4) of the LP Act, that the defendant pay to the plaintiffs as a debt, in whole or in part, the amount received by the defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiff during the period from 1 July 2014 up to and including 7 September 2016.
13. A DECLARATION that, if and to the extent necessary, it is just and fair for the application for assessment of costs, the subject of the claim made by the defendant under the Costs Agreement against the plaintiffs, be dealt with after the 12 month period pursuant to s 350(5) of the LP Act, or alternatively s 198(4) of the LP Uniform Law.
14. A DECLARATION that the Costs Agreement dated 1 July 2014, or such other retainer as was in existence in respect of the period on and from 1 July 2014 and continuing thereafter, was repudiated by Mr Mulally.
15. A DECLARATION that from 22 March 2016 and continuing thereafter Mr Mulally acted in breach of contract, or in breach of fiduciary duty, by:
- (a) purporting to provide legal services as a solicitor without having a practising certificate;
  - (b) acting without authority, or instructions, in sending emails, and correspondence, to third parties without the consent of the Board of the ZZR Co-op and the Trust;
  - (c) breaching the confidence of the Board of the ZZR Co-op and the Trust; and
  - (d) acting in conflict of interest and duty by preferring the interests of former members of the Board of the ZZR Co-op to the Board of the ZZR Co-op and the Trust, including:
    - (i) Mr Forbes,
    - (ii) Mr Langdon,
    - (iii) Mr Ackland, and
    - (iv) Mr Robinson-Mills.

16. A DECLARATION that on or about 21 September 2016 the plaintiffs lawfully terminated the retainer with the defendant.
17. An ORDER that the defendant pay the plaintiffs' costs of and incidental to this Summons on an indemnity basis.
18. Such further orders as the Court considers appropriate.

### PLEADINGS AND PARTICULARS

1. The first plaintiff, Zig Zag Reserve Zig Zag Railway (**Zig Zag Co-op**), is a co-operative registered under the *Co-operatives National Law (NSW)* (**Co-operatives National Law**), registration number NSWC00449.
2. On 14 March 1881, the site of the Zig Zag Railway was declared a public reserve in Gazette No. 97 under s5 of the *Crowns Lands Alienation Act 1861* (NSW).
3. The second plaintiff, the Zig Zag Railway Reserve Trust (**Zig Zag Trust**) is the appointed Trustee of Reserve 590044 for public recreation.
4. The Zig Zag Co-op is regulated by the rules of the Zig Zag Co-op.
5. The Zig Zag Trust is subject to the rules contained with the *Reserve Trust Handbook* issued by the NSW Department of Primary Industries.
6. The site of the Zig Zag Trust is comprised by land identified in a number of titles, including the following:
  - (a) Lot 9 in Deposited Plan 788554 at Oakey Park, Local Government Area Lithgow City, Parish of Lett, County of Cook, Title Diagram DP788554 (Folio 9/788554); and
  - (b) Land described in schedule of parcels at Clarence Local Government Area Lithgow City, Parish of Lett, County of Cook, Title Diagram DP932875 (Vol 2001) Folio 243 is the current certificate of title: Auto-consol: 2001-243).
7. Pursuant to s 92(1) of the *Crown Lands Act 1989* (NSW) (**Crown Lands Act**), the Minister may, by notification in the Gazette, establish and name a reserve trust and appoint it as trustee of any one or more specified reserves or any one or more parts of a reserve.

8. A reserve trust established under s 92(1) of the *Crown Lands Act* is constituted by that Act as a corporation having as its corporate name the name assigned to the trust in the notification of its establishment, under s 92(2) of the *Crown Lands Act*.
9. A reserve trust is charged with the care, control and management of any reserve of which it is appointed trustee, pursuant s 92(5) of the *Crown Lands Act*.
10. The affairs of a reserve trust are managed, if a corporation is appointed under s 95, by the corporation, pursuant s 92(6) of the *Crown Lands Act*.
11. Pursuant to s 95(1) of the *Crown Lands Act* the Minister could, by notification in the Gazette, appoint a corporation to manage the affairs of a reserve trust.
12. Under s 95(2) of the *Crown Lands Act*, the corporation so appointed had power to accept the appointment and to exercise all the functions of a manager of a reserve trust.
13. On 25 January 1991, the then Minister for Lands and Forests, Mr Gary West, MP, notified the following Appointment of Corporation to Manage Reserve Trust, in Gazette No. 18:

Pursuant to s 95 of the Crown Lands Act 1989, the corporation specified in the schedule hereunder is appointed to manage the affairs of the reserve trust specified opposite thereto in Column 2, which is trustee of the reserve referred to in Column 3 of the Schedule.

Column 1	Column 2	Column 3
Zig Zag Railway Co-operative Limited	Zig Zag Railway Reserve	Reserve at Lithgow Dedicated for Public Recreation 14 <sup>th</sup> March, 1881

14. The Zig Zag Co-op has legal capacity to be sue and be sued.
15. The Zig Zag Trust has legal capacity to be sue and be sued.
16. On or about 16 October 2013 there was a bushfire (**the Bushfire**) which originated from Australian Defence Force Murrumbidgee Army Training Base, which bushfire caused damage to the Zig Zag Railway and various assets of the Zig Zag Co-op and the Zig Zag Trust, including signals stations, workshop, amenity blocks and demountable units, amongst others.
17. In respect of the financial year commencing 1 July 2014 and ending 30 June 2015, Mr Mulally ~~held~~ did not hold a practising certificate as a solicitor issued by the Law Society of New South Wales.

18. In respect of the financial year commencing 1 July 2015 and ending 30 June 2016, Mr Mulally did not hold a practising certificate issued by the Law Society of New South Wales.
19. In respect of the financial year commencing 1 July 2016 up to and including 2 November 2016, Mr Mulally did not hold a practising certificate issued by the Law Society of New South Wales.
20. At all material times from on or about 1 July 2014 up to and including 2 November 2016 the defendant, Mr John Mulally:
  - (a) practiced as a solicitor under the business name John Mulally & Associates; and
  - (b) conducted his practice as a solicitor from the address known as 3 Spring Street, Sydney, in New South Wales.
21. During the period from on or about 15 July 2014 up until and including 21 September 2016, Mr Mulally provided legal services and legal advice, as a solicitor to:
  - (a) the Zig Zag Co-op; and
  - (b) the Zig Zag Trust.
22. During the period from on or about 15 July 2014 up until and including 21 September 2016, Mr Mulally:
  - (a) charged for legal services, and legal advice, provided by him at an hourly rate of \$200 per hour (ex GST); and
  - (b) issued invoices to the Zig Zag Co-op on the basis of an hourly rate charged at \$200 (ex GST) per hour.
23. During the period from on or about 15 July 2014 and continuing thereafter until 22 March 2016, Mr Mulally took instructions on behalf of the Zig Zag Co-op and the Zig Zag Trust from one or more of the following persons a committee known as the Legal & Liabilities Committee:
  - (a) Mr Michael Forbes;
  - (b) Mr Noel Ackland;
  - (c) Mr Alexander Robinson-Mills;
  - (d) Mr Mark Watson; and



(e) Mr Larry Zanker.

24. On or before 8 September 2015, Mr Mulally:

- (a) cancelled his registration with the Australian Taxation Office (**ATO**) for the purposes of the Goods and Services Tax (**GST**); and
- (b) cancelled his registration of Australian Business Number (**ABN**) 42 428 655 167.

25. On or about 8 September 2015, Mr Mulally:

- (a) ceased to be registered with the ATO for the purposes of GST; and
- (b) ceased to be entitled to use ABN 42 428 655 167.

26A On or before 1 July 2014 up to and including 30 June 2015, Mr Mulally:

- (a) had not paid LawCover for professional indemnity insurance for the period 1 July 2014 to 30 June 2015, and had not been issued professional indemnity insurance by LawCover for that period, such insurance being a necessary pre-requisite to the issue of a practising certificate as a solicitor by the Law Society of New South Wales; and
- (b) did not hold professional indemnity insurance for the period from 1 July 2014 up to and including 30 June 2015.

26. On or before 1 July 2015 up to and including 30 October 2016, Mr Mulally:

- (a) had not paid LawCover for professional indemnity insurance for the period 1 July 2015 to 30 June 2016, and had not been issued professional indemnity insurance by LawCover for that period, such insurance being a necessary pre-requisite to the issue of a practising certificate as a solicitor by the Law Society of New South Wales; and
- (b) did not hold professional indemnity insurance for the period from 1 July 2015 up to and including 30 June 2016; and
- (c) had not paid LawCover for professional indemnity insurance for the period 1 July 2016 to 30 October 2016, and had not been issued professional indemnity insurance by LawCover for that period, such insurance being a necessary pre-requisite to the issue of a practising certificate as a solicitor by the Law Society of New South Wales; and

- (d) did not hold professional indemnity insurance for the period from 1 July 2016 up to and including 30 October 2016.
27. On 18 March 2016, there was an Extraordinary General Meeting of the members of the Zig Zag Co-op (**EGM**). At the EGM the following directors were removed from the Board of the Zig Zag Co-op:
- (a) Mr Noel Ackland;
  - (b) Mr Alexander Robinson-Mills;
  - (c) Mr Mark Watson; and
  - (d) Mr Larry Zanker.
28. On or about 21 March 2016, Mr Peter Lowry, acting in conjunction with John Mulally, submitted a claim to the Minister of the Australian Defence Force (**Bushfire Claim**), in respect of the claim for damages made by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire.
29. On 22 March 2016, Mr Mulally sent a letter to Mr Wiggins which, amongst other matters:
- (a) referred to the Bushfire Claim document having been submitted to the Australian Minister for Defence; and
  - (b) which stated that Mr Mulally's fees in respect of the Bushfire Claim had been paid in full.
30. On 22 March 2016, there was a meeting of the Board of the Zig Zag Co-op, where amongst other matters the following resolutions were passed by the Board:
- (a) Mr Lee Wiggins was appointed to the position of Chairman;
  - (b) Mr James Windsor was appointed to the position of Secretary;
  - (c) the Legal & Liabilities Committee shall cease all current activities, and provide a full and comprehensive report on the status of all projects and no further activity is to proceed without the specific written approval of the Board;
  - (d) that John Mulally & Associates shall address all correspondence relating to the Zig Zag Railway to the Secretary, and shall provide a copy of the Bushfire damages claim referred to in Mr Mulally's letter dated 22 March 2016.

31. During the period from on or about 22 March 2016 and continuing thereafter, the plaintiffs requested that Mr Mulally provide a copy of the Bushfire Claim to the Board of the Zig Zag Co-op.

**Particulars**

- (a) Zig Zag Co-op letter to Mr Mulally dated 5 May 2016;
- (b) Meeting with Mr Mulally on 16 May 2016 attended by:
- (i) Mr Lee Wiggins;
  - (ii) Mr Ben Lawrence;
  - (iii) Mr Lesley Kent; and
- (c) Zig Zag Co-op letter to Mr Mulally dated 10 August 2016.
32. During the period from on or about 22 March 2016 and continuing thereafter Mr Mulally refused to provide a copy of the Bushfire Claim to the Board of the Zig Zag Co-op and the Zig Zag Trust.

**Particulars**

- (a) Letter from Mr Mulally to the Zig Zag Co-op dated 15 April 2016; and
- (b) Letter from Mr Mulally to the Zig Zag Co-op sent on or about 12 May 2016 (incorrectly dated 15 April 2016).
33. On 29 March 2016, the Zig Zag Co-op sent a letter to Mr Mulally prohibiting him from performing any work on behalf of the plaintiffs other than by instruction from the Chairman or Secretary of the Zig Zag Co-op.

**Particulars**

The letter provides, inter alia, that:

*... the Board wishes to advise that all future work must be submitted and approved by the board before, and any such requests will come to you from the Chairman or Secretary of the Zig Zag Railway. The Legal and Liabilities committee which comprises of Michael Forbes, Noel Ackland, Mark Watson, Alexander Robinson-Mills and Mark Langdon do not hold authorisation to approve any further expenditure or act on behalf of the Zig Zag Railway Co-op Ltd. or the Zig Zag Railway Reserve Trust (ZZRRT) effective from the 23rd March 2016.*

*As it is critically important for the success of the claim and to ensure the all matters proceed as smoothly as possible, we require you to declare any current, potential or perceived conflict of interest you may have in acting on behalf of for the Zig Zag Railway Co-op Ltd or the Zig Zag Railway Reserve Trust and act on our requests as stated.*

34. On 6 April 2016 Mr Mulally sent a letter to Zig Zag Co-op, which relevantly stated that he did not have any conflict of interest in acting for the plaintiffs.

### Particulars

The letter provides, inter alia, that:

*In accordance with the request in the final paragraph of your letter, I declare that I have no current, potential or perceived conflict of interest in acting on behalf of Zig Zag Railway Co-op Ltd in its own right or in its capacity as the presently appointed manager of the affairs of the Zig Zag Railway Reserve Trust.*

*I also declare that I have no current, potential or perceived conflict of interest in acting in the interests of the Zig Zag Railway Reserve Trust in this fire claim through the role of Zig Zag Railway Co-op Ltd as the currently appointed manager of the affairs of the Zig Zag Railway Reserve Trust.*

35. On 14 September 2016 Mr Mulally served a copy of the Bushfire Claim on Comcover.

### Particulars

Letter from Mr John Mulally to Comcover dated 14 September 2016. Mr Mulally requested a meeting with James Windsor, the Board and its advisors.

36. At all material times on or about 14 September 2016 Mr Mulally, did not have the authority, consent, or any instructions from, the Zig Zag Co-op to serve a copy of the Bushfire Claim on Comcover.
37. On 14 September 2016, Mr Mulally served a copy of the Bushfire Claim on Senator the Hon Ms Marise Payne, Minister for Defence.

### Particulars

Letter from Mr John Mulally to Senator the Hon Ms Marise Payne, Minister for Defence dated 14 September 2016. Mr Mulally requested a meeting with James Windsor, the Board and its advisors.

38. At all material times on or about 14 September 2016, Mr Mulally did not have the authority, consent, or any instructions from, the Zig Zag Co-op to serve a copy of the Bushfire Claim on Senator the Hon Ms Marise Payne, Minister for Defence.
39. During the period from on or after 15 July 2014 up to and including 21 September 2016 it was an term of the contract with Mr Mulally for the provision of legal services (including legal advice), or Mr Mulally had a duty imposed by the general law, to:
- (a) Exercise reasonable care and skill in the provision of legal services (including legal advice) (**Reasonable Care and Skill Duty**).

### Particulars

This term is implied at law.

(b) Act in good faith for, with loyalty to, and in the best interests of (**Best Interests Duty**):

- (i) The Zig Zag Co-op;
- (ii) The Zig Zag Trust.

**Particulars**

This term is implied at law.

(c) To avoid any, and not act in, conflict of interest with the interests of the Zig Zag Co-op and the Zig Trust, and not prefer the interests of any of the following to the interests of the Zig Zag Co-op, Zig Zag Co-op in its capacity as Manager of the Zig Zag Trust and the Zig Zag Trust (**No Conflict Duty**):

- (i) Mr Mulally; or
- (ii) any third party, including the members of the Legal and Liabilities Committee:
  - Mr Michael Forbes;
  - Mr Noel Ackland;
  - Mr Mark Langdon; and
  - Mr Alexander Robinson-Mills.

**Particulars**

This term is implied at law.

(d) To protect, and maintain, the confidential information of the Zig Zag Co-op and the Zig Zag Trust (**Confidential Information Duty**):

**Particulars**

This term is implied at law.

(e) To follow, and act in accordance with, the instructions of the Zig Zag Co-op and the Zig Zag Trust (**Obey Instructions Duty**).

**Particulars**

This term is implied at law

40. During the period from on and after 22 March 2016 and continuing thereafter the Zig Zag Co-op requested a copy of the Bushfire Claim from the following:

- (a) Mr Michael Forbes;
- (b) Mr Noel Ackland; and
- (c) Mr Alexander Robinson-Mills.

**Particulars**

Particulars to paragraph 40 are set out in **Annexure A**

41. During the period from on and after 22 March 2016 and continuing thereafter the Zig Zag Co-Op requested a copy of the Bushfire Claim from Mr Mulally.

**Particulars**

Particulars to paragraph 41 are set out in **Annexure A**

42. In breach of the Best Interests Duty, during the period from on and after 22 March 2016 and continuing thereafter Mr Mulally acted to prefer the interests of the following members of the Legal & Liabilities Committee to the interests of the Zig Zag Co-op, the Zig Zag Co-op in its capacity as Manager of the Zig Zag Trust and the Zig Zag Trust:

- (a) Mr Michael Forbes;
- (b) Mr Noel Ackland;
- (c) Mr Mark Langdon; and
- (d) Mr Alexander Robinson-Mills.

**Particulars**

Particulars to paragraph 42 are set out in **Annexure A**

43. In breach of the No Conflict Duty, during the period from on and after 22 March 2016 and continuing thereafter Mr Mulally acted to prefer the interests of the following members of the Legal & Liabilities Committee to the interests of the Zig Zag Co-op, the Zig Zag Co-op in its capacity as Manager of the Zig Zag Trust and the Zig Zag Trust:

- (a) Mr Michael Forbes;
- (b) Mr Noel Ackland;

- (c) Mr Mark Langdon; and
- (d) Mr Alexander Robinson-Mills.

#### Particulars

Particulars to paragraph 43 are set out in **Annexure A**

44. In breach of the Confidential Information Duty, during the period from on and after 22 March 2016 and continuing thereafter Mr Mulally disclosed confidential information, including his instructions from the Zig Zag Co-op, the Zig Zag Co-op in its capacity as Manager of the Zig Zag Trust and the Zig Zag Trust, to one or more of the following:

- (a) Mr Michael Forbes;
- (b) Mr Noel Ackland;
- (c) Mr Mark Langdon;
- (d) Mr Alexander Robinson-Mills; and
- (e) Mr Peter Lowry.

#### Particulars

Particulars to paragraph 44 are set out in **Annexure A**

45. In breach of the Obey Instructions Duty, during the period from on and after 22 March 2016 and continuing thereafter Mr Mulally:

- (a) did not act in accordance with, and follow, the instructions of the Zig Zag Co-op and the Zig Zag Trust;
- (b) acted without the authority or, or having obtained instructions from the Zig Zag Co-op and the Zig Zag Trust;
- (c) acted in accordance, and followed, the instructions of:
  - (i) Mr Michael Forbes;
  - (ii) Mr Michael Forbes;
  - (iii) Mr Noel Ackland;
  - (iv) Mr Mark Langdon;

(v) Mr Alexander Robinson-Mills; and

(vi) Mr Peter Lowry.

#### Particulars

Particulars to paragraph 45 are set out in **Annexure A**

46. In breach of the Exercise Reasonable Care and Skill Duty, during the period from on and after 22 March 2016 and continuing thereafter Mr Mulally:

(a) provided legal services (including legal advice) to the Zig Zag Co-op and the Zig Zag Trust which fell below the standard of a competent legal practitioner;

(b) did not act in accordance with, and follow, the instructions of the Zig Zag Co-op and the Zig Zag Trust.

(c) acted without the authority or, or having obtained instructions from the Zig Zag Co-op and the Zig Zag Trust.

(d) acted in accordance, and followed, the instructions of:

(i) Mr Michael Forbes;

(ii) Mr Noel Ackland;

(iii) Mr Mark Langdon;

(iv) Mr Alexander Robinson-Mills; and

(v) Mr Peter Lowry.

#### Particulars

Particulars to paragraph 46 are set out in **Annexure A**

47. On and after 22 March 2016 Mr Mullaly was acting in breach of, and repudiated, the contract with:

(a) The Zig Zag Co-op; and

(b) The Zig Zag Trust.

#### Particulars

Particulars to paragraph 47 are set out in **Annexure A**



48. On 21 September 2016 the Zig Zag Co-op and the Zig Zag Trust accepted Mr Mulally's repudiation of the contract with the Zig Zag Co-op and the Zig Zag Trust.

#### Particulars

Letter from the Zig Zag Co-op to Mr Mulally dated 21 September 2016.

49. By the conduct of Mr Mulally:
- (a) in breach of, and repudiating, the contract with the Zig Zag Co-op and the Zig Zag Trust;
  - (b) in breach of the Best Interests Duty in the respects particularised in paragraph 42 above;
  - (c) in breach of the No Conflict Duty in the respects particularised in paragraph 43 above;
  - (d) in breach of the Confidential Information Duty in the respects particularised in paragraph 44 above;
  - (e) in breach of the Obey Instructions Duty in the respects particularised in paragraph 45 above; and
  - (f) in breach of the Exercise of Reasonable Care and Skilful Duty in the respects particularised in paragraph 46 above,
- the Zig Zag Co-op and the Zig Zag Trust have suffered loss and damage.

#### Particulars of Loss and Damage

- i. delay in progressing the claim against the Commonwealth;
  - ii. delay in achieving a settlement, and hence receive funds, to pay debts and restore the services of the plaintiffs and otherwise resume normal operations;
  - iii. legal and other costs in dealing with Mulally and the former board members prior to the commencement of these Proceedings; and
  - iv. the costs of these Proceedings.
50. During the period on and after 22 September 2016, the Zig Zag Co-op retained Mr Michael John Fitzgerald (**Mr Fitzgerald**), solicitor, with respect to the dispute with Mr Mulally, and Mr Mulally's failure to provide a copy of the Bushfire Claim to:

- (a) the Zig Zag Co-op; and
- (b) the Zig Zag Trust.

51. During the period from on and after 22 September 2016 up to and including 12 December 2016, Mr Fitzgerald, acting on behalf of the Zig Zag Co-op and the Zig Zag Trust, made numerous requests to Mr Mulally that he provide a copy of the Bushfire Claim.

#### Particulars

Particulars to paragraph 51 are at **Annexure A**

52. On or about 22 September 2016, Mr Mulally sent a letter to the Zig Zag Co-op: which enclosed:
- (a) a document asserting an entitlement to be paid on account of legal costs an additional sum of \$450 per hour (plus GST) over and above the hourly rate of \$200 per hour which Mr Mulally had been paid to that date, in respect of legal services (including legal advice) provided during the period from 1 July 2014 up to and including 21 September 2016; and
  - (b) a copy of a costs agreement and disclosure statement purportedly dated 1 July 2014, and signed by Mr Mulally, Mr Michael Forbes, Mr Noel Ackland and Mr Alexander Robinson-Mills; and
  - (c) a document entitled "Terms of Engagement".

53. The Engagement Letter contained a term that an uplift fee of \$450 per hour exclusive of GST be payable by the plaintiffs in the event that damages are recovered or the defendant's services are brought to an end by the plaintiffs pursuant to the express termination provision in the contract.

#### Particulars

Clause 2.2 of the Terms of Engagement.

54. The Terms of Engagement provided, stated under that heading:

*This document contains information as to your rights and the terms of engagement on which, in addition to those disclosed in the accompanying retainer letter ... John Mulally & Associates ... will provide the legal services described in the Retainer Letter ...*

*When you accept my offer to enter into a costs agreement you will retain me to do the Work on the terms set out in these terms of engagement and the Retainer Letter which, together, will constitute a costs agreement for the purposes of Part 3.2 of the Legal Profession Act 2004 ...*

55. The Terms of Engagement included the following, clause 13(e):

*If the agreement and our retainer are terminated by either you or us, you will be liable for payment of costs and disbursements properly incurred by us up to the date of termination. In that event we will give you, as soon as reasonably practicable, a bill for any costs and disbursements due to us at the date of termination and you must pay the bill and other unpaid bills in accordance with the terms of this agreement.*

56. Together the Engagement Letter and the document titled Terms of Engagement are referred to as the Costs Agreement.
57. Having regard to the matters set out below, the Costs Agreement purportedly signed, and dated 1 July 2014 was not contractually binding, and was not brought into existence until sometime after 30 June 2015, and in all likelihood on or shortly before 22 September 2016.

#### Particulars

Particulars to paragraph 57 are at **Annexure A**.

58. In the alternative to paragraph 57 above, if, which is not admitted, the Costs Agreement was signed, and dated, on or about 1 July 2014, and the Costs Agreement was contractually binding from that time, in respect of the Costs Agreement:
- (a) the defendant engaged in conduct in contravention of s 324(1), (4), (5) and (6) of the *Legal Profession Act 2004* (NSW) (**LP Act**);
  - (b) as a consequence of the defendant's contravention of s 324(4), (5) and (6) of the LP Act, the defendant is not entitled to recover any amount in respect of the provision of legal services in the matter to which the Costs Agreement related, and must repay any amount received in respect of those services to the first plaintiff, pursuant to s 327(3) of the LP Act;
  - (c) as a consequence of the defendant's contravention of s 324(1) of the LP Act, the defendant is not entitled to recover any amount in respect of the provision of legal services in the matter to which the Costs Agreement related, and must repay any amount received in respect of those services to the first plaintiff, pursuant to s 327(4) of the LP Act;
  - (d) as a consequence of the defendant's contravention of s 324(4), (5) and (6) of the LP Act, the defendant is not entitled to recover the whole or any part of the uplift fee, pursuant to s 327(3A) of the LPA.

59. The Costs Agreement was an entire contract with respect to recovery of damages for the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire which started at the Marrangaroo Army Depot on 16 October 2013.

#### Particulars

Particulars to paragraph 59 are at **Annexure A**

60. The Costs Agreement was a costs agreement within the meaning of s 302 of the *Legal Profession Act 2004 (NSW) (LPA 2004)*.
61. The Costs Agreement was a conditional costs agreement within the meaning of s 302 of the LPA 2004.
62. The Costs Agreement provided for the payment of an uplift fee within the meaning of s 302 of the LPA 2004.

#### Particulars

Particulars to paragraph 62 are at **Annexure A**

63. The basis of the calculation of the uplift fee was not separately identified in the Costs Agreement, in contravention of s 324(3) of the LPA 2004.
64. The Costs Agreement did not contain an estimate of the uplift fee, or if that was not reasonably practicable:
- (a) a range of estimates of the uplift fee; and
  - (b) an explanation of the major variables that will affect the calculation of the uplift fee, in contravention of s 324(4) of the LPA 2004.
65. The Costs Agreement:
- (a) was a conditional costs agreement within the meaning of s 302 of the LPA 2004;
  - (b) relates to a litigious matter – being the recovery of damages by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire which originated from the Marrangaroo Army Depot on 16 October 2013;
  - (c) included an uplift fee within the meaning of s 302 of the LPA 2004; and

(d) the uplift fee exceeded 25% of the legal costs otherwise payable,

in contravention of s 324(5) of the LPA 2004.

66. By entering into the Costs Agreement Mr Mulally entered into a conditional costs agreement in relation to a claim for damages that provides for the plaintiff of an uplift fee on the successful outcome of the claim to which the fee relates, in contravention of s 324(1) of the LPA 2004.
67. On 2 December 2016 the Law Society of New South Wales sent an email to Mr Fitzgerald to the effect that Mr Mulally did not hold a practising certificate during the period from 1 July 2015 to 3 November 2016.

#### Particulars

Email from the Law Society of New South Wales sent an email to Mr Fitzgerald which, among other things, stated:

*According to the record maintained by the Law Society, Mr John Mulally holds a current Australian practising certificate granted by the Council of the Law Society of New South Wales which was issued on 3 November 2016. Prior to that, the last Australian practising certificate granted in this jurisdiction held by Mr John Mulally expired on 30 June 2015*

68A. In respect of the period from 1 July 2014 up to and including 30 June 2015:

- (a) The defendant did not have professional indemnity insurance from LawCover providing insurance coverage for the period from 1 July 2014 to 30 June 2015;
- (b) The Council of the Law Society could not issue the defendant a current local practising certificate (pursuant to s 406 of the Legal Profession Act 2004 (NSW));
- (c) The defendant did not hold a current local practising certificate within the meaning of s 6 of the Legal Profession Act 2004 (NSW);
- (d) The defendant was not an Australian Legal Practitioner within the meaning of s 6 of the Legal Profession Act 2004 (NSW), in that the defendant was an Australian lawyer who did not hold a current local practising certificate;
- (e) The defendant engaged in legal practice in New South Wales, in contravention of s 14(1) of the Legal Profession Act 2004 (NSW);
- (f) Pursuant to s 14(4) of the Legal Profession Act 2004 (NSW), the defendant is not entitled to recover any amount, and must repay any amount received, in respect of legal services provided by the defendant to the plaintiffs in respect of the period from 1 July 2014 up to and including 30 June 2015;
- (g) Pursuant to s 14(5) of the Legal Profession Act 2004 (NSW), the plaintiffs are entitled to recover from the defendant as a debt due the amount received by the

defendant from the plaintiffs in respect of the legal services provided by the defendant to the plaintiffs during the period from 1 July 2014 up to and including 30 June 2015;

- (h) The plaintiffs are entitled to recover from the defendant as a debt due for the period from 1 July 2014 up to and including 30 June 2015 the sum of \$103,842.61.
68. During the period from 1 July 2015 to 2 November 2016, in circumstances where Mr Mulally did not hold a practising certificate issued by the Law Society of New South Wales:
- (a) by engaging in legal practice in New South Wales in circumstances where he was not “a qualified entity” within the meaning of the *Legal Profession Uniform Law 2014 (NSW) (No 16a) (Legal Profession Uniform Law)*, Mr Mulally contravened s 10(1) of the Legal Profession Uniform Law;
  - (b) Mr Mulally was not entitled, therefore, to recover any amount, and must repay any amount received, in respect of anything he did in contravention of s 10(1) of the Legal Profession Uniform Law; and
  - (c) any amount Mr Mulally received may be recovered as a debt by the person who paid the amount, s 10(2) Legal Profession Uniform Law s 10(2); and
  - (d) the Zig Zag Co-op was, therefore, entitled to recover from Mr Mulally as a debt any amount received by Mr Mulally in respect of anything Mr Mulally did in contravention of s 10(1) of the Legal Profession Uniform Law, in respect of legal services (including legal advice) provided by Mr Mulally to the Zig Zag Co-op and the Zig Zag Trust after 1 July 2015 up to and including 2 November 2016.
69. Annexed and marked “B” to this statement of claim is a copy of the First Schedule of Invoices (**First Schedule of Invoices**) sent to Mr Fitzgerald by Mr Mulally on 21 October 2016 – in which Mr Mulally asserted an entitlement to be paid fees in the sum of \$264,465 based on an additional hourly rate of \$450 per hour (ex GST) over and above the hourly rate of \$200 per hour (ex GST) paid to Mr Mulally for legal services (including legal advice) provided by Mr Mulally to the plaintiffs during the period from on or about 15 July 2014 up to and including 21 September 2016.
70. Annexed and marked “C” to this statement of claim is a copy of the Second Schedule of Invoices to Mr Fitzgerald (**Second Schedule of Invoices**). The Second Schedule of Invoices records Mr Mulally’s contention that there is an amount due of \$33,076 in respect of the Second Schedule of Invoices.

71. Annexed and marked "D" to this statement of claim is a table of payments made by the Zig Zag Co-op to Mr Mulally for which:

- (a) the plaintiffs have not been able to locate invoices issued by Mr Mulally work performed in the period from 1 July 2014 to 30 June 2015; and
- (b) no invoices in respect of the work performed in the period from 1 July 2014 to 30 June 2015 have been produced by Mr Mulally in:
  - (i) Archive Box 1 produced on 23 December 2016;
  - (ii) AB2 produced on 23 December 2016;;
  - (iii) AB3 produced on 10 March 2017; and
  - (iv) AB4 produced on 10 March 2017.

## SIGNATURE OF LEGAL REPRESENTATIVE

#This statement of claim does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.

#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 claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff[s] that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature

Solicitor

19 May 2017.

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you.

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 **If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 **If money is claimed, and you believe you owe the money claimed**, by:



- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

**3 If money is claimed, and you believe you owe part of the money claimed, by:**

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at [www.ucprforms.justice.nsw.gov.au](http://www.ucprforms.justice.nsw.gov.au) or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2000
Telephone	02 8688 7777

[on separate page]

[Do not include the affidavit verifying in Local Court proceedings. See Guide to preparing documents for other circumstances where affidavit not required.]

**#AFFIDAVIT VERIFYING**

Name Lee Michael Wiggins  
 Address 86 Rabaul Street, Lithgow  
 Occupation Project Officer  
 Date 19 May 2017.

I affirm:

- 1 #I am the Chairman of the board of directors and have day to day carriage of this matter on the plaintiff's behalf.
- 2 I believe that the allegations of fact in the statement of claim are true.

~~#SWORN~~ #AFFIRMED at

Sydney

Signature of deponent



Name of witness

Address of witness

Capacity of witness

[#Justice of the peace #Solicitor #Barrister  
#Commissioner for affidavits #Notary public]

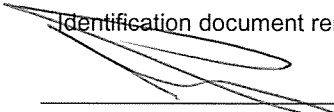
And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]  
~~#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*~~
- 2 ~~#I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable].~~  
 #I have confirmed the deponent's identity using the following identification document:

DRIVERS License

Identification document relied on (may be original or certified copy) †

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

[on separate page]

**#PARTY DETAILS**

[Include only if more than two plaintiffs and/or more than two defendants.]

**PARTIES TO THE PROCEEDINGS**

**Plaintiff[s]**

**Defendant**

Zig Zag Railway Co-op Limited

John Mulally

Zig Zag Railway Reserve Trust

[repeat as required for each additional plaintiff]

[repeat as required for each additional defendant]

**FURTHER DETAILS ABOUT PLAINTIFF[S]****First Plaintiff**

Name Zig Zag Railway Co-op Limited

Address  
[The filing party must give the party's address.]

	Zig Zag Railway	Via
Lithgow	NSW	2790

#Frequent user identifier [include if the plaintiff is a registered frequent user]

**Second Plaintiff**

Name Zig Zag Railway Reserve Trust

Address  
[The filing party must give the party's address.]

	Zig Zag Railway	Via
Lithgow	NSW	2790

#Frequent user identifier [include if the plaintiff is a registered frequent user]

[repeat the above information as required for the second and each additional plaintiff]

**Legal representative for plaintiff[s]**

Name Michael John Fitzgerald

Practising certificate number 23405

Firm MJF Legal Pty Limited

#Contact solicitor Michael Fitzgerald

Address

Level 8		
65	York	Street
Sydney	NSW	2000

DX address 13019 Sydney Market Street

Telephone 02 9283 2500

Fax

Email m\_fit@bigpond.com

Electronic service address m\_fit@bigpond.com

**DETAILS ABOUT DEFENDANT[S]****[First] defendant**

Name John Charles Mulally t/as John Mulally & Associates

Address

3	Spring	Street
Sydney	NSW	2000

**ZIG ZAG RAILWAY CO-OP LTD**  
**and**  
**ZIG ZAG RAILWAY RESERVE TRUST**  
**v**  
**JOHN MULALLY t/as JOHN MULALLY & ASSOCIATES**

**ANNEXURE A**

**Particulars to paragraph 40**

- (A) In respect of the sub-paragraph 40(a) of the Statement of Claim, the Zig Zag Co-op wrote to Mr Michael Forbes requesting a copy of the Bushfire Claim on the following occasion:
- (i) on 29 April 2016, the Zig Zag Co-op (Mr James Windsor) sent a letter to Mr Michael Forbes **[Exhibit ZZR-1 Volume 1 page 621]**.
- (B) In respect of the sub-paragraph 40(b) of the Statement of Claim, the Zig Zag Co-op wrote to Mr Noel Ackland requesting a copy of the Bushfire Claim on the following occasion:
- (i) on 31 March 2016 the Zig Zag Co-op (Mr James Windsor) sent a letter to Mr Noel Ackland **[Exhibit ZZR-1 Volume 1 Page 598]**. In that letter Mr Windsor requested that Mr Ackland make available for collection all documents, lists and files relating to the activities of both of the Trust and all correspondence with both the Legal and Liabilities Committee and the Trust Management Committee.
- (C) In respect of the sub-paragraph 40(c) of the Statement of Claim, the Zig Zag Co-op wrote to Mr Alexander Robinson-Mills requesting a copy of the Bushfire Claim on the following occasions:
- (i) on 31 March 2016, the Zig Zag Co-op (Mr James Windsor) sent a letter to Alexander Robinson-Mills **[Exhibit ZZR-1 Volume 1 Page 596]**. That letter states, in part:

*As you previously held the position of ZZRRT chairman, that board as now re-constituted requests that you make available for collection all documents, lists and files relating to the activities of both of the ZZRRT and all correspondence with both the ZZRRT Legal & Liabilities Committee and the ZZRRT Management Committee (sometimes also referred to as the ZZRRT Committee of Management). You are also requested to provide the minutes of all ZZRRT board and ZZRRT Management Committee meetings (including any and all attachments and correspondence) currently in your possession.*

- (ii) on 31 March 2016, Mr Lee Wiggins sent an email to Mr Alexander Robinson-Mills **[Exhibit ZZR-1 Volume 1 Page 599]** seeking Mr Robinson-Mills attendance at a meeting of the Board on 4 April to understand what expenditure has been incurred as a result of the Bushfire Claim and what work had been undertaken with respect to the Bushfire Claim;
- (iii) on 4 April 2016, Mr Lee Wiggins sent an email to Mr Alexander Robinson-Mills **[Exhibit ZZR-1 Volume 1 Pages 605-607]** seeking amongst other things that Mr Robinson-Mills provide a copy of the Bushfire Claim before the Board could accept his resignation as acting CEO; and
- (iv) on 6 April 2016, Mr Lee Wiggins to Mr Alexander Robinson-Mills **[Exhibit ZZR-1 Volume 1 Page 613]** again requesting a copy of the Bushfire Claim amongst other things

#### Particulars to paragraph 41

- (A) In respect of paragraph 41 of the Statement of Claim, the Zig Zag Co-op requested that Mr Mulally provide a copy of the Bushfire Claim on the following occasions:
  - (i) on 5 May 2016, the Zig Zag Co-op (Mr James Windsor) sent a letter to Mr Mulally **[Exhibit ZZR-1 Volume 1 Page 622]**;
  - (ii) on 10 August 2016, the Zig Zag Co-op sent a letter to Mr Mulally **[Exhibit ZZR-1 Volume 2 Page 658]**;
  - (iii) on 7 September 2016, the Zig Zag Co-op sent a letter to Mr Mulally **[Exhibit ZZR-1 Volume 2 Page 663]**; and
  - (iv) on 21 September 2016, the Zig Zag Co-op sent a letter to Mr Mulally **[Exhibit ZZR-1 Volume 2 Page 666]**.

#### Particulars to paragraph 42

- (A) Without the authority, consent, and without disclosing to, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally communicated with each of the following in respect of the affairs of the Zig Zag Co-op and the Zig Zag Trust, including as follows:

(i) Emails sent by Mr Mulally to the following on the dates set out below:

1. on 22 April 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills [**Exhibit ZZR-3 Page 79**]. That email relevantly includes:

*"At this stage I have not sent a copy of this incoming email to anyone else in ZZR. If you believe I should please let me know. Sending this incoming email to others will open up contact opportunities for them which may be used not in the best interests of ZZR."*

2. on 23 April 2016, at 7.30 am, Mr Mulally sent an email to Mr Ackland [**Exhibit ZZR-3 Page 83**]. That email relevantly includes:

*"I totally agree with you.*

*Are we in a position to try and have the five of us meet with the new Chair and Secretary of ZZR perhaps on this coming Monday Anzac Day public holiday say at Wentworth Falls to try to have the Legal Committee of you four reinstated with with the new Chair and New Secretary added to the committee.*

*As we know it is essential to get some stability back into ZZR so it can present a unified face to the world, particularly in relation to the Claim. As I said in my email last night I acknowledge that is a huge task."*

3. on 23 April 2016, at 8.46 am, Mr Mulally sent an email to Mr Ackland and copied that email to Mr Forbes, Mr Robinson-Mills and Mr Landon [**Exhibit ZZR-3 Page 83**]. That email relevantly includes:

*"I agree Noel.*

*I am happy to read the note before it goes if that would help."*

4. on 24 April 2016, at 2.08 pm, Mr Mulally sent an email to Mr Robinson-Mills [**Exhibit ZZR-3 Page 80**]. That email relevantly includes:

*"How the new Chair and the new Secretary act or do not act is a matter for them.*

*But they do risk harming ZZR and the Claim if they fail to utilise the people, being the four of you, who have carried out all the work for ZZR, including on the Claim, over the past couple of years."*

5. on 26 April 2016, at 8.01 pm, Mr Mulally sent an email to Mr Langdon and copied that email to Mr Robinson-Mills, Mr Ackland and Mr Forbes [**Exhibit ZZR-3 Page 80**]. That email relevantly includes:

*"Let us hope that the ONSR audit disappoints them."*

6. on 17 May 2016, at 10.46 am, Mr Mulally sent an email to Mr Ackland, Mr Langdon, Mr Robinson-Mills and Mr Forbes **[Exhibit ZZR-3 Page 94]**. That email included all personal information of members of the Zig Zag Co-op. Mr Mulally also states:

*"I refer to my telephone discussion with Michael Forbes a few minutes ago.*

*I enclose a copy of the further email which I have received from Lee Wiggins.*

*I will reflect on my reply and discuss it with you before I send it."*

7. on 18 May 2016, at 10.20 am, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills **[Exhibit ZZR-3 Page 99]**. That email relevantly includes:

*"I enclose for your confidential information a copy of the letter I emailed to Lee Wiggins this morning.*

*The Confidentiality Agreements which I sent to him are the same as those you signed but with the Trust added as an additional party with the result that the confidentiality obligation is also owed to the Trust as well as to ZZR under these new Confidentiality Agreements.*

*I will let you know when I receive a reply."*

8. on 22 May 2016, Mr Mulally sent an email to Mr Ackland and copied that email to Mr Robinson Mills, Mr Langdon and Mr Forbes **[Exhibit ZZR-3 Page 101]**. That email relevantly includes:

*I understand completely the position you are putting.*

*I will talk to Peter Lowry and find out if he can join our meeting on Tuesday. I will let you know after I speak to him.*

9. on 25 May 2016, Mr Mulally sent an email to Mr Robinson-Mills and copied that email to Mr Ackland, Mr Forbes and Mr Langdon **[Exhibit ZZR-3 Page 106]**. That email relevantly includes:

*I note that ZZR states it has \$292,101.82 in its bank accounts at the time the email was sent;*

*I am unhappy at what I perceive as the underlying motive behind disclosing details of payments to Michael Hall SC – even though his name was not set out in full – and to me in the email;*

.....

*The email states that the Board is taking direct control of matters previously dealt with by the Legal and Liabilities Committee*



*The email also states that a letter will be sent to me asking me to provide a full copy of the Claim. I have not received that letter*

*The Board apparently is or was meeting with Crown Lands to clarify the ZZR responsibilities in relations to the Trust.*

*I will start to draft the two papers we discussed yesterday.*

*I look forward to guidance on the quantum of the Trust portion of the Claim.*

10. on 26 May 2016, Mr Mulally sent an email to Mr Ackland, Mr Robinson-Mills, Mr Langdon and Mr Forbes [**Exhibit ZZR-3 Page 108**].

11. on 1 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills [**Exhibit ZZR-3 Page 110**]. That email relevantly includes:

*I enclose a copy of the email and letter I sent to Lee Wiggins today.*

*I will let you know when I receive a reply.*

12. on 1 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills [**Exhibit ZZR-3 Page 112**]. That email relevantly includes:

*I enclose for your private information the email and letter I sent to Council's lawyers today.*

*I am informing Lee Wiggins that I have sent the Deed to Council's lawyers but at this stage I am not giving him a copy of the letter or Deed.*

13. on 7 June 2016, Mr Mulally sent an email to Mr Ackland [**Exhibit ZZR-3 Pages 114-116**]. That email relevantly includes:

*Thank you Noel.*

*This is very helpful.*

14. on 8 June 2016, Mr Mulally sent an email to Mr Robinson-Mills and copied that email to Mr Forbes, Mr Langdon and Mr Ackland [**Exhibit ZZR-3 Pages 114-116**]. That email relevantly includes:

*Thank you Alexander*

*I will keep you informed as this key issue is addressed.*

15. on 8 June 2016, Mr Mulally sent an email to Mr Robinson-Mills [**Exhibit ZZR-3 Pages 117-118**]. That email relevantly includes:

*I presume we have not heard anything about the Regulator's meeting with ZZR a little while ago?*

16. on 15 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of emails sent to myself and a copy of the letter sent to Council's lawyers **[Exhibit ZZR-3 Pages 119-120]**.
17. on 21 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of an email sent from Le Fevre & Co to Mr Mulally and also included his reply to Le Fevre & Co **[Exhibit ZZR-3 Pages 121-122]**.
18. on 22 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills **[Exhibit ZZR-3 Page 123]**. That email relevantly includes:

*I am writing to let you know that I am now meeting with Peter Lowry at 10.30am this coming Tuesday to discuss the best and proper way to proceed with the fire claim by the Zig Zag Railway Reserve Trust in the current circumstances.*

*I have the benefit of comments from some of you to assist me in this.*

*I will be in touch after the meeting.*

19. on 28 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of an email sent to me and a copy of Mr Mulally's letter to Council's lawyer **[Exhibit ZZR-3 Page 124]**.
20. on 29 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of an email sent to me and a copy of Mr Mulally's further letter to Council's lawyer **[Exhibit ZZR-3 Page 125]**.
21. on 30 June 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills **[Exhibit ZZR-3 Page 126]**. That email relevantly includes:

*I enclose for your personal information a copy of the email I just received last evening from the NSW Department of Justice about the Brief being prepared for the Coroner to assist the upcoming Fire Enquiry.*

*I will keep you informed.*

*At this stage I am not distributing this email to anyone else.*

22. on 1 July 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of a letter sent to me regarding the renewal of the license deed **[Exhibit ZZR-3 Page 127]**.
23. on 13 July 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included a copy of a letter sent to the lawyers for Lithgow City Council **[Exhibit ZZR-3 Page 128]**.
24. on 24 July 2016, Mr Mulally sent an email to Mr Langdon **[Exhibit ZZR-3 Pages 131-132]**. That email relevantly includes:

*I refer to our recent meeting in Sydney*

*Do you think you will have time to prepare the safety paper we discussed at that meeting and send it out for our side to look at it before we meet the Crown Lands people on Wednesday?*

25. on 25 July 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills which included an exchange of emails between Le Fevre & Co and Mr Mulally as well as an email to me **[Exhibit ZZR-3 Pages 133-134]**.
26. on 28 July 2016, Mr Mulally sent an email to Mr Ackland, Mr Forbes, Mr Langdon and Mr Robinson-Mills **[Exhibit ZZR-3 Page 135]**. That email relevantly includes:
  - o *Letter from Le Fevre & Co to My Mulally;*
  - o *Revised Certificate of Currency issued by Statewide Mutual;*
  - o *Letter from Statewide Mutual to Le Fevre & Co;*
  - o *Letter sent by Mr Mulally to Le Fevre & Co.*
27. on 21 September 2016, Mr Mulally sent an email to Mark Langdon and Michael Forbes copying it to Michael Forbes, Alexander Robinson-Mills and Noel Ackland. That email relevantly includes:

*Thank you Mark and Michael for your emails yesterday.*

*I do not see that we should be doing anything about the Regulator at this stage. It seems to me the tie for that will be when you get the money for ZZR and there is serious talk of running fare paying passengers again. Do any of you have a different view? If so we can pursue that.*

(ii) Emails sent by the following to Mr Mulally on the dates set out below:

1. on 22 April 2016, Mr Ackland sent an email to Mr Forbes and copied that email to Mr Robinson-Mills, Mr Langdon and Mr Mulally [**Exhibit ZZR-3 Pages 80-85**].
2. on 23 April 2016, Mr Ackland sent an email to Mr Mulally and copied that email to Mr Forbes, Mr Robinson-Mills and Mr Langdon [**Exhibit ZZR-3 Pages 80-85**]. That email relevantly includes:

*Perhaps a 'carefully crafted' note from Alex to Wiggins about such meeting might be the best approach.*

3. on 24 April 2016, Mr Robinson-Mills sent an email to Mr Ackland and copied that email to Mr Forbes, Mr Langdon and Mr Mulally [**Exhibit ZZR-3 Pages 80-85**]. That email relevantly includes:

*There are a couple of interesting comments on Facebook that suggest JW will not want to cooperate and does not want the four to be involved.*

4. on 26 April 2016 Mr Langdon sent an email to Mr Mulally and copied that email to Mr Robinson-Mills, Mr Ackland and Mr Forbes [**Exhibit ZZR-3 Pages 80-85**]. That email relevantly includes:

*They may be waiting for the ONSR [Office of the National Rail Safety Regulator] audit to occur and are hoping that this audit will validate their actions in holding the SGM [EGM] and they can then ignore the old committee.*

5. on 18 May 2016, Mr Forbes sent an email to Mr Mulally, Mr Robinson-Mills, Mr Ackland and Mr Langdon [**Exhibit ZZR-3 Page 100**]. That email relevantly includes:

*The 4JM would be pleased to come to your office next Tuesday (24/5) and will catch the early train as per our last visits.*

6. on 22 May 2016, Mr Ackland sent an email to Mr Mulally and copied that email to Mr Robinson-Mills, Mr Langdon and Mr Forbes [**Exhibit ZZR-3 Page 101**]. That email relevantly includes:

*Following a short meeting with Alex, Michael and myself, we are still dedicated at this stage to preservation of the fire claim. However, as we are not in full knowledge of the intentions of the new Board, we are putting our effort into the Trust portion of the claim. We would like to discuss with you the various possibilities for doing this, and our responsibilities as concerned Members, as we feel the Board may plan to disband the Legal Committee as it is and form a new one.*

.....

*So, we would like on Tuesday to seek your advice on the Trust's portion of the claim and our efforts to protect both it and the State Government's interests. We find we are not so concerned with the future of the ZZR Co-op Ltd as we feel they do not have the correct priorities in this matter.*

*See you on Tuesday 24th at 2 pm.*

7. on 24 May 2016, Mr Robinson-Mills sent an email to Mr Mulally [**Exhibit ZZR-3 Pages 102-105**]. This email includes a copy of members update email that Mr Wiggins sent to the members of the ZZR Co-op on 21 April 2016.
8. on 25 May 2016, Mr Robinson-Mills sent an email to Mr Mulally and copied that email to Mr Ackland, Mr Forbes and Mr Langdon [**Exhibit ZZR-3 Page 107**]. That email relevantly includes:

*The four are meeting at 2pm this afternoon. We will be address the items in your email, separate the claim into railway and trust and conduct the risk assessment on separating the two entities.*

.....

*We should be able to give you a decision by late afternoon today*

9. on 26 May 2016, Mr Ackland sent an email to Mr Robinson-Mills, Mr Mulally, Mr Langdon and Mr Forbes [**Exhibit ZZR-3 Page 108**]. That email relevantly includes:

*In the event of ZZR insolvency (from loss of accreditation) the Trust gets some operating assets as per original agreement. Hence the Trust should claim now for operating locos and carriages against the Railway. This would be the cost of two locos at full operating status and condition at the present time. Arguably this action could take place now as there are no operating locos.*

.....

*Add to 'reasons' page:*

*"The current Board has indicated it may accept the original offer from Comcover of \$2.7m. This would not be adequate to cover the ZZRT portion of the amount of claim monies and would result in further action against ZZR adding to the solvency issue"*

*If ZZR takes the offer from Comcover we need a separate Trust to sue the Railway for extra claim money. This means we need to know if ZZR is planning to accept the original \$2.7m offer. Intelligence would help here - ? via the Payne/Ayres or Berejiklian/Rumble conduits.*

10. on 7 June 2016, Mr Ackland sent an email to Mr Mulally and copied that email to Mr Robinson-Mills, Mr Langdon and Mr Forbes [**Exhibit ZZR-3 Pages 114-116**]. That email relevantly includes:

*The final amount for the Zig Zag Railway Trust portion of the bushfire claim we have calculated at \$9,510,660.34.*

11. on 8 June 2016, Mr Robinson-Mills sent an email to Mr Mulally and copied that email to Mr Forbes, Mr Langdon and Mr Ackland **[Exhibit ZZR-3 Pages 114-116]**. That email relevantly includes:

*In addition to Noel's amount, a further \$500,000 needs to be removed from the ZZR figure and added to the ZZRT. This amount was the commercial payout ZZR received from AON. I believe AON is seeking to be reimbursed from the TMF. The Railway have nearly spent all of this amount.*

*If this is not done at the time or before confirmed separation, the ZZR would have to be sued by the ZZRT and possibly send the ZZR into insolvency.*

12. on 8 June 2016, Mr Langdon sent an email to Mr Mulally and copied that email to Mr Robinson-Mills, Mr Forbes and Mr Ackland providing further information regarding the spilt of the Claim into ZZR and Trust portions **[Exhibit ZZR-3 Pages 114-116]**.

13. on 8 June 2016, Mr Robinson-Mills sent an email to Mr Mulally **[Exhibit ZZR-3 Pages 117-118]**. That email included a copy of an email that Mr Wiggins sent to the ZZR Co-op membership.

14. on 8 June 2016, Mr Robinson-Mills sent an email to Mr Mulally advising that he had heard nothing further **[Exhibit ZZR-3 Pages 117-118]**.

15. on 20 September 2016 at 8.54 am, Mr Michael Forbes sent an email to himself, Alexander Robinson-Mills, John Mulally, Mark Langdon and Noel Ackland. That email relevantly includes:

*I suspect that any further contact with itsr could be detrimental and a complete waste of effort. Other than applying for accreditation of a new limited company of course.*

16. on 20 September 2016, at 11.20 am an email sent by Mark Langdon to Michael Forbes copied to Michael Forbes, Alexander Robinson-Mills, John Mulally and Noel Ackland.

- (iii) Meetings attended by Mr Mulally with one or more of the following on the dates set out below:

1. meeting held on 24 May 2016 attended by one or more of Mr Mulally, Mr Ackland, Mr Robinson-Mills, Mr Forbes and Mr Langdon;

2. meeting held on 27 June 2016 attended by Mr Mulally and Mr Lowry;

(B) Without the authority, consent, and without disclosing to, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally provided assistance to third parties contrary to the interests of the Zig Zag Co-op, including as follows:

- (i) emails sent by Mr Mulally on the dates and to the people set out in particulars (A)(i) above;
- (ii) emails sent to Mr Mulally by the people on the dates set out in particulars (A)(ii) above; and
- (iii) meetings attended by Mr Mulally with one or more of the people on the dates set out in particulars (A)(iii) above;

(C) Without the authority, consent, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally took instructions from, and drafted reply correspondence to be sent to the Zig Zag Co-op, on behalf of one or more of the following:

- (i) Mr Michael Forbes, including:
  - 1. the email described in particular (A)(ii)(5) above.
- (ii) Mr Noel Ackland, including:
  - 1. the emails described in particulars (A)(ii)(1), (2), (6), (9) & (10) above.
- (iii) Mr Mark Langdon, including:
  - 1. the emails described in particulars (A)(ii)(4) & (12) above.
- (iv) Mr Alexander Robinson-Mills, including:
  - 1. the emails described in particulars (A)(ii)(3), (7), (8), (11), (13) & (14) above.

(D) Without the authority, consent, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally took instructions from one or more of Mr Michael Forbes, Mr Noel Ackland, Mr Mark Langdon and Mr Alexander Robinson-Mills to send the following correspondence on or about 14 September 2016:

- (i) letter from Mr Mulally to Comcover dated 14 September 2016; and

- (ii) letter from Mr Mulally to the Hon Senator Ms Marise Payne dated 14 September 2016.

### **Particulars to paragraph 43**

- (A) Without the authority, consent, and without disclosing to, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally communicated with each of the following in respect of the affairs of the Zig Zag Co-op and the Zig Zag Trust, including as follows:
  - (i) emails sent by Mr Mulally on the dates and to the people set out in particulars (A)(i) in paragraph 42 above.
  - (ii) emails sent to Mr Mulally by the people on the dates set out in particulars (A)(ii) in paragraph 42 above; and
  - (iii) meetings attended by Mr Mulally with one or more of the people on the dates set out in particulars (A)(iii) in paragraph 42 above.
- (B) Without the authority, consent, and without disclosing to, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally provided assistance to third parties contrary to the interests of the Zig Zag Co-op, including as follows:
  - (i) Emails sent by Mr Mulally on the dates and to the people set out in particulars (A)(i) in paragraph 42 above;
  - (ii) Emails sent to Mr Mulally by the people on the dates set out in particulars (A)(ii) in paragraph 42 above; and
  - (iii) Meetings attended by Mr Mulally with one or more of the people on the dates set out in particulars (A)(iii) in paragraph 42 above.
- (C) Without the authority, consent, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally took instructions from, and drafted reply correspondence to be sent to the Zig Zag Co-op, on behalf of one or more of the following:
  - (i) Mr Michael Forbes, including:
    - 1. the email described in particular (A)(ii)(5) to paragraph 42 above.
  - (ii) Mr Noel Ackland, including:



1. the emails described in particular (A)(ii)(1), (2), (6), (9) & (10) to paragraph 42 above.
- (iii) Mr Mark Langdon, including:
1. the emails described in particular (A)(ii)(4) & (12) to paragraph 42 above.
- (iv) Mr Alexander Robinson-Mills, including:
1. the emails described in particular (A)(ii)(3), (7), (8), (11), (13) & (14) to paragraph 42 above.
- (E) Without the authority, consent, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally took instructions from one or more of Mr Michael Forbes, Mr Noel Ackland, Mr Mark Langdon and Mr Alexander Robinson-Mills to send the following correspondence on or about 14 September 2016:
- (i) letter from Mr Mulally to Comcover dated 14 September 2016; and
  - (ii) letter from Mr Mulally to the Hon Senator Ms Marise Payne dated 14 September 2016.

#### **Particulars to paragraph 44**

- (A) Without the authority, consent, and without disclosing to, or informing any, of the New Board of the Zig Zag Co-op Mr Mulally disclosed confidential information, including his instructions from the Zig Zag Co-op and the Zig Zag Trust, to the following:
- (i) emails sent by Mr Mulally on the dates and to the people set out in particulars (A)(i) in paragraph 42 above.
  - (ii) emails sent to Mr Mulally by the people on the dates set out in particulars (A)(ii) in paragraph 42 above; and
  - (iii) meetings attended by Mr Mulally with one or more of the people on the dates set out in particulars (A)(iii) in paragraph 42 above.

**Particulars to paragraph 45**

- (A) In respect of the sub-paragraph 45(a) of the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:
- (i) all future work to be undertaken by Mr Mulally must be submitted and approved by the board before and must come from the Chairman or Secretary of Zig Zag Railway **[Exhibit ZZR-3 Page 49]**;
  - (ii) the Legal and Liabilities Committee comprising Michael Forbes, Noel Ackland, Mark Watson, Alexander Robinson-Mills and Mark Langdon do not hold any authorisation to approve any further expenditure or to act on behalf of the Zig Zag Co-op Ltd or the Zig Zag Trust effective from 23<sup>rd</sup> March 2016 **[Exhibit ZZR-3 Page 49]**;
  - (iii) all correspondence regarding Zig Zag Co-op or Zig Zag Trust must be forwarded to James Windsor in his capacity as secretary **[Exhibit ZZR-3 Page 49]**;
  - (iv) Mr Mulally was required to declare any current, potential or perceived conflict of interest he may have in acting for Zig Zag Co-op or Zig Zag Trust **[Exhibit ZZR-3 Page 49]**;
  - (v) Mr Mulally was required to provide a copy of the damages claim delivered by Peter Lowry to the offices of the Australian Defence Forces in Canberra and did not do so **[Exhibit ZZR-3 Page 86]**;
  - (vi) Mr Mulally was instructed that Zig Zag Co-op Ltd did not require Confidentiality Agreements to be signed in order to view its claim for damages and for Mr Mulally to provide to Zig Zag Co-op Ltd a complete copy of the damages claim delivered by Peter Lowry to the offices of the Australian Defence Forces in Canberra **[Exhibit ZZR-3 Page 136 and 141]**;
  - (vii) Mr Mulally was instructed that all requests for documentation or information involving the Bushfire Damages Claim, the Zig Zag Co-op Ltd or the Zig Zag Trust must come from either James Windsor in his capacity as Secretary or Lee Wiggins in his capacity as Chairman **[Exhibit ZZR-3 Page 136]**;
  - (viii) Mr Mulally was instructed that it was up to the Zig Zag Co-op Ltd to manage both the Zig Zag Co-op Ltd and the Zig Zag Trust components of the Bushfire Claim

and that the Board of Zig Zag Co-op Ltd had indicated to Mr Mulally how it will do that **[Exhibit ZZR-3 Page 142]**; and

- (ix) Mr Mulally was instructed to forward all files, records, correspondence and all other documentation associated with both the Zig Zag Co-op Ltd and the Zig Zag Trust to Ben Lawrence in his capacity as director by no later than 26 September 2016 **[Exhibit ZZR-3 Page 142]**.

(B) In respect of the sub-paragraph 45(b) of the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:

- (i) In respect of the instructions described in particulars (A)(i) above Mr Mulally:
- a. sent emails on the dates and to the people set out in particulars (A)(i) to paragraph 42 above;
  - b. sent the following letters:
    - i. letter from Mr Mulally to Comcover dated 14 September 2016; and
    - ii. letter from Mr Mulally to the Hon Senator Ms Marise Payne dated 14 September 2016.
- (ii) In respect of the instructions described in particulars (A)(ii) above, Mr Mulally:
- a. received emails sent by the people on the dates set out in particulars (A)(ii) to paragraph 42 above; and
  - b. attended meetings with one or more of the people on the dates set out in particulars (A)(iii) to paragraph 42 above.
- (iii) In respect of the instructions described in particulars (A)(iii) above, Mr Mulally:
- a. Did not forward all correspondence concerning the Zig Zag Co-op Ltd or the Zig Zag Trust to Mr Windsor in his capacity as Secretary instead he sent emails on the dates and to the people set out in particulars (A)(i) to paragraph 42 above;
- (iv) In respect of the instructions described in particulars (A)(iv) above, Mr Mulally:
- a. By letter dated 6 April 2016, Mr Mulally stated amongst other things:

*"I declare that I have no current, potential or perceived conflict of interest in acting on behalf of The Zig Zag Railway Co-op Limited in its own right or in its capacity as the presently appointed manager of the affairs of the cab Zig Zag Railway Reserve Trust.*

*I also declare that I have no current, potential or perceived conflict of interest in acting in the interests of the cab Zig Zag Railway Reserve Trust in this fire claim through the role of cab Zig Zag Railway Co-op Limited as the currently appointed manager of the affairs of the cab Zig Zag Railway Reserve Trust."*

- b. Did not disclose then or at any subsequent time, that he would continue to act and follow the instructions of Mr Michael Forbes, Mr Noel Ackland, Mr Mark Langdon, Mr Alexander Robinson-Mills and Mr Peter Lowry.
  - c. Mr Mulally did not disclose that he was aware that Messrs Forbes, Ackland, Robinson-Mills and Langdon intended that:
    - i. any settlement of the Bushfire Claim be paid by Comcover to an entity other than the plaintiffs; and
    - ii. to set up a limited liability company to become the successor to the Zig Zag Co-op Limited.
- (v) In respect of the instructions described in particulars (A)(v) and (ix) above, Mr Mulally:
- a. did not until ordered by the Supreme Court of New South Wales on 15 December 2016, provide a copy of the Bushfire Claims Documents;
- (vi) In respect of the instructions described in particulars (A)(vi) above, Mr Mulally:
- a. by letter dated 17 August 2016 [**Exhibit ZZR-3 Page 137**] advised the New Board of Zig Zag Co-op Ltd that it was not up to the Board to make such a decision; and
  - b. did not until ordered by the Supreme Court of New South Wales on 15 December 2016, provide a copy of the Bushfire Claims Documents;
- (vii) In respect of the instructions described in particulars (A)(vii) and (viii) above, Mr Mulally:
- a. sent emails on the dates and to the people set out in particulars (A)(i) to paragraph 42 above;

- b. received emails sent by the people on the dates set out in particulars (A)(ii) to paragraph 42 above;
- c. attended meetings with one or more of the people on the dates set out in particulars (A)(iii) to paragraph 42 above;
- d. sent the following letters:
  - i. letter from Mr Mulally to Comcover dated 14 September 2016; and
  - ii. letter from Mr Mulally to the Hon Senator Ms Marise Payne dated 14 September 2016.

(C) In respect of the sub-paragraph 45(c) to the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:

- (i) emails sent by Mr Mulally on the dates and to the people set out in particulars (A)(i) to paragraph 42 above;
- (ii) emails sent to Mr Mulally by the people on the dates set out in particulars (A)(ii) to paragraph 42 above;
- (ii) meetings attended by Mr Mulally with one or more of the people on the dates set out in particulars (A)(iii) to paragraph 42 above;
- (iii) sent the following letters:
  - i. letter from Mr Mulally to Comcover dated 14 September 2016; and
  - ii. letter from Mr Mulally to the Hon Senator Ms Marise Payne dated 14 September 2016.

#### **Particulars to paragraph 46**

(A) In respect of the sub-paragraph 46(a) to the Statement of Claim, Mr Mulally provided legal services (including legal advice) to the Zig Zag Co-op and the Zig Zag Trust which fell below the standard of a competent legal practitioner, in the following respects:

- (i) failure to advise Zig Zag Co-op that the L&LC has a duty to report to the board and duty to be candid and comprehensive in its report about the Bushfire Claim **[Exhibit ZZR-1 Page 618]**;
- (ii) failed to advise Zig Zag Co-op that there was not any need for Mr Mulally to inform the relevant State Minister of the Bushfire Claim **[Exhibit ZZR-1 Page 618]**;
- (iii) that Zig Zag Co-op may be “stripped of its role as manager of the affairs of the Trust with the current fire damages claim being stopped and of the Trust then subsequently mounting its own separate claim for its loss. This would significantly reduce the ZZR negotiating position in relation to the ZZR portion of the claim-as distinct from the Trust portion of the claim.” **[Exhibit ZZR-1 Page 619]**;
- (iv) advised the Zig Zag Co-op that Zig Zag Trust was required to or needed to hold separate directors meetings from Zig Zag Co-op Ltd;
- (v) failed to advise Zig Zag Co-op Ltd that the L&LC was obliged to provide the Bushfire Claim Documents to the Board of the Zig Zag Co-op Ltd, in lieu Mr Mulally advised that “[i]n view of all these matters, and other relevant matters, I strongly recommend that the Legal and Liabilities Committee with the both of you as full-time and four members in your positions as Chair and Secretary of ZZR members be restored to its role” **[Exhibit ZZR-1 Page 619]**
- (vi) failed to advise the Zig Zag Co-op there was no requirement for the Board of the Zig Zag Co-op to sign Confidentiality Agreements to review the Bushfire Claim **[Exhibit ZZR-1 Page 620]**;
- (vii) advise the Board of Zig Zag Co-op that there was no need for the Zig Zag Co-op to enter into a confidentiality agreement with itself before the L& LC could report to the Zig Zag Co-op or before Mr Mullally could provide a copy of the Bushfire Claim to Zig Zag Co-op **[Exhibit ZZR-1 Vol 2 Pages 639 and 642]**;
- (viii) provided advice to the Board of the Zig Zag Co-op that “I look forward to receiving your personal assurance and that of the Board that Confidentiality Agreements will be honoured as I requested in my email to you yesterday morning to enable me to disclose details of the Claim to those signing the Confidentiality Agreements without first addressing matters with the Trust and with those considering the Claim” **[Exhibit ZZR-1 Vol 2 Page 642]** was wrong in principle as well as law; and

- (ix) the advice contained in the letter from Mr Mulally to James Windsor dated 17 August 2016 was erroneous;
- (B) In respect of the sub-paragraph 46(b) to the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:
  - (i) The plaintiffs repeat the particulars at particulars (A), (B) and (C) to paragraph 45 above;
- (C) In respect of the sub-paragraph 46(c) to the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:
  - (i) The plaintiffs repeat the particulars at particulars (A), (B) and (C) to paragraph 45 above; and
- (D) In respect of the sub-paragraph 46(d) to the Statement of Claim, Mr Mulally did not act in accordance with, and follow the instructions of, the Zig Zag Co-op and the Zig Zag Trust in the following respects:
  - (i) The plaintiffs repeat the particulars at particulars (A), (B) and (C) to paragraph 45 above.

#### **Particulars to paragraph 47**

- (A) Mr Mulally purported to provide legal services (including legal advice) to the Zig Zag Co-op and the Zig Zag Trust without holding a practising certificate issued by the Law Society of New South Wales for the period from 1 July 2015 up to and including 2 November 2016, in breach of the following provisions of the Uniform Legal Profession Law:
  - (i) section 10 of the Uniform Legal Profession Law;
- (B) Mr Mulally cancelled his registration:
  - (i) for GST with the ATO on or before 8 September 2015, and
  - (ii) for ABN 42 428 655 167 on or before 8 September 2015;
- (C) Mr Mulally:

- (i) was not registered with the ATO for GST from 8 September 2015, and
  - (ii) did not have a registered ABN from 8 September 2015;
- (D) Mr Mulally charged GST to the Zig Zag Co-op and the Zig Zag Trust, and issued invoices, in respect of legal services (including legal advice) provided on and after 8 September 2015;
- (E) Mr Mulally acted in breach of the Best Interests Duty in the respects particularised in paragraph 42 above;
- (F) Mr Mulally acted in breach of the No Conflict Duty in the respects particularised in paragraph 43 above;
- (G) Mr Mulally acted in breach of the Confidential Information Duty in the respects particularised in paragraph 44 above;
- (H) Mr Mulally acted in breach of the Obey Instructions Duty in the respects particularised in paragraph 45 above; and
- (I) Mr Mulally acted in breach of the Exercise of Reasonable Care and Skilly Duty in the respects particularised in paragraph 46 above.

#### **Particulars to paragraph 51**

- (a) Email from Mr Fitzgerald to Mr Mulally dated 10 October 2016;
- (b) Email from Mr Fitzgerald to Mr Mulally dated 18 October 2016;
- (c) Letter from Mr Mulally to Mr Fitzgerald dated 18 October 2016;
- (d) Letter from Mr Fitzgerald to Mr Mulally dated 20 October 2016;
- (e) Letter from Mr Fitzgerald to Mr Mulally dated 21 October 2016;
- (f) Email from Mr Mulally to Mr Fitzgerald dated 21 October 2016;
- (g) Letter from Mr Fitzgerald to Mr Mulally dated 22 November 2016; and
- (h) Letter from Mr Fitzgerald to Mr Mulally dated 23 November 2016.



### Particulars to paragraph 573

The fact in this paragraph is to be inferred from:

- (a) the absence, in the files (physical and electronic) of the plaintiffs of the following:
  - (i) the original or any copy of the Costs Agreement;
  - (ii) a copy of an email sent by Mr Mulally to [newnes@zigzagrailway.com.au](mailto:newnes@zigzagrailway.com.au) or to [cea@zigzagrailway.com.au](mailto:cea@zigzagrailway.com.au), attaching, or otherwise referring to, the Costs Agreement;
  - (iii) any reference to the Costs Agreement;
  - (iv) any meeting attended by Mr Mulally, Mr Michael Forbes, Mr Mark Langdon, Mr Noel Ackland and Mr Alex Robinson-Mills at which a costs agreement or retainer agreement or costs disclosure was signed by Mr Mulally, Mr Forbes, Mr Langdon, Mr Ackland and Mr Robinson-Mills;
  - (v) any estimate of fees having been provided by Mr Mulally prior to 22 March 2016; or
  - (vi) any reference to confidentiality agreements with Mr Michael Forbes, Mr Mark Langdon, Mr Noel Ackland and Mr Alex Robinson-Mills;
- (b) evidence given by Mr Mulally on oath in his affidavit of 7 April 2017 served in these proceedings, which evidence is contradicted by contemporaneous documentary evidence as set out in paragraphs [31] – [51] of the affidavit of Mr Lee Wiggins of 19 April 2017 served in these proceedings; and
- (c) the conduct of Mr Mulally pleaded and particularised in paragraphs 42, 43, 44, 45, 46 and 47 of the statement of claim.

### Particulars to paragraph 59

- (a) Engagement Letter, clause 1.1;
- (b) Engagement Letter, clause 2.2;
- (c) on the proper construction of the Costs Agreement, Mr Mulally had no entitlement to be paid the additional hourly rate of \$450 (ex GST), over and above the hourly rate of \$200

per hour (ex GST) paid in respect of the invoices issued by Mr Mulally to Zig Zag Co-op during the period from on and after 15 July 2014 up to and including 21 September 2016, except in circumstances where:

- (i) damages were recovered by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire that started at the Marrangaroo Army Depot on 16 October 2013; or
- (ii) Mr Mulally's services ended, meaning that there was a termination of Mr Mulally's services in accordance with the Terms of Engagement.

### **Particulars to paragraph 62**

- (a) The Costs Agreement provided for additional legal costs to be payable on the successful of the outcome to which the agreement relates being the recovery of damages by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire which originated from the Marrangaroo Army Depot on 16 October 2013; and
- (b) In the event of recovery of damages by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire which originated from the Marrangaroo Army Depot on 16 October 2013, Mr Mulally asserted an entitlement to be paid an additional payment of \$450 per hour (ex GST) of fees rendered immediately damages were recovered by the Zig Zag Co-op and the Zig Zag Trust against the Commonwealth of Australia in relation to the Bushfire which originated from the Marrangaroo Army Depot on 16 October 2013.

ZIG ZAG RAILWAY CO-OP LTD and ZIG ZAG RAILWAY RESERVE TRUST

v

JOHN MULALLY t/as JOHN MULALLY & ASSOCIATES

ANNEXURE B

First Schedule of Invoices

Date	Invoice	Matter	Fees charged @ \$200 p/hr	GST	Disbursements (incl GST)	Total Invoice	Difference in fees being \$450/hr	Hours
30/07/14	01380	Proposed Bushfire Damages Claim	5,600.00	560.00	0	6,160.00	12,600.00	28.0
15/09/14	01394	Proposed Bushfire Damages Claim	8,100.00	810.00	0	8,910.00	18,225.00	40.5
15/10/14	01409	Proposed Bushfire Damages Claim	8,300.00	830.00	0	9,130.00	18,675.00	41.5
15/11/14	01418	Proposed Bushfire Damages Claim	700.00	70.00	0	770.00	1,575.00	3.5
23/12/14	01441	Proposed Bushfire Damages Claim	1,600.00	160.00	455.74	2,215.74	3,600.00	8.0
14/01/15	01449	Proposed Bushfire Damages Claim	1,900.00	190.00	0	2,090.00	4,275.00	9.5
23/02/15	01457	Proposed Bushfire Damages Claim	5,000.00	500.00	0	5,500.00	11,250.00	25.0
15/03/15	01471	Proposed Bushfire Damages Claim	4,860.00	486.00	0	5,346.00	10,935.00	24.3
31/03/15	01475	Proposed Bushfire Damages Claim	4,840.00	484.00	0	5,324.00	10,890.00	24.2
14/04/15	01480	Proposed Bushfire Damages Claim	10,760.00	1,076.00	275.00	12,111.00	24,210.00	53.8
31/05/15	01501	Proposed Bushfire Damages Claim	12,800.00	1,280.00	0	14,080.00	28,800.00	64.0
30/06/15	01511	Proposed Bushfire Damages Claim	900.00	90.00	0	990.00	2,025.00	4.5
15/07/15	01537	Proposed Bushfire Damages Claim	400.00	40.00	0	440.00	900.00	2.0

Date	Invoice	Matter	Fees charged @ \$200 p/hr	GST	Disbursements (incl GST)	Total Invoice	Difference in fees being \$450/hr	Hours	
31/07/15	01546	Proposed Bushfire Damages Claim	1,900.00	190.00	0	2,090.00	4,275.00	9.5	
31/08/15	01554	Proposed Bushfire Damages Claim	3,400.00	340.00	0	3,740.00	7,650.00	17.0	
15/09/15	01575	Proposed Bushfire Damages Claim	2,740.00	274.00	0	3,014.00	6,165.00	13.7	
30/10/15	01589	Proposed Bushfire Damages Claim	6,400.00	640.00	0	7,040.00	14,400.00	32.0	
30/11/15	01605	Proposed Bushfire Damages Claim	20,560.00	2,056.00	0	22,616.00	46,260.00	102.8	
23/12/15	01630	Proposed Bushfire Damages Claim	3,840.00	384.00	0	4,224.00	8,640.00	19.2	
15/01/16	01638	Proposed Bushfire Damages Claim	2,428.00	242.80	189.90	2,860.70	6,435.00	14.3	
30/03/16	01678	Proposed Bushfire Damages Claim	9,980.00	998.00	351.30	11,329.30	22,680.00	50.4	
				<b>117,008.00</b>	<b>11,700.80</b>	<b>1,271.94</b>	<b>129,980.74</b>	<b>264,465.00</b>	<b>587.7</b>

Total in Fee Difference	264,465.00
GST on Fee Difference	26,446.50
Due and Payable	290,911.50

**ZIG ZAG RAILWAY CO-OP LTD**  
and  
**ZIG ZAG RAILWAY RESERVE TRUST**

v

**JOHN MULALLY t/as JOHN MULALLY & ASSOCIATES**

**ANNEXURE C**  
**SECOND SCHEDULE OF INVOICES**

BILL TO: Zig Zag Railway Co-Operative Limited  
VIA Lithgow NSW 2790

Date	Invoice No	Description	Amount	Amount Paid	Date Paid
15/09/14	01394	Proposed Bushfire Damages Claim	8,910.00	0.60	
17/11/14	01426	Access Road Issue	9,536.60	0	
15/07/15	01534	Corporate Issues	2,860.00	0	
15/07/15	01535	Access Road Issue	1,320.00	0	
15/07/15	01536	Zig Zag Railway Reserve Trust	220.00	0	
15/07/15	01537	Proposed Bushfire Damages Claim	440.00	0	
23/12/15	01628	Access Road Issue	2,904.00	0	
23/12/15	01630	Proposed Bushfire Damages Claim	4,224.00	0	
23/12/15	01631	Corporate Issues	1,166.00	0	
23/12/15	01632	Agreement with Turner	506.00	0	
30/03/16	01679	Access Road Issue	110.00	0	
31/07/16	01753	Access Road Issue	880.00	0	

Current	1-30 Days Past Due	31 – 60 Days Past Due	61-90 Days Past Due	Over 90 Days Past Due	Amount due
					\$33,076.00

**ZIG ZAG RAILWAY CO-OP LTD**  
and  
**ZIG ZAG RAILWAY RESERVE TRUST**

v

**JOHN MULALLY t/as JOHN MULALLY & ASSOCIATES**

**ANNEXURE D**  
**Table of payments**

	<b>Date</b>	<b>Inv No</b>	<b>Payment</b>	<b>ZZR Exhibit 2 page number</b>
1.	23/12/14	01442	\$990.00	008
2.	23/12/14	01443	\$3,190.00	008
3.	15/01/15	01448	\$2,970.00	009
4.	15/01/15		\$440.00	009
5.	06/03/15	01456	\$220.00	012
6.	18/03/15	01470	\$770.00	012
7.	10/04/15	01476	\$1,408.00	014
8.	10/04/15	01477	\$990.00	015
9.	04/05/15	01477	\$17,121.94	017
10.	02/06/15	01500, 01502, 01503, 01504	\$4,225.29	018
11.	08/07/15	01509	\$3,410.00	021
12.	08/07/15	01521	\$330.00	021
13.	08/07/15	01510	\$2,417.38	021
14.	20/08/15	01547	\$880.00	023
15.	21/08/15	01545	\$1,870.00	023
16.	21/08/15	01544	\$660.00	023

	<b>Date</b>	<b>Inv No</b>	<b>Payment</b>	<b>ZZR Exhibit 2 page number</b>
17.	08/09/15	01555	\$1,672.00	025
18.	08/09/15	01556	\$1,540.00	025
19.	08/09/15	01557	\$770.00	025
20.	08/09/15	01552	\$2,926.00	025
21.	08/09/15	01553	\$936.37	025
22.	29/09/15	01579	\$220.00	025
23.	29/09/15	01578	\$1,080.20	025
24.	29/09/15	01577	\$396.00	025
25.	29/09/15	01576	\$308.00	025
26.	16/11/15	01585	\$638.00	027
27.	16/11/15	01586	\$990.00	027
28.	16/11/15	01587	\$1,686.46	027
29.	16/11/15	01588	\$968.00	027
30.	22/12/15	01608	\$968.00	028
31.	22/12/15	01607	\$2,266.00	028
32.	22/12/15	01610	\$62.00	029
33.	22/12/15	01609	\$550.00	029
34.	22/03/16		\$17,270.00	031