

**Royal Commission into Misconduct in the Banking, Superannuation and
Financial Services Industry**

REASONS FOR RULING

Ruling No: 05/2018

Applicant: Questor Financial Services Pty Ltd

Application for: Legal Professional Privilege

Date of reasons: 31 July 2018

1 On Wednesday, 11 July 2018, Notice to Produce NP-962 was given to Questor Financial Services Pty Ltd, a company in the IOOF Group. The notice required the production, by 4pm on Tuesday, 17 July, of documents including:

Each bundle of documents (or "Board Pack") prepared for consideration of the board of Questor for the purpose of each meeting of the board held since 1 July 2011.

2 At 3:30 pm on Tuesday 17 July, King and Wood Mallesons, solicitors for Questor and other entities in the IOOF Group, produced documents in response to the notice together with a letter saying that:

IOOF believes that the documents being produced constitute complete production in response to the Notice to Produce.

3 On examining the documents produced, Solicitors Assisting the Commission observed that for the years between 2011 and 2014, apparently complete board packs had been produced but that, for subsequent years, only agendas had been produced, without any supporting papers. At 1:24pm on Friday 20 July, Solicitors Assisting sent the solicitors for Questor an email saying:

Please urgently advise whether the entire Board Packs were produced in response to NP-962, and if so, the document IDs of those Board Pack.

If the Board Packs were not produced to the Commission, please urgently produce those documents to the Commission (by no later than 5pm today), and provide the Commission with a written explanation as to why the Board Packs were not produced in the first instance.

4 Questor's solicitors replied at 4:50pm saying:

These documents will be provided to you as soon as possible. As it is likely to be out of hours, we will send them to you via our secure file transfer system. They were inadvertently not provided as a result of a technical error. (emphasis added)

5 By 11am on Sunday 22 July, nothing further had been heard and Solicitors Assisting sent an email to Questor’s solicitors saying:

Please urgently advise when the Commission should expect to receive the board packs referred to below. I note that these board packs were required to be produced by 17 July 2018, and no reasonable excuse for failing to produce the documents has been provided. The Commission requires urgent production of those documents. For the avoidance of doubt, I note that those documents should be produced in their entirety, with no redactions other than for information that your client claims is subject to legal professional privilege.

6 Questor’s solicitors replied at 2:30pm saying, relevantly:

As mentioned in my email below, the documents that you have identified in your email below were inadvertently not provided as a result of a technical error. The technical error was the “export” function in IOOF’s Diligent BoardBooks software only exported the agenda from those meetings and this was not identified by IOOF at the time.

...

IOOF has been working to provide the Commission with full sets of the documents identified in your email below since receiving your email. The short delay, on Friday afternoon and over the weekend, has been reviewing the documents for claims of legal professional privilege and the necessary time involved in preparing the documents for the Commission in the format set out in the Commission’s document management protocol.

We expect that the documents will be provided to the Commission, by our secure file transfer system, by 10.00am tomorrow, if not before.

7 Questor’s solicitors produced the documents at 9:48pm that night but said that their client “makes privilege claims in relation to parts of the documents produced”. The email also said that “We will provide the Commission with an affidavit in support of that claim tomorrow”.

8 No affidavit being received on that following day, Solicitors Assisting emailed Questor’s solicitors at 12:14pm on Tuesday 24 July asking when the affidavit would be provided and, in addition, noting that the March 2016 Board Pack had not been produced. The following day, at 1:11am, the March 2016 Board Pack was produced and, at about 5:00pm, a pro forma affidavit by a junior solicitor in support of the privilege claims that had been made was delivered to Solicitors Assisting.

9 The claims for privilege appeared large. I decided that I should exercise the power given by s 6AA(3) of the *Royal Commissions Act 1902 (Cth)* to require production of the complete documents for inspection for the purpose of deciding whether to accept or reject the claims made. The un-redacted documents were produced on 30 July and I have inspected them.

10 I reject many of the claims that were made. Many of the documents in respect of which privilege is claimed are not documents that record or refer to communications made for the dominant purpose of IOOF or Questor obtaining legal advice; they do not record or refer to communications of that kind; and, they are not documents created for the dominant purpose of obtaining legal advice. Some of the documents do no more than record or constitute communications with APRA, ASIC or the Australian Tax Office. Some of them do no more than record particular governance and compliance issues that had arisen without any expression of, or record concerning, any legal advice about or legal characterisation of those events. The claims that were made in respect of the last class of documents in Board Packs after 2015 stand in sharp contrast with the fact that similar documents for which no claims were made were contained in earlier Board Packs produced in response to NP-962 on 17 July.

11 To deal precisely with the claims that have been made it has been necessary to point to specific parts of particular documents in ways that may reveal their content. I have therefore asked Solicitors Assisting to record my decisions and provide them to Questor's solicitors in a document separate from this. But I think it important to record the course of events as I have and to publish that record.

12 Prompt and proper compliance with Notices to Produce is required by law and is essential to the proper execution of the Commission's work. Delays of the kind that have occurred in this case impede the proper work of the Commission. Ill based claims for privilege further impede its work.

K M HAYNE