

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	VID1494/2016
File Title:	TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 14/02/2017 12:58:46 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33  
Rule 16.32

## Defence

Federal Court of Australia  
District Registry: Victoria  
Division: Commercial and Corporations NPA

No. 1494 of 2016

### **TPT PATROL PTY LTD AS TRUSTEE FOR THE AMIES SUPERANNUATION FUND**

Applicant

### **MYER HOLDINGS LIMITED (ACN 119 085 602)**

Respondent

To the Applicant's Statement of Claim dated 29 December 2016, the Respondent  
**(Myer)** says as follows:

1. As to paragraph 1, it:
  - (a) admits that the Applicant purports to bring this proceeding pursuant to Part 4A of the *Federal Court Act 1976* (Cth);
  - (b) otherwise does not admit the allegations contained therein.
2. As to paragraph 2, it:
  - (a) admits that the Applicant purports to commence this proceeding on its own behalf and on behalf of Group Members as defined in paragraph 2;

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**Filed on behalf of:** The Respondent

Prepared by: Fred Prickett  
Law firm: Clayton Utz

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- (b) otherwise does not admit the allegations contained therein.
- 3. It admits paragraph 3.
- 4. As to paragraph 4, it:
  - (a) says that Mr Christopher Amies and Miss Jacinta Amies were recorded on the Myer share register as holders of 40,000 ordinary fully paid shares on 20 and 25 November 2014 as follows:
    - (i) 2,036 on 20 November 2014;
    - (ii) a further 37,964 on 25 November 2014;
  - (b) otherwise does not know and therefore cannot admit the allegations contained therein.
- 5. It does not know and therefore cannot admit the allegations contained in paragraph 5.
- 6. As to paragraph 6, it:
  - (a) says that Mr Christopher Amies and Miss Jacinta Amies were recorded on the Myer share register as holding the 40,000 ordinary fully paid shares referred to in paragraph 4(a) above until 12 February 2016; and
  - (b) otherwise does not know and therefore cannot admit the allegations contained therein.
- 7. As to paragraph 7, it:
  - (a) says that TPT Patrol Pty Ltd was recorded on the Myer share register as holder of 40,000 ordinary fully paid shares from 12 February 2016 until 2 November 2016;
  - (b) otherwise does not know and therefore cannot admit the allegations contained therein.

8. It does not know and therefore cannot admit the allegations contained in paragraph 8.
9. As to paragraph 9, it:
  - (a) refers to and repeats paragraph 7 above;
  - (b) otherwise does not know and therefore cannot admit the allegations contained therein.
10. As to paragraph 10, it:
  - (a) says that at all material times it had a Continuous Disclosure Policy as referred to in the Corporate Governance Statement in its 2014 Annual Report (section 5.2, page 36);
  - (b) otherwise denies the allegations contained therein.
11. It admits paragraph 11.
12. As to paragraph 12, it:
  - (a) admits that during the “Preliminary 2014 Myer Holdings Ltd Earnings Call” referred to in paragraph 12, Mr Bernie Brookes, Myer’s Chief Executive Officer at the time, made the following comment  
**(Comment):**  
  
*“We will therefore not only have increased sales growth, but anticipated profit growth this year”;*
  - (b) says that the Comment was made in the context of the presentation of a lengthy set of PowerPoint slides (which formed part of the ASX & Media Release referred to in the particulars to paragraph 11 of the Statement of Claim) and an accompanying verbal presentation to external analysts over approximately one and a half hours (including a question and answer session), which Myer will refer to at trial for their full terms and effect;
  - (c) otherwise denies the allegations contained therein.

13. As to paragraph 13, it:
- (a) refers to and repeats paragraphs 11 and 12 above;
  - (b) otherwise denies the allegations contained therein.
14. As to paragraph 14, it:
- (a) refers to and repeats paragraphs 11 and 12 above;
  - (b) admits that the Comment was a representation with respect to a future matter;
  - (c) otherwise denies the allegations contained therein.
15. As to paragraph 15, it:
- (a) refers to and repeats paragraphs 11 and 12 above;
  - (b) denies that it had no reasonable grounds for making the Comment, alternatively the representation alleged in paragraph 14 of the Statement of Claim (if a representation in that form was made);

### **Particulars**

The Comment was based on the confidential and internal budget prepared by Myer for the 2015 financial year, which anticipated that Myer's NPAT for the year would be greater than NPAT for the 2014 financial year. The budget is in writing and is dated 13 August 2014. The budget reflects internal work performed across all key aspects of Myer's business.

- (c) otherwise denies the allegations contained therein.
16. It denies the allegations contained in paragraph 16 and refers to and repeats paragraph 15 above.
17. It admits paragraph 17 and says that at trial it will refer to the release for its full terms and effect.

18. As to paragraph 18, it:
- (a) denies that it advised the market that it would not achieve NPAT in the 2015 financial year in excess of \$98.5 million;
  - (b) refers to and repeats paragraph 17 above;
  - (c) otherwise denies the allegations contained therein.
19. As to paragraph 19, it:
- (a) denies the allegations contained therein and refers to and repeats paragraphs 12, 15 and 18 above;
  - (b) says further that at all relevant times after 11 September 2014, market expectation for Myer's NPAT for the 2015 financial year was less than its NPAT for the 2014 financial year;

### **Particulars**

Market expectation as to Myer's NPAT for the 2015 financial year was reflected in, evidenced by, or set by, the NPAT forecast for the 2015 financial year by sell-side analysts who covered Myer and whose forecasts were published by Bloomberg. The average of those analysts' forecast NPAT for Myer for the 2015 financial year (Bloomberg Consensus) was, at all material times on and after 11 September 2014, less than Myer's NPAT for the 2014 financial year.

- (c) says further that having regard to the matters referred to in sub-paragraph (b) above, "the information about the earnings forecast matter" was not information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of Myer's ED securities.
20. As to paragraph 20:

- (a) it says that the pleading is liable to be struck out on the basis that it does not provide any, or any proper, particulars of the allegation that Myer “was aware” of the matters alleged;
- (b) under cover of that objection, it:
  - (i) denies that a representation in the form alleged was made, and it refers to and repeats paragraph 12 above;
  - (ii) if (which is denied) a representation in the form alleged was made, it denies that it had no reasonable grounds for making the representation and it refers to and repeats the particulars to paragraph 15 above;
  - (iii) if (which is denied) a representation in the form alleged was made and Myer had no reasonable grounds for making that representation, it says further that:
    - A. “the information about the earnings forecast matter” which is alleged in paragraph 19(a) of the Statement of Claim was not “information”, alternatively was not “information” that was in existence on 11 September 2014, and accordingly was not something of which Myer was capable of being aware;
    - B. further or alternatively, denies that it was aware that it had no such reasonable grounds;
  - (iv) it otherwise denies the allegations contained therein.

21. As to paragraph 21:

- (a) it says that the paragraph is liable to be struck out on the basis that:
  - (i) no proper particulars are provided of the allegation that Myer “was aware” of the matters alleged;
  - (ii) the matters alleged are otherwise vague and embarrassing;

- (b) under cover of this objection, it says that “the information about the earnings forecast matter” which is alleged in paragraphs 19(b) to (e) of the Statement of Claim was not “information” that was in existence on or before 11 November 2014, and accordingly was not something of which Myer was capable of being aware;
- (c) it otherwise denies the allegations contained therein.

22. As to paragraph 22, it:

- (a) denies that it had the awareness alleged in paragraphs 20 and 21 of the Statement of Claim and refers to and repeats paragraphs 18 to 21 above;
- (b) otherwise does not admit the allegations contained therein.

23. As to paragraph 23, it:

- (a) denies the allegations contained therein;
- (b) refers to and repeats paragraphs 18 to 22 above;
- (c) says that if (which is denied) “the information about the earnings forecast matter” was “information” of which Myer was aware on or before 11 November 2014 (as alleged), then that “information” was within the exception to Listing Rule 3.1 provided by Listing Rule 3.1A because:
  - (i) the information:
    - A. comprised matters of supposition or was insufficiently definite to warrant disclosure; and/or
    - B. the information was generated for the internal management purposes of Myer;
  - (ii) the information was confidential and ASX had not formed the view that the information had ceased to be confidential; and



- (iii) a reasonable person would not have expected the information to be disclosed.

24. As to paragraph 24:

- (a) the paragraph is vague and embarrassing and liable to be struck out as the Applicant does not identify what information about the earnings forecast matter ought to have been disclosed in the publications referred to, nor why the non-disclosure of the (unidentified) information rendered the communications misleading or deceptive or likely to mislead or deceive;
- (b) under cover of that objection, it denies the allegations contained in paragraph 24 and says that it will refer at trial to each of the documents or calls referred to in sub-paragraphs a. to f. for their full terms and context.

25. As to paragraph 25, it:

- (a) admits that at all material times the Listing Rules and the Act were in force, and says further that it will refer at trial to the Listing Rules and the Act for their full terms and effect;
- (b) otherwise does not admit the allegations contained therein.

26. As to paragraph 26, it:

- (a) says that the reference to the purchase of 400 MYR ED securities on 14 November 2014 is confusing and embarrassing;
- (b) otherwise does not know and therefore cannot admit the allegations contained therein.

27. It denies the allegations contained in paragraph 27.

28. It denies the allegations contained in paragraph 28.

29. It denies the allegations contained in paragraph 29.

This pleading was prepared by Ian Waller QC and Paul Liondas of counsel and Clayton Utz, lawyers for the Respondent.

Date: 14 February 2017



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Signed by Frederick Michael Prickett  
Partner, Clayton Utz  
Lawyers for the Respondent

**Certificate of lawyer**

I, Frederick Michael Prickett, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 14 February 2017



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Signed by Frederick Michael Prickett  
Partner, Clayton Utz  
Lawyers for the Respondent