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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): AFFIRM MARKETING (PTY) LTD AND OTHERS (“complainants”) v IF UMBRELLA PENSION FUND (“first respondent”); IF UMBRELLA PROVIDENT FUND (“second respondent”) AND FORMER TRUSTEES OF THE FUNDS (“third respondents”)

[1] INTRODUCTION

- 1.1 The complaint concerns alleged maladministration of the first and second respondents by their former board of trustees by using the members’ fund credits to fund the cost of reconstructing the funds’ data and records.
- 1.2 The complaint was received by this Tribunal on 3 May 2011. On 17 May 2011, letters were dispatched to the first and second respondents giving them until 30 June 2011 to file their responses. A response on behalf of the first respondent, the second respondent and the current board of trustees of the funds was received on 3 August 2011. This

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered is free to members of the public.

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Tribunal received a supplemented complaint on behalf of Dell Computer (Pty) Ltd on 8 May 2013 following a court order that was issued by the South Gauteng High Court on 5 February 2013, which allowed the complainants to supplement the original complaint. Responses were also received from the third respondents on 17 April 2013, 25 April 2013, 29 April 2013, 1 May 2013 and 27 May 2013.

- 1.3 After considering the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complaint involves a group of employers who participate in the first and second respondents (“herein after referred to as the IF Funds”). It also involves employees of the participating employers who are also members of the IF Funds. The IF Funds are pension fund organisations registered in terms of section 4 of the Act. The third respondents are former trustees of the IF Funds, namely, Tony Kamionsky, Gail le Grellier, Renier Botha, David Lepar, Brian Rosen, Lorraine Jager, and Claire Mol.
- 2.2 The IF Funds were initially administered by Dynamique SA Consultants and Actuaries (Pty) Ltd (“Dynamique”) until 31 January 2008 when Aon South Africa (Pty) Ltd (“Aon”) took over the administration of the IF Funds. The transfer of the IF Funds’ administration occurred after Aon purchased the administration books of Dynamique in 2008. During July 2010, the former board of trustees of the IF Funds appointed Deloitte and Touche to conduct a member level rebuild of the data and records of the funds from inception of the funds (1 January 2004) until 31 January 2008. This was

necessitated by the fact that the data held in respect of the IF Funds was questionable and not accurate. The cost of the rebuild exercise amounted to approximately R20 million. This translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits.

- 2.3 Upon receiving communication of the boards' decision to rebuild the funds' data in November 2010, the complainants indicated their dissatisfaction with the decision to use the members' fund credits in order to fund the rebuild exercise.

[3] **COMPLAINT**

- 3.1 The complainants state that the decision to rebuild the IF Funds' data occurred as a result of maladministration of the funds. The maladministration of the funds relates, *inter alia*, to reinvestments not being credited to members' accounts, switches between investments not being correctly recorded, inaccurate recording of monies being deposited into the bank accounts of other funds and a lack of monthly and annual audits. The complainants submit that the particulars of claim against the director of Dynamique that were filed at the South Gauteng High Court indicate that Dynamique breached its administration agreement with the IF Funds. The particulars of claim state that there was a failure to ensure that the IF Funds investments were made in accordance with the Act and the Financial Advisory and Intermediary Services Act 37 of 2002. This is due to the fact that the administrator failed to keep proper records, failed to perform monthly and annual audits, assets and liquidity requirements were not maintained and the sale of Dynamique's fund administration business to Aon was not adequately disclosed or dealt with in terms of section 13B(5)(a) of the Act.
- 3.2 The complainants assert that the former board of trustees also failed to

comply with its fiduciary duties provided in sections 7C and 7D of the Act. Although the board is entitled to delegate its functions to administrators, it remains responsible for the actions of such service providers who act as agents of the funds. The delegation of duties does not amount to a transfer of oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board.

- 3.3 They contend that the third respondents have not accounted for the loss suffered by the members in that their fund credits were reduced by 2.5% to fund the rebuild exercise. There is a further potential loss in that the costs of the rebuild exercise may not be recovered. There is also no assurance that the cost of the rebuild exercise will be met from the professional indemnity insurance cover held in respect of the IF Funds.
- 3.4 In the supplemented complaint, Dell Computer (Pty) Ltd submits that the former trustees who should be held liable for the maladministration of the IF Funds are Tony Kamionsky, Gail le Grellier, Renier Botha, and David Lepar. It submits that they should be held accountable for the cost of the rebuild exercise and the loss suffered by the members in this regard.

[4] RESPONSES

Response on behalf of the IF Funds

- 4.1 Dunster and Associates filed a response on behalf of the IF Funds and the current board of trustees. It indicates that the IF Funds and the current board of trustees were not cited as respondents by the complainant and as a result, no relief can be sought against the funds.
- 4.2 It states that the decision to conduct a rebuild of the funds data was taken in July 2010 by the previous trustees of the funds, namely, Gail le Grellier,

Renier Botha, David Lepar and Carel Smith. The liability of the former trustees should be limited to those who were in office up to 1 February 2008 as the 2,5% contribution for the cost of the rebuilding exercise is computed up to this date. Aon took over the administration of the funds from Dynamique on 1 February 2008. The previous board of trustees and the former trustees individually are separate entities from the IF Funds.

- 4.3 As regard the decision to rebuild the funds' data, this was done because the data relating to members' investments up to the end of February 2008 was potentially inaccurate. A firm of auditors (Deloitte and Touche) was tasked with verifying the accuracy of the members' information up to the end of January 2008 and commenced the rebuild exercise in July 2010. The previous trustees took legal advice from their attorneys before implementing their decision. The decision and the reasons thereof were communicated to members on 1 November 2010. This was further disclosed to the members by the trustees on 28 January 2011.
- 4.4 The former trustees who made the decision to effect a rebuild of the funds' data resigned on 10 February 2011. The new board of trustees was appointed from 10 February 2011. The new board of trustees considered the need for the rebuild exercise and had no reason not to endorse the decision made by the previous board of trustees. Aon have instructed the auditors to continue with the rebuild process from February 2008 through to date at its own cost.
- 4.5 The parties who are potentially liable for the maladministration of the funds' records which caused the need for the rebuild exercise are Dynamique, Mr Tony Kamionsky, Aon and any former trustees who contributed to the maladministration. The funds are pursuing legal proceedings against Dynamique, Mr Tony Kamionsky (in his capacity as a

director of Dynamique and a former trustee) and Aon in order to recover the cost of the rebuild process. In its response received during May 2013, the funds advised that they have settled their litigation against Tony Kamionsky and Dynamique. It indicates that an amount of R1 million was paid to the funds in settlement of the civil claim. However, it states that no legal action have been instituted against the former trustees after weighing the possibility of recovery of any loss and the cost implication of the civil action. It submits, however, that it is proceeding with its legal action against Aon.

- 4.6 As regards the indemnity insurance, the funds have an indemnity insurance which initially ran from 1 August 2010 until 31 July 2011. The period has been revised to run from 1 June 2011 until 31 May 2012. The cost of the rebuild exercise is not a claim covered by the portion of the policy dealing with theft, fraud, dishonesty and computer crime. The IF Funds are also unable to claim compensation from the insurers for the cost it incurred in effecting the rebuild process. This cost was borne by the funds' members.

Responses from the third respondents (former trustees)

Tony Kamionsky

- 4.7 He states that he has been excluded from the complaint after concluding a settlement agreement with the IF Funds and as a result, no relief can be sought against him. He asserts that the complainants have not provided any evidence of maladministration of the funds. He indicates that there was no maladministration of the funds and that R20 million was wasted on a rebuild that was never required. However, he submits that the former trustees who should be held liable for recklessly spending R20 million to fund the rebuild exercise are Gail le Grellier, Renier Botha and David

Lepar. He states that the cost could have been reduced by identifying and correcting specific problems rather than doing a complete rebuild of the funds' data. He concludes that the former trustees named above did not pay insurance premiums on the indemnity policies and hence the insurer refused to pay for the cost of the rebuild exercise.

Gail le Grellier and Renier Botha

- 4.8 Gail le Grellier and Renier Botha submitted essentially the same response. They confirm that they were trustees of the IF Funds from 22 November 2006 to 10 February 2011. They state that the complaint does not amount to a "complaint" as it does not relate to a specific complainant. The participating employers in the funds do not have an interest in the complaint. The members also have not suffered any prejudice as they are only entitled to their fund credits in terms of the funds' rules.
- 4.9 They aver that the complainants made broad allegations of a failure to exercise an oversight function over Dynamique against them without any evidence. The trustees exercised oversight function over Dynamique during several trustees' meetings that were held from 22 November 2006 to 1 February 2008. They state that the decision to use the member's fund credits to fund the cost of the rebuild exercise was an ad hoc expense as defined in the funds' rules. The state of affairs of the IF Funds also made it impossible for the trustees to carry out their duties and as a result, a decision had to be made to protect the funds and the interests of members. The IF Funds could not continue operating on the basis of inaccurate data and no financial statements.

David Lepar

4.10 Mr David Lepar submits that he served on the former board of trustees from 9 July 2008 to 10 February 2011. Thus, he states that he cannot be held liable for the decisions of the former board of trustees that were taken prior to 9 July 2008 or after 10 February 2011.

Brian Rosen, Lorraine Jager and Claire Mol

4.11 Mr Brian Rosen states that he resigned from the former board of trustees in 2006 and thus, any issue that arose relating to the funds after this date does not involve him. Lorraine Jager and Claire Mol also submit that they resigned from previous board of trustees in 2006 and were not party or consulted regarding the trustees' decision to use the member's fund credits to pay for the cost of rebuilding the funds data.

[5] DETERMINATION AND REASONS THEREFOR

Preliminary issues raised by former trustees, Gail le Grellier and Renier Botha

Complaint as defined in the Act

5.1 Gail le Grellier and Renier Botha submit that the employers involved in this complaint do not have an interest in the complaint and the issues raised do not relate to a specific complainant. The definition of a "complainant" in section 1 of the Act includes an employer who participates in a fund. The definition of a "complaint" in section 1 also includes allegations of maladministration of a fund or an allegation that a decision of the fund or any person purportedly taken in terms of the fund rules was excessive or amounts to improper exercise of powers. It also includes allegations that a complainant has sustained or may sustain prejudice as a result of maladministration of the fund. Thus, the participating employers in this complaint fall within the ambit of a "complainant" as defined in section 1 of

the Act and the issues raised amount to a “complaint” as defined in the Act. A complainant does not have to wait until he suffers loss or prejudice before lodging a complaint before this Tribunal.

5.2 Thus, the technical points fall to be dismissed.

Tony Kamionsky, Dynamique and Aon

5.3 It is noted that Tony Kamionsky and Dynamique concluded an out of court settlement with the IF Funds on 28 March 2013 in terms of which he paid the funds R1 million rand in settlement of a claim for alleged maladministration of the IF Funds. This Tribunal was provided with a copy of the settlement agreement between the parties. In terms of the settlement agreement, all disputes and civil claims between Tony Kamionsky, Dynamique and the IF Funds were settled. The IF Funds also agreed to withdraw all actions and civil claim against Tony Kamionsky and Dynamique.

5.4 The funds also advised that summons have been issued against Aon in the South Gauteng High Court for maladministration of the funds. The submissions indicate that the civil claim against Aon commenced on 28 January 2011 before the initial complaint was received by this Tribunal on 3 May 2011. Thus, it will be premature for this Tribunal to pronounce on the liability (if any) of Aon relating to the administration of the funds whilst there is pending civil claim against it. In order to avoid two parallel rulings relating to the same issue, the High Court should be allowed to adjudicate the civil claim against Aon. Section 30H(2) of the Act also precludes this Tribunal from adjudicating any complaint if before lodging the complaint proceedings have been instituted in any civil court in respect of the same subject matter.

High Court order

- 5.5 It should be noted that this Tribunal issued a determination in this matter on 31 July 2012 in terms of which the IF Funds were ordered to recalculate the member's fund values and credit them with the 2.5% that was used to fund the cost of the rebuild exercise. However, the IF Funds filed an appeal in terms of section 30P of the Act and the South Gauteng High Court issued an order on 5 February 2013 ordering that the complainant should pursue relief only against former trustees of the funds for breach of their statutory and fiduciary duties.
- 5.6 This Tribunal sent letters to all known former trustees affording them an opportunity to file responses to the initial complaint and the supplemented complaint as required in terms of section 30F of the Act. Thus, in light of the court order, the current complaint is only directed against the former trustees of the IF Funds to the exclusion of Tony Kamionsky, Dynamique and Aon.

The merits

- 5.7 The issue that falls for determination is whether or not the previous board of trustees of the IF Funds acted properly in terms of the funds' rules and the Act in using the members' fund credits to fund the cost of the rebuild exercise.

The funds' rules

- 5.8 The complainants are bound by the funds' rules as their claim is derived from the fund rules (see section 13 of the Act). Their claim can only succeed if they can show that the former board of trustees did not act in

terms of the funds' rules. The first and second respondents, as registered funds, are also bound to act in terms of their registered rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA)).

- 5.9 In terms of rule 2.6.19 of Amendment No. 2 of the IF Funds' rules, a members' fund credit consists of his or her contributions, the employers' contributions that are allocated for retirement funding, plus amounts transferred to the funds from a previous fund, less funds transferred to the expense reserve account in respect of ad hoc expenses, plus transfers from the expense reserve account and investment returns. The IF Funds' rules define "expenses" as follows:

"EXPENSES" means the ongoing monthly costs that cover administration services, consulting services and premiums in respect of INSURED DEATH BENEFITS and INSURED DISABILITY BENEFITS."

- 5.10 The rules also define "*ad hoc* expense" as follows:

"AD HOC EXPENSE" means costs and expenses, other than EXPENSES, that are not necessarily payable monthly and are not necessarily capable of being predetermined and will include, *inter alia*, fees, taxes and levies paid and accrued to service providers, the regulatory authorities, TRUSTEES, premiums in respect of professional indemnity and fidelity guarantee insurance, and audit fees."

- 5.11 In terms of rule 4.6.1 of the funds' rules, expenses and *ad hoc* expenses will be borne by the funds. The rule also states that expenses will be funded by the contributions made by the employers to the funds whilst the cost of *ad hoc* expenses will be deducted from the member's fund credit on such basis as may be determined by the trustees from time to time.

- 5.12 Thus, the IF Funds' rules define what costs can be deducted from the members' fund credit as *ad hoc* expenses. In terms of the rules, *ad hoc* expenses include costs and expenses that are necessarily payable monthly and are not capable of being predetermined. It is clear that the costs of *ad hoc* expenses are funded by deductions from the members' fund credits.
- 5.13 The IF Funds are defined contributions funds, which means that the benefits payable to members upon their exit depend on the underlying investment performance of the funds and is thus subject to the vagaries of the financial markets (see *Masingi v Pick 'n Pay Provident Fund* [2002] 1 BPLR 2985 (PFA) at 2987D-F). Thus, a member is not guaranteed any fund credit as the value thereof is determined upon the date of exit. A member's fund credit also does not include transfers to the expense reserve account in respect of *ad hoc* expenses. It appears from the funds rules that the deduction of the costs for the rebuild process can be categorised as audit fees, fees or levies paid to service providers or creditors of the funds. It may also include fees that are not necessarily payable monthly and are not capable of being predetermined.

Maladministration of the funds by the former trustees

- 5.14 Although the definition of *ad hoc* expenses allows the trustees to deduct such costs from the members' fund credits, this does not give them an unlimited power to use the member's fund credits to fund any cost resulting from their negligent conduct. It also does not cover costs resulting from maladministration of the funds which resulted in the members suffering an unwarranted loss on their fund credits. The facts indicate that the decision of the previous board of trustees of the funds to use 2.5% of the members' fund credits to fund the cost of the rebuild process was a result of maladministration of the funds. The members were

financially prejudiced in that their fund credits would be lesser than they would have been had the former trustees managed the funds properly. The other prejudicial factor is that the IF Funds are not able to compute and pay correct benefits to members upon their exit due to incorrect data.

- 5.15 The submissions indicate that the decision to engage the services of auditors to rebuild the funds' data and records was necessitated by the fact that the fund data was questionable and not accurate. The rebuilding of the funds' data had to be done at individual member level. The decision to rebuild the funds' data was taken in July 2010 when the funds were administered by Aon. The funds' administration was taken over by Aon from Dynamique on 1 February 2008. It appears from the facts that Dynamique did not keep proper records or administer the funds in accordance with its agreement with the funds. Aon also purchased the administrative books of Dynamique without conducting a proper due diligence. As a result of its failure to act with care and due diligence, it inherited the administrative problems from Dynamique.
- 5.16 However, the ultimate responsibility for the proper management of the funds rests with their board of trustees (see rule 6.1 of the funds' rules). In terms of rule 6.6.1 of the rules, the object of the board is to direct, control and oversee the operations of the funds in accordance with applicable laws and the rules. This includes the duty to act in the interest of members, to take measures to protect the assets of the funds and to ensure that proper records essential for the efficient administration of the funds are kept (see rules 6.7.1.13 and 6.14.1).
- 5.17 A board of trustees owes a fiduciary duty to the fund and to its members. A registered fund is entrusted with the control of property with which it is bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations (see *Tek Corporation Provident Fund and Others v*

Lorentz 1999 (4) SA 884 (SCA) at 894C-D and *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 499). Sections 7C and D of the Act codified some of the common law fiduciary duties of the board of trustees.

5.18 The apposite portion of section 7C(1) and (2) reads as follows:

“The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund.”

(1) In pursuing its object the board shall-

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected

...;

(b) act with due care, diligence and good faith.”

5.19 Section 7D, in turn, reads as follows:

“The duties of a board shall be to-

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board ...”

(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws.”

5.20 In terms of rule 6.9 of the funds' rules, the board may delegate its powers and duties to an administrator. However, the primary function of the board of trustees in relation to the business of a fund is to ensure that it exercises a rigorous oversight function over its administrators. In order for the board to exercise its oversight role properly, those to whom functions

are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable the board to make an informed performance assessment. The submissions indicate that the IF Funds do not have proper records and data. This prevents the funds from having accurate records regarding the members' fund values. This is the main reason why there was a need to appoint auditors to rebuild the funds' data and records.

Personal liability of former trustees

- 5.21 The Financial Institutions Act 28 of 2001 imposes certain duties on trustees. Section 2(a) of that Act requires a trustee, in the control and administration of a fund, to observe the utmost good faith and exercise proper care and diligence. Failure to comply with these duties constitutes a criminal offence which, on conviction, may result in a fine not exceeding R10 000 or imprisonment for a period not exceeding 10 years or to both such fine and imprisonment. In addition, the trustees could be liable to the financial institution or beneficiary thereof for any damage suffered by the institution or beneficiary as a result of such failure (see section 10 (2)).
- 5.22 There can be no doubt that these provisions were intended also for the kind of situation with which this Tribunal is confronted. Firstly, the Financial Institution Act imposes the section 2(a) duties on an “*official... of a financial institution...who controls or administers any funds of the institution... held by or on behalf of the institution for any beneficiary.*” A “financial institution” is defined with reference to the Financial Services Board Act, 97 of 1990 which in its definition of “financial institution” includes a pension fund.
- 5.23 As trustees of the board of management of the complainant, the members of the former board of trustees are all officials of the financial institution as

defined. As trustees of the funds, the board controls and administers monies paid into the fund and each trustee can be held personally liable for any financial loss caused to the funds due to maladministration (see *Mes v Art Medical Equipment Pension Fund (Now Liquidated) and Others* (2) [2005] 4 BPLR 332 (PFA) at paragraphs 20-22). Section 2(a) of the Financial Institution Act requires that they should perform these duties with care and diligence.

- 5.24 It follows that the trustees that were in office when the decision was taken to rebuild the funds data in July 2010 must be held personally liable to compensate the IF Funds for the financial loss occasioned by the rebuilding of the funds' data by reason of their failure to exercise their duties of proper care and diligence in the management of the funds.
- 5.25 It appears that the liability of the former trustees should be limited to those who were in office from 1 February 2008 to July 2010 as the 2.5% fund credits that were deducted to fund the cost of the rebuilding exercise is computed up to this date. These will include Gail le Grellier, David Lepar, Renier Botha, and Carel Smith. There were other former trustees including Lorraine Jager, Claire Mol and Clive Stuart who joined the former board of trustees after the decision to rebuild the funds' data was taken and resigned in 2006. Thus, they were not on the board of trustees when a decision was taken to rebuild the fund's data and when the IF Funds were administered by Dynamique.
- 5.26 As regards Tony Kamionsky, it should be noted that the amount of R1 million rand that he paid on his behalf and Dynamique in settlement of all civil claims against him for alleged maladministration is negligible having regard to the amount of financial loss suffered by the IF Funds and members as a result of the rebuild exercise. A reasonable settlement should have taken into account the financial prejudice to members and the

IF Funds. However, this Tribunal takes into cognisance that the IF Funds have concluded a settlement agreement with Tony Kamionsky and Dynamique, which is binding on the parties concerned.

Apportionment of financial loss

5.27 The issue of the personal liability of former trustees is compounded by the fact that the few trustees that were identified cannot be held solely liable to compensate the IF Funds for their financial loss. This is due to the fact that various parties contributed to the financial loss as a result of the rebuilding of the funds' data. These include Dynamique and Aon. As indicated above, Dynamique together with Tony Kamionsky have paid an amount of R1 million to the funds in settlement of a civil claim against them for alleged maladministration of the funds. The funds have also instituted a civil claim against Aon for maladministration of the funds. Thus, the personal liability of the former trustees should be less the amount of R1 million paid to the funds by Tony Kamionsky and Dynamique.

5.28 In terms of our common law, persons who jointly administer the affairs and property of others like trustees, can be held jointly and severally liable for loss caused by maladministration (see *Gross & Others v Pentz* 1996 (4) SA 617 (A) 629F-630D). Therefore, the former trustees who were responsible for managing the IF Funds in July 2010 when a decision was taken to rebuild the funds' data should be held personally liable for the financial loss occasioned by the rebuilding process.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 It is declared that the previous trustees of the IF Funds, which

include Gail le Grellier, Renier Botha, David Lepar, and Carel Smith, did not manage the IF Funds properly and as a result, caused financial loss to the funds and ultimately to the members;

- 6.1.2 The IF Funds are ordered to compute the amount of the financial loss to the funds and members occasioned by the rebuilding of the funds' data, having regard to the investment returns earned by the funds, within four weeks of this determination;
- 6.1.3 The members of the former board of trustees identified in paragraph 6.1.1 above are personally (jointly and severally) ordered to pay the IF Funds the amount of the financial loss as computed in paragraph 6.1.2 above, less the amount of R1 million rand already paid by Tony Kamionsky and Dynamique, within six weeks of this determination; and
- 6.1.4 The former trustees are further ordered to notify the IF Funds and this Tribunal of the payment as stated in paragraph 6.1.3 above, within seven weeks of the date of this determination.

DATED AT PRETORIA ON THIS 3RD DAY OF JULY 2012

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M filing: High Court

Complainants were represented by: Jonathan Mort Inc

The first and second respondents were represented by: Dunster and Associates

Dell Computer (Pty) Ltd was represented by: Brooks Luyt Inc

No legal representation for the third respondents