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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: NSD529/2016
File Title: Kwangho Kim v Hodgson Faraday Pty Ltd Limited ACN 130 606 987 & Ors
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 19/12/2019 1:24:45 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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Third Amended Statement of Claim

No. NSD 529 of 2016

Federal Court of Australia

District Registry: New South Wales

Division: General

KWANGHO KIM

Applicant

HODGSON FARADAY PTY LIMITED ACN 130 606 987 and others named in the schedule

Respondents

A. INTRODUCTION

A.1. The Applicant and Group Members

1. This is a representative proceeding brought pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) on behalf of the Applicant and all persons who suffered loss or damage by reason of the conduct of the Respondents pleaded in this Statement of Claim (collectively, **Group Members**), which conduct occurred in the period 1 January 2015 to 25 June 2015 (**Relevant Period**).
2. As at the commencement of this proceeding, seven or more Group Members have claims against the Respondents within the meaning of s 33C of the FCAA.

A.2. Respondents

3. The First Respondent (**TM Index**):
 - (a) was incorporated as a corporation pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) in Australia on 14 April 2008;

Filed on behalf of (name & role of party)	Kwangho Kim, Applicant
Prepared by (name of person/lawyer)	Philip Yang
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- (b) between 1 March 2012 and 27 October 2014, was known as “Taemus Funds Limited”;
- (c) between 28 October 2014 and 16 April 2015 was known as “TM Index Limited”;
- (d) between 17 April 2015 and 29 July 2015, was known as “NZGFT Fund Management Ltd”;
- (e) between 30 July 2015 and 11 October 2015, was known as “NZGFT Fund Management Pty Ltd” after it became a proprietary company;
- (f) between 12 October 2015 and 14 April 2016, was known as “Hodgson Faraday Pty Ltd”;
- (g) from 15 April 2016, became known as “Hodgson Faraday Limited” after becoming a public company;
- (h) at all material times, held Australian Financial Services Licence (**AFSL**) 326375.

4. The Second Respondent (**TMK Index**):

- (a) was registered as a corporation pursuant to the Corporations Act on 14 February 2007;
- (b) between 12 February 2007 and 25 May 2015, was known as “Fish Capital Securities Ltd”;
- (c) on 26 May 2015, became known as “TMK Index Ltd”; and
- (d) at all material times, held AFSL 314823.

5. The Third Respondent (**Wang**) was a director of TM Index from 24 June 2014 to 8 October 2015.

B. REPRESENTATIONS

B.1 January 2015

- 6. On or about January 2015, the Applicant and some Group Members attended a presentation in Seoul, South Korea conducted by Mr Geun Su Ha (**January 2015 Seoul Presentation**).
- 7. At the January 2015 Seoul Presentation, Mr Ha showed a series of PowerPoint slides to those persons in attendance bearing the logo of TM Index and entitled “*Introduction to TM Index*” (**January 2015 Seoul Slideshow**), which represented that:

- (a) TM Index provided a product/s by which a client could make an investment that would be held by a third party custodian bank and placed in an MT4 personal trading account (**TM Account Representation**);
 - (b) the money invested in that product/s would be managed by a trading and risk management team to generate profit for the investor through index trading (**TM Index Trading Representation**);
 - (c) an investment in any of the financial products offered by TM Index would produce a guaranteed weekly return on the investment, in that a client could request a refund if their MT4 account goes negative for over a week (**TM Guaranteed Returns Representation**);
 - (d) the products offered by TM Index were designated either a “T” product or a “M” product, each of which provided specified weekly returns which differed on the type of product purchased and amount invested (**TM Products Representation**).
 - (e) TM Index achieved \$205m of trading profit in 6 months in 2014, averaging a 17% return on investment weekly (**TM Trading Profit Representation**).
8. In January 2015, a brochure was made available to some Group Members bearing the logo of TM Index and entitled “*Creating Wealth, Realizing Dreams*” (**January 2015 Brochure**).
9. The January 2015 Brochure repeated the:
- (a) TM Account Representation;
 - (b) TM Index Trading Representation;
 - (c) TM Guaranteed Returns Representation; and
 - (d) TM Trading Profit Representation
- B.2 May 2015**
10. On or about 19 May 2015, an email in the Korean language was sent to the Applicant and some Group Members attaching a 2-page document (in Korean) entitled ‘*Itinerary for Manila Convention*’ (**Manila Itinerary**).
11. The Manila Itinerary stated that:
- (a) a convention would be held in Manila over 27 to 30 May 2015 (**Manila Convention**);

- (b) presentations would be given by the CEOs of TM Index and TMK Index.
12. On 28 May 2015, at the Manila Convention, at which the Applicant and some Group Members attended, a series of PowerPoint slides were shown to those persons in attendance bearing the logo of TMK Index and entitled "*TMK Index: Creating Wealth, Realizing Dreams*" (**May 2015 Manila Slideshow**).
13. The May 2015 Slideshow:
- (a) stated that TMK Index was affiliated with TM Index;
 - (b) repeated the TM Trading Profit Representation
 - (c) represented that TMK Index provided a product/s by which a client could make an investment that would be held by a third party custodian bank and placed in an MT4 personal trading account (**TMK Account Representation**);
 - (d) represented that the money invested in that product/s would be managed by a trading and risk management team to generate profit for the investor through index trading (**TMK Index Trading Representation**);
 - (e) represented that an investment in any of the financial products offered by TMK Index would produce a guaranteed weekly return on the investment, in that a client could request a refund if their MT4 account goes negative for over a week (**TMK Guaranteed Returns Representation**); and
 - (f) represented that the products offered by TMK Index were designated either a "T" product, an "M" product, or a "K" product, each of which provided specified weekly returns which differed on the type of product purchased and amount invested (**TMK Products Representation**).
14. On or around May 2015, a brochure was made available on the website www.tm4x.com (**Website**) entitled "*TM Index Ltd Double Profit Program*" (**May 2015 Brochure**).
15. The May 2015 Brochure:
- (a) repeated the TM Product Representation;
 - (b) repeated the TM Guaranteed Returns Representation;
 - (c) represented that TM Index provided a product/s by which a client could make an investment that was placed in a "MT4" personal trading account which would then "mirror" TM Index's trading accounts using TM Index's "exclusive EA system" (**TM EA System Representation**); and

- (d) represented that an investment in any of the financial products offered by TM Index came with “100% Capital Protection”, in that TM Index would restore to its original balance any MT4 account that fell below the initial balance during any week of trading (**TM Guaranteed Capital Representation**).

B.3 June 2015

- 16. On or about 25 June 2015, an investor presentation was given in Seoul to potential investors (**June 2015 Seoul Presentation**) at which the Applicant and some Group Members attended.
- 17. At the June 2015 Seoul Presentation, a brochure bearing the logo of TMK Index entitled “*A Doorway to Create your Wealth/ A Journey to Pursue Your Dreams*” was made available to attendees (**June 2015 Brochure**).
- 18. The June 2015 Brochure:
 - (a) stated that TMK Index was a subsidiary of TM Index established to develop the growth and potential of the Korean market;
 - (b) repeated the TMK Products Representation;
 - (c) repeated the TMK Account Representation; and
 - (d) repeated the TMK Guaranteed Returns Representation.

B.4 Collapse of scheme

- 19. The Applicant and Group Members transferred funds by electronic bank transfer in respect of “T”, “M” or “K” products to bank accounts nominated by persons giving the January 2015 Seoul Presentation, Manila Convention or June 2015 Seoul Presentation (**Nominated Account**).
- 20. The Applicant and Group Members who had transferred funds into a Nominated Account were provided:
 - (a) an “Official Receipt” on the letterhead of TM Index or TMK Index stating that the amount of the transfer had been credited to the Group Member’s MT4 account; and
 - (b) a personal account either on the Website, tmk4.com or tmkindex.com, which purported to indicate the performance of their “T”, “M” or “K” product/s.

21. On and from 29 October 2015, all funds transferred by the Applicant and Group Members into Nominated Accounts became unable to be accessed and have been unable to be accessed since.

C. THE TRUE POSITION

22. At all times during the Relevant Period, neither TM Index nor TMK Index:
- (a) conducted any business;
 - (b) had available for purchase any “T”, “M” or “K” products;
 - (c) used the MT4 trading platform;
 - (d) used the EA system to trade on behalf of investors;
 - (e) intended that any moneys received from investors would be traded or invested on behalf of the investor,
- (together, the **True Position**).

Particulars

First and Third Respondent’s Defence filed 20 September 2016, paragraphs 2(a)(i), 4(b) and 21(a)(iii).

D. CONDUCT OF TM INDEX AND TMK INDEX

D.1 TM Index

23. Each of the:
- (a) TM Account Representation;
 - (b) TM Index Trading Representation
 - (c) TM Products Representation;
 - (d) TM Trading Profit Representation;
 - (e) TM Guaranteed Returns Representation;
 - (f) TM EA System Representation; and
 - (g) TM Guaranteed Capital Representation
- was made by TM Index.

Particulars of TM Index's conduct

TM Index's making of each of the representations above may be reasonably inferred by the publication of the name, logo, ABN and/or AFSL of TM Index on the January 2015 Seoul Slideshow, January 2015 Brochure and May 2015 Brochure.

Further, it may be inferred that the representations were made with the authority of TM Index by reason of the fact that Wang was sole director of TM Index and must be taken to have known that the representations were to be made in connection with the name of TM Index by reason of the facts and matters alleged in particulars (iii) to (vii) to paragraph 31 below.

Further particulars may be provided following subpoena and discovery.

24. Further to paragraph 23, TM Index made or authorised the:

- (a) TMK Account Representation;
- (b) TMK Index Trading Representation
- (c) TMK Products Representation; and
- (d) TMK Guaranteed Returns Representation.

Particulars of TM Index's conduct

TM Index's making of each of the representations above may be reasonably inferred by:

- (i) *the publication of the name and logo of TM Index on the May 2015 Slideshow and June 2015 Brochure;*
- (ii) *the identification of TM Index offices in the May 2015 Slideshow;*
- (iii) *the publication of financial information of TM Index in the June 2015 Brochure; and*
- (iv) *the presence of an introduction and CEO's Address in relation to TM Index in the June 2015 Brochure.*

Further, it may be inferred that the representations were made with the authority of TM Index by reason of the references to TM Index in the May 2015 Slideshow and the June 2015 Brochure, the fact that Wang was sole director of TM Index and controlled TMK Index by reason of the facts and matters alleged in particular (ii) to paragraph 31 below, and the fact that Wang must be taken to have known that the representations were to

be made in connection with the names of TM Index and TMK Index by reason of the facts and matters alleged in particulars (iii) to (vii) to paragraph 31 below.

Further particulars may be provided following subpoena and discovery.

D.2 TMK Index

25. TMK Index made or authorised the:

- (a) TM Trading Profit Representation;
- (b) TMK Account Representation;
- (c) TMK Index Trading Representation
- (d) TMK Products Representation; and
- (e) TMK Guaranteed Returns Representation.

Particulars of TMK Index's conduct

TMK Index's making of each of the representations above may be reasonably inferred by reason of the publication of the name, logo, ABN and/or AFSL of TMK Index on the May 2015 Slideshow and May 2015 Brochure.

Further, it may be inferred that the representations were made with the authority of TMK Index by reason of the fact that Wang controlled TMK Index by reason of the facts and matters alleged in particular (ii) to paragraph 31 below and must be taken to have known that the representations were to be made in connection with the name of TMK Index by reason of the facts and matters alleged in particulars (iii) to (vii) to paragraph 31 below.

Further particulars may be provided following subpoena and discovery.

E. MISLEADING OR DECEPTIVE CONDUCT

E.1 Representations were misleading or deceptive

26. By reason of the True Position, each of the:

- (a) TM Account Representation;
- (b) TM Index Trading Representation
- (c) TM Products Representation;
- (d) TM Trading Profit Representation;
- (e) TM Guaranteed Returns Representation;

- (f) TM EA System Representation; and
- (g) TM Guaranteed Capital Representation.
- (h) TMK Account Representation;
- (i) TMK Index Trading Representation
- (j) TMK Products Representation; and
- (k) TMK Guaranteed Returns Representation.

(Representations) were misleading or deceptive, or likely to mislead or deceive, within the meaning of s 12DA of the ASIC Act.

E.2 TM Index

27. By reason of the matters pleaded at paragraphs 23 and 24 above, TM Index engaged in conduct:
- (a) in relation to financial services within the meaning of s 12BAB of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**);
 - (b) in trade or commerce within the meaning of s 12DA of the ASIC Act;
 - (c) to which Division 2 Part 2 of the ASIC Act extends by reason of s 12AC of the ASIC Act.
28. By reason of the matters pleaded in paragraphs 26 and 27 above, TM Index engaged in conduct in relation to financial services which was misleading or deceptive, or likely to mislead or deceive, in contravention of s 12DA of the ASIC Act (**TM Index Contravention**).

E.3 TMK Index

29. By reason of the matters pleaded at paragraph 25 above, TMK Index engaged in conduct:
- (a) in relation to financial services within the meaning of s 12BAB of the ASIC Act;
 - (b) in trade or commerce within the meaning of s 12DA of the ASIC Act; and
 - (c) to which Division 2 Part 2 of the ASIC Act extends by reason of s 12AC of the ASIC Act.
30. By reason of the matters pleaded in paragraphs 26 and 29, TM Index engaged in conduct in relation to financial services which was misleading or deceptive, or likely to

mislead or deceive, in contravention of s 12DA of the ASIC Act (**TMK Index Contravention**).

F. WANG'S INVOLVEMENT IN CONDUCT

31. Wang was involved in the:

- (a) TM Index Contravention; and/or
- (b) TMK Index Contravention.

in the meaning of s 12GF of the ASIC Act.

Particulars of Wang's involvement

Wang's "involvement" in the TM Index Contravention in the meaning of s 12GF of the ASIC Act can be reasonably inferred from the following matters considered together:

- (i) *Wang was the sole appointed director of TM Index from at least 19 February 2014 to 8 October 2015.*
- (ii) *It may be reasonably inferred that at all material times Wang controlled TMK Index, in the sense of directing the affairs of that company, by reason of the following facts and matters:*
 - A. *At the time the Representations were made by TMK Index, the sole appointed director of TMK Index was Mr Greg Forrester.*
 - B. *Wang offered Mr Greg Forrester the position of director of TMK Index, and agreed to pay Mr Forrester \$2,000 a month for his services and assured him that TMK Index "was not operating".*
 - C. *Wang as registered agent lodged with ASIC a form recording the appointing of Mr Forrester as director of TMK Index (ASIC Form 7E6993347).*
 - D. *TMK Index was purchased by Successway Ltd in the following circumstances:*
 - (a) *The contract for purchase was acted on by Wang's firm of solicitors, Wang & Associates, acting for the purchaser;*
 - (b) *Successway Limited paid \$60,000 for the purchase of Fish Capital Securities Ltd, which funds were paid from Hong Kong HSBC account number 053 500203 838 in the name of Vivid Quark Technology SEY (**Vivid Quark**), an offshore entity.*

- (c) Wang was sole director of Vivid Quark from its incorporation on 25 February 2014. Wang controlled and was the beneficial owner of Vivid Quark. In that regard, reliance is placed on the findings recorded by Bromwich J in Wang v ASIC [2019] FCA 1178 at [27]-[28].
- (d) The shares in Vivid Quark were held by Australian SIV Fund Management Pty Ltd, the shares in which were owned by Wang's mother. Wang controlled and was the beneficial owner of Australian SIV Funds Management Pty Ltd. In that regard, reliance is placed on the findings recorded by Bromwich J in Wang v ASIC [2019] FCA 1178 at [23], [25], [27].
- (e) Successway Limited was a shareholder of Imperium Forex Group Pty Limited ACN 149 011 361, of which Wang was a director between 17 June 2015 and 30 October 2015.
- (f) On 26 February 2016, Wang offered for sale Successway Limited and informed a prospective purchaser that "My family is the owner of the company" (Wang email to Grant Guenther of Macpherson Kelley Lawyers, 26 February 2016).
- E. On 21 May 2015, prior to settlement, a solicitor in the employ of Wang & Associates requested from the vendor an urgent name change of TMK Index from "Fish Capital Securities Ltd" to "TMK Index Limited".
- F. The name TMK Index implies an association with TM Index, the affairs of which Wang directed by reason of his being its sole director in the Relevant Period.
- (iii) It may be reasonably inferred that material included in the January 2015 Brochure was provided by Wang.

 - A. On 28 October 2014 as director of TM Index, Wang passed a resolution to change the name of TM Index from "Taemus Funds Limited" to "TM Index Ltd".
 - B. On 28 October 2014 at 18:50:07, a change of company name form to change the name of TM Index from "Taemus Funds Limited" to "TM Index Ltd" was lodged with ASIC by Wang as registered agent (ASIC document number 7E6477878).

- C. *The January 2015 Brochure contained an ASIC extract for TM Index dated 28 October 2014 with a timestamp of 19:06:06 AEST.*
 - D. *The timestamp of the ASIC extract referred to in C above suggests the extract was provided by Wang because at the time the extract was obtained he must have known that the change of name had been lodged by him 16 minutes earlier.*
- (iv) *It may be reasonably inferred that material included in the June 2015 Brochure was provided by Wang.*
- A. *On 26 May 2015, at 15:05:39, a change of company name form to change the name of TMK Index from “Fish Capital Securities Ltd” to “TMK Index Ltd” was lodged with ASIC by Wang as registered agent (ASIC document number 7E6983899).*
 - B. *The June 2015 Brochure contained an ASIC extract for TMK Index dated 26 May 2015 with a timestamp of 15:30:34 AEST.*
 - C. *The timestamp of the ASIC extract referred to in B above suggests the extract was provided by Wang because at the time the extract was obtained he must have known that the change of name had been lodged by him 25 minutes earlier.*
- (v) *It may reasonably be inferred that Wang, as sole director of TM Index and as the person directing the affairs of TMK Index, would not have provided the material referred to in particulars (iii) and (iv) above without knowing, or enquiring as to, the purpose for which the material was to be used.*
- (vi) *It may reasonably be inferred that Wang knew that the name and logo of TMK Index were to be used in the May 2015 Slideshow:*
- A. *The May 2015 Slideshow occurred at the Manila Convention on 28 May 2015*
 - B. *The name of TMK Index had been changed from “Fish Capital Securities Ltd” to “TMK Index Ltd” on 26 May 2015 in the circumstances alleged in particulars (ii)(E) and (iv)(A) above*
 - C. *It is inherently unlikely that the organisers of the Manila Convention could have known that the name of TMK Index was to be changed in time for the conference, where the name and logo of TMK Index were used, without notification from Wang that the name had changed and*

the prior knowledge of Wang that the name and logo was to be used at the Manila Convention.

- (vii) It may reasonably be inferred that Wang, as the person directing the affairs of TM Index, would not have changed the name of TMK Index in time for it to be used at the Manila Convention without knowing, or enquiring as to, the purpose for which it was to be used at that conference.*
- (viii) Wang knew the True Position by reason of the fact that, at the time the Representations were made, he was the sole director of TM Index and must be taken to have controlled TMK Index as alleged in particular (ii) above.*

Further particulars may be provided following subpoena and discovery.

G. CAUSATION

G.1. Applicant

- 32. The Applicant attended the:
 - (a) January 2015 Seoul Presentation
 - (b) Manila Convention; and
 - (c) June 2015 Seoul Presentation.
- 33. The Applicant transferred \$238,000 USD into one or more Nominated Accounts in respect of the following “T”, “M” and “K” products:
 - (a) 7 February 2015 - \$6,000 USD in a “T6,000” Product;
 - (b) 13 February 2015 - \$6,000 USD in an “M6,000” Product;
 - (c) 2 April 2015 - \$42,000 USD in a “T42,000” Product;
 - (d) 10 April 2015 - \$42,000 USD in an “M42,000” Product;
 - (e) 18 May 2015 - \$14,000 USD in a “T14,000” Product;
 - (f) 26 May 2015 - \$14,000 USD in a “T14,000” Product;
 - (g) 6 June 2015 - \$14,000 USD in a “T14,000” Product;
 - (h) 11 June 2015 - \$14,000 USD in an “M14,000” Product;
 - (i) 17 June 2015 - \$7,000 USD in a “T7,000” Product;
 - (j) 19 June 2015 - \$14,000 USD in a “K14,000” Product;
 - (k) 20 June 2015 - \$14,000 USD in a “T14,000” Product;

- (l) 29 August 2015 - \$7,000 USD in an "M7,000" Product; and
 - (m) 24 September 2015 - \$42,000 USD in a "K42,000" Product.
34. In his decision to transfer funds into one or more Nominated Accounts in respect of "T", "M" or "K" products, the Applicant:
- (a) relied on the Representations; and
 - (b) would not have transferred the funds had he known the True Position.
35. Alternatively, but for the Representations, the Applicant:
- (a) would not have decision to transfer funds into a Nominated Account in respect of any "T", "M" or "K" product; and
 - (b) would not have suffered the loss that is the subject of these proceedings.

G.2. Group Members - Reliance

36. In their decision to transfer funds into a Nominated Account/s in respect of any "T", "M" or "K" product/s, some Group Members:
- (a) relied on, alone and/or in combination the Representations; and
 - (b) would not have transferred the funds had they known the True Position .

Particulars

The identity of all those Group Members who relied directly on any or all of the Representations is not within the current state of the Applicant's knowledge. Further particulars of individual Group Member claims will be provided, if necessary after the initial trial of common issues.

37. Further or in the alternative to paragraph 36 above, during the Relevant Period,
- (a) the Representations materially contributed to the decision of some of the Group Members to transfer funds into a Nominated Account in respect of any "T", "M" or "K" product; and
 - (b) those Group Members would not have transferred those funds had they known the True Position.

Particulars

The identity of all those Group Members identified in paragraph 36 is not within the current state of the Applicant's knowledge. Further particulars of individual Group Member claims will be provided, if necessary after the initial trial of common issues.

G.3. Group Members - Indirect Causation

38. But for the Representations (alone or in combination) some of the Group Members would not have transferred funds into a Nominated Account in respect of any “T”, “M” or “K” product.

Particulars

The identity of all those Group Members identified in paragraph 38 is not within the current state of the Applicant’s knowledge. Further particulars of individual Group Member claims will be provided, if necessary after the initial trial of common issues.

H. LOSS AND DAMAGE

39. As a result of the:
- (a) TM Index Contravention; and/or
 - (b) TMK Index Contravention,
- the Applicant suffered loss and damage.

Particulars

- (i) *The Applicant’s loss is approximately US\$182,000.*
- (ii) *Further particulars will be provided following service of the Applicant’s lay evidence.*

40. As a result of the:
- (a) TM Index Contravention; and/or
 - (b) TMK Index Contravention,
- the Group Members suffered loss and damage.

Particulars

Further particulars of the loss suffered by the Group Members will be provided following the determination of the Applicant’s claim and identified common issues at an initial trial and if and when necessary for a determination.

41. The Applicant and Group Members may recover pursuant to s 12GF(1) of the ASIC Act the amount of loss suffered by them from:
- (a) TM Index by reason of paragraphs 27 to 28 and 32 to 40;
 - (b) TMK Index by reason of paragraphs 29 to 30 and 32 to 40; and/or

(c) Wang by reason of paragraphs 31 to 40.

Date: 18 December 2019



Signed by Philip Yang
Lawyer for the Applicant

This pleading was prepared by Alexander H Edwards and settled by Michael Izzo, SC, Counsel for the Applicant.

Certificate of lawyer

I, Philip Yang, certify to the Court that, in relation to the Third Amended Statement of Claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 18 December 2019



Signed by Philip Yang
Lawyer for the Applicant

Schedule

No. NSD 529 of 2016

Federal Court of Australia

District Registry: New South Wales

Division: General

Applicants

Applicant: KWANGHO KIM

Respondents

First Respondent: HODGSON FARADAY PTY LIMITED ACN 130 606 987

Second Respondent: TMK INDEX LIMITED ACN 123 936 336

Third Respondent: YINGJIE WANG