

# OUTCOME DETAILS

**Supreme Court - Civil  
at Supreme Court Sydney  
on 23 March 2022**

**2018/00076580-023, 2018/00076580-008, 2018/00076580-004, 2018/00076580-010, 2018/00076580-009, 2018/00076580-022, 2018/00076580-001 / Cross Summons 006: Robin Gray v Wayne Leonard Chapman, Cross Summons 002: Gunns Plantations Limited (in Liquidation) v Andrew Gray (KPMG Partner), Cross Summons 001: Andrew Gray (KPMG Partner) v Gunns Plantations Limited (in Liquidation), Cross Summons 004: Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay v Gunns Plantations Limited (in Liquidation), Cross Summons 003: Wayne Leonard Chapman v Andrew Gray (KPMG Partner), Cross Summons 005: Robin Gray v Catlin Australia Pty Ltd, Summons: Giabal Pty Ltd v Gunns Plantations Limited (in Liquidation)**

1. Orders made in chambers in accordance with the Short Minutes of Order, initialled by Stevenson J, dated today and placed with the papers.

2. List the matter for directions before the Commercial List Judge on 13 May 2022.

## SHORT MINUTES OF ORDER

Plaintiffs' Notice of Motion filed 22 December 2021

1. The Plaintiffs be granted leave to file and serve the proposed Second Further Amended Commercial List Statement annexed to these short minutes of order.

2. The Plaintiffs pay the Third to Thirteenth Defendants costs thrown away by reason of Order 1.

3. The Plaintiffs have leave to rely on the Supplementary Expert Report of Alex Bell dated 22 November 2021.

4. The Defendants to file and serve any Commercial List Response to the Second Further Amended Commercial List Statement by 22 April 2022.

5. The Plaintiffs to file and serve any Commercial List Reply by 4 May 2022.

## Cross-Claims and Cross-Claim Responses

6. Order 7.2 of the orders dated 14 December 2021 is vacated.

7. Where an existing Commercial List Cross-Claim Statement filed in this proceeding requires amendment as a result of the filing of the Second Further Amended Commercial List Statement:

a. the Cross-Claimants to the Commercial List Cross-Claim Statement are to file and serve an amended Commercial List Cross-Claim Statement by 22 April 2022; and

b. the Cross-Defendants to an amended Commercial List Cross-Claim Statement filed in accordance with order 4.1 are to file and serve an amended Commercial List Cross-Claim Response by 11 May 2022.

Further discovery by the Plaintiffs

8. The Plaintiffs and the Tenth and Eleventh Defendants are to confer with a view to agreeing, by 13 April 2022, any categories for further discovery by the Plaintiffs.

9. If the parties do not reach agreement in accordance with Order 8 above, any notice of motion seeking further discovery by the Plaintiffs is to be filed by 27 April 2022.

Conferral on common questions

10. The parties are to confer with a view to identifying with precision and agreeing by 29 April 2022 the common questions of fact and law for determination at the initial trial.

Other Orders

11. The matter be listed for further directions on a date after 29 April 2022, with the expectation that orders for the service by the Defendants of affidavit and expert evidence will be made at that time.

12. The parties' have liberty to apply on three days' notice.

13. Such further orders as the Court deems fit.

The Court notes that:

14. The Plaintiffs do not intend to seek any further disclosure arising from the amendments made in the Second Further Amended Commercial List Statement. This does not preclude the Plaintiffs' making an application for further disclosure if subsequent matters (such as the Defendants' list responses or evidence to be served by the Defendants) so require.

**2018/00076580-004, 2018/00076580-023, 2018/00076580-008, 2018/00076580-010, 2018/00076580-009, 2018/00076580-022, 2018/00076580-001 / Cross Summons 001: Andrew Gray (KPMG Partner) v Gunns Plantations Limited (in Liquidation), Cross Summons 006: Robin Gray v Wayne Leonard Chapman, Cross Summons 002: Gunns Plantations Limited (in Liquidation) v Andrew Gray (KPMG Partner), Cross Summons 004: Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay v Gunns Plantations Limited (in Liquidation), Cross Summons 003: Wayne Leonard Chapman v Andrew Gray (KPMG Partner), Cross Summons 005: Robin Gray v Catlin Australia Pty Ltd, Summons: Giabal Pty Ltd v Gunns Plantations Limited (in Liquidation)**

This matter is listed for Directions (Commercial) on 13 May 2022 9:45 AM before the Supreme Court - Civil at Supreme Court Sydney.

Estimated duration: 5 Minutes

Justice J Stevenson

Signed

Date

Form 3A (version 3)  
UCPR 6.2

## **SECOND FURTHER AMENDED COMMERCIAL LIST STATEMENT**

(Filed pursuant to leave granted by Justice Ball \_\_\_\_\_ on ~~14 August 2020~~ \_\_\_\_\_).

### **COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2018/76580

### **TITLE OF PROCEEDINGS**

First Plaintiff	<b>Giabal Pty Ltd</b> ACN 009 863 807
Second Plaintiff	<b>Geoffry Edward Underwood</b>
Third Defendant	<b>Wayne Leonard Chapman</b>
Number of Defendants	11 Refer to Party Details at rear for full list of parties

### **FILING DETAILS**

Filed for	<b>Giabal Pty Ltd</b> , ACN 009 863 807 First Plaintiff <b>Geoffry Edward Underwood</b> , Second Plaintiff
Legal representative	Gordon Grieve Piper Alderman
Legal representative reference	GTG.MDM.402437
Contact name and telephone	Gordon Grieve Tel: +61 2 9253 9999
Contact email	ggrieve@piperalderman.com.au

### **A NATURE OF DISPUTE**

1. This proceeding is commenced as a representative proceeding under Part 10 of the *Civil Procedure Act 2005* (NSW) by the Plaintiffs on their own behalves and on behalf of other persons who or which:
  - 1.1 acquired an interest in one or more of the managed investment schemes known as the "Woodlot Projects" operated by Gunns Plantations Limited (ACN 091 232 209) (in Liquidation) (Receivers and Managers Appointed) (**GPL**) in the periods 2002-2003, 2005-2006 and 2008-2009 (**Gunns Woodlot Schemes**);
  - 1.2 suffered loss or damage because of the conduct pleaded below; and

1.3 have entered into litigation funding agreements with LCM Operations Pty Ltd (ACN 616 451 033),

**(Group Members).**

2. As at the date of commencement of this proceeding, there were more than seven Group Members.
3. As at the date of commencement of this proceeding, the First Defendant was GPL and the Second Defendant was Gunns Limited (ACN 009 478 148) (in Liquidation) (Receivers and Managers Appointed) (**Gunns Ltd**). Leave was granted for the commencement and maintenance of the proceedings against those entities pursuant s.500 of the *Corporations Act 2001* (Cth) (**Act**) on 13 April 2018. On 4 December 2019, that leave was revoked due to the exhaustion of funds under a primary policy of insurance that had been used to defend the proceedings. The first excess layer insurer, the Twelfth Defendant (**Catlin**), and another excess layer insurer, the Thirteenth Defendant (**Chubb**) have denied indemnity to GPL and the Third and Fifth to Ninth Defendants and the late John Eugene Gay (**Mr Gay**) (together, **GPL Directors**). The Plaintiffs challenge those denials of indemnity pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) (**Third Party Claims Act**), and seek to recover directly from Catlin and Chubb the loss they have suffered as a result of GPL's and the GPL Directors' conduct pleaded below.
4. As at the date of the commencement of this proceeding, Mr Gay was the Fourth Defendant. Pursuant to *Uniform Civil Procedure Rules* r 6.30(2), the Court ordered on 19 July 2019 that this proceeding be continued against Robert Watson and Erica Gay as the legal personal representatives for the estate of Mr Gay in his place.

## **B ISSUES LIKELY TO ARISE**

5. The issues in the proceeding include whether the Third and Fifth to Eleventh Defendants, Mr Gay, GPL and Gunns Ltd breached their various duties as directors, auditors and trustees as set out below, in respect of which the following common questions of fact and law arise:

**(as to the Gunns Woodlot Schemes)**

- 5.1 whether the Gunns Woodlot Schemes operated as pleaded in section C2 below;

**(as to GPL)**

- 5.2 whether GPL owed the duties pleaded in paragraphs 65 to 67A below;
- 5.3 if GPL owed the duties pleaded in paragraphs 65 to 67A, whether GPL breached the duties by engaging in the conduct pleaded in paragraphs 79 to 80A below;
- 5.4 if GPL breached the duties as pleaded in paragraphs 79 to 80A, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 86A1 to 90A and 102 to 104 below;

**(as to Gunns Ltd)**

- 5.5 whether Gunns Ltd owed the duties pleaded in paragraph 68 below;

**(as to the GPL Directors)**

- 5.8 whether the GPL Directors owed the duties pleaded in paragraph 69 below;
- 5.9 if the GPL Directors owed the duties pleaded in paragraph 69 below, whether the GPL Directors breached the duties by engaging in the conduct pleaded in paragraphs 82 to ~~84~~ 85 below;
- 5.10 if the GPL Directors breached the duties as pleaded in paragraphs 82 to ~~84~~ 85 below, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 90C~~B~~ to 94A and 102 to 104 below;

**(as to KPMG)**

- 5.11 whether the Tenth and Eleventh Defendants (**KPMG**) owed the duties pleaded in paragraphs 70 to 72 below;
- 5.12 if KPMG owed the duties pleaded in paragraphs 70 to 72 below, whether KPMG breached the duties by engaging in the conduct pleaded in paragraph 86 below;
- 5.13 if KPMG breached the duties as pleaded in paragraph 86 below, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 98 to 101 and 102 to 104 below;

***(as to the relief sought by the Plaintiffs)***

- 5.14 what the correct principles are for measuring the Plaintiffs' and Group Members' compensable loss and damage as pleaded herein; and
  - 5.15 what relief other than monetary relief may be available to the Plaintiffs and Group Members.
6. In addition, issues in the proceeding arise as to:
- 6.1 whether GPL and the GPL Directors are 'insured persons' with 'insured liabilities' within the meaning of ss.3-4 of the Third Party Claims Act in respect of the matters pleaded by the Plaintiffs and Group Members in these proceedings; and
  - 6.2 whether the Plaintiffs and Group Members may recover the amount of GPL's and the GPL Directors' insured liabilities directly from Catlin and Chubb under s.4 of the Third Party Claims Act.

**C PLAINTIFF'S CONTENTIONS****C1 GPL, GUNNS LTD AND THE DEFENDANTS****GPL**

- 1. GPL, was at all material times:
  - 1.1 a company registered pursuant to the Corporations Act 2001 (Cth) (Act) and capable of being sued in its corporate name and style;
  - 1.2 a wholly-owned subsidiary of Gunns Limited (ACN 009 478 148) (in Liquidation) (Receivers and Managers Appointed) (**Gunns Ltd**);
  - 1.3 the responsible entity (**RE**) of the Gunns Woodlot Schemes; and
  - 1.4 the licensee of Australian Financial Services Licence No. 238701 (**AFSL**).

**Gunns Ltd**

- 2. Gunns Ltd was at all material times:
  - 2.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style;

- 2.2 a member of the Gunns group of companies (**Gunns Group**);
  - 2.3 the parent company of GPL; and
  - 2.4 as pleaded below, the “Custodian” of the Gunns Woodlot Schemes.
3. Gunns Ltd was listed on the Australian Stock Exchange until trading in its shares was suspended in March 2012.

#### **Directors and Officers of Gunns Ltd and GPL**

4. The Third Defendant, Wayne Leonard Chapman, was the secretary for GPL from 21 February 2000 to 11 August 2010, and is the secretary for Gunns Ltd and was appointed on 1 January 1998.
5. Mr Gay was a director of GPL from 21 February 2000 to 3 June 2010, and was a director of Gunns Ltd from 4 July 1986 to 27 May 2010.
6. The Fifth Defendant, Rodney John Loone, was a director of GPL from 21 February 2000 to 27 November 2012.
7. The Sixth Defendant, Leslie Ralph Baker, was a director of GPL from 21 February 2000 to 13 August 2010.
8. The Seventh Defendant, Robert Henry Graham, was a director of GPL from 16 April 2008 to 27 November 2012.
9. The Eighth Defendant, Robin Gray, was a director of GPL from 24 February 2009 to 3 February 2011, and was a director of Gunns Ltd between 29 August 1996 to 5 May 2010.
10. The Ninth Defendant, Paul Desmond Teisseire, was a director of GPL from 3 June 2010 to 27 November 2012, and was a director of Gunns Ltd from 27 March 2008 to 20 July 2012.
11. In respect of each of the Gunns Woodlot Schemes, the Third and Fifth to Ninth Defendants and Mr Gay are referred to herein as the “**GPL Directors**” as at the times they were directors of GPL.



**KPMG**

12. The Tenth to Eleventh Defendants were at the relevant times:

12.1 partners of KPMG (~~a~~ the firm), which was at all material times:

- (a) operating from offices at 3/100 Melville Street, Hobart, Tasmania, 33 George Street, Launceston, Tasmania providing audit, advisory and tax services in Australia under the partnership name "KPMG";
- (b) the financial auditors for Gunns Ltd and GPL; and

Particulars

(1) The following partners of KPMG (the firm) were responsible for the conduct of the financial audit of Gunns Ltd and GPL:

(A) M H Cooke:

(i) financial year ended 30 June 2003;

(B) Eleventh Defendant:

(i) financial year ended 30 June 2004;

(ii) financial year ended 30 June 2005;

(iii) financial year ended 30 June 2006

(iv) financial year ended 30 June 2007;

(v) financial year ended 30 June 2008 (Gunns Ltd only);

(C) David Howie:

(i) financial year ended 30 June 2008 (GPL only);

(D) Leigh Charles Franklin:

(i) financial year ended 30 June 2009;

(ii) financial year ended 30 June 2010;

- (iii) financial year 30 June 2011.
- (c) as pleaded below, the compliance plan auditors for the Gunns Woodlot Schemes; and
- (d) some of the staff at KPMG (the firm) in Launceston Tasmania conducting the financial audit of GPL and Gunns Ltd were also engaged in the audit of the compliance plans as pleaded below; and

### **Particulars**

- (1) The Tenth Defendant was:
  - (A) involved in the financial audit of Gunns Ltd as another partner supporting the Eleventh Defendant, in the financial years ended 30 June 2004 to 30 June 2008;
  - (B) was listed as the 'Engagement Partner' on the draft Gunns Ltd Audit Plan for the financial year ending 30 June 2008 dated April 2008 [PWC.001.021.7413];
  - (C) was listed as the 'Client Relationship Partner' on the draft Gunns Ltd Audit Plan for the year ending 30 June 2010 dated December 2009 [PWC.001.055.8856];
  - (D) involved in a 'support role' to provide continuity in the financial year ended 30 June 2009 during the transition period when Mr Franklin assumed the role of Gunns Ltd financial auditor from the Eleventh Defendant.

12.2 responsible for the conduct of the compliance plan audits for the compliance plans referred to at paragraphs 53 to 55 below.

### **Particulars**

#### 2002 Gunns Woodlot Scheme

- (a) Not used.
- (b) In relation to Matthew Gary Wallace:
  - (1) 30 September 2003

- (2) 30 September 2004,
- (c) In relation to Andrew Gray:
  - (1) 29 September 2005
  - (2) 29 September 2006
  - (3) 29 September 2007
  - (4) 30 September 2008
  - (5) 30 September 2009
  - (6) 30 September 2010
  - (7) 30 September 2011,

2003 Gunns Woodlot Scheme

- (d) In relation to Matthew Gary Wallace:
  - (1) 30 September 2003
  - (2) 30 September 2004,
- (e) In relation to Andrew Gray:
  - (1) 29 September 2005
  - (2) 29 September 2006
  - (3) 29 September 2007
  - (4) 30 September 2008
  - (5) 30 September 2009
  - (6) 30 September 2010
  - (7) 30 September 2011

2005 Gunns Woodlot Scheme

- (f) In relation to Andrew Gray:
  - (1) 29 September 2005
  - (2) 29 September 2006
  - (3) 29 September 2007
  - (4) 30 September 2008

- (5) 30 September 2009
- (6) 30 September 2010
- (7) 30 September 2011

2006 Gunns Woodlot Scheme

- (g) In relation to Andrew Gray:
  - (1) 29 September 2006
  - (2) 9 October 2007
  - (3) 30 September 2008
  - (4) 30 September 2009
  - (5) 30 September 2010
  - (6) 30 September 2011<sub>1</sub>

2008 Gunns Woodlot Scheme

- (h) In relation to Andrew Gray:
  - (1) 30 September 2008
  - (2) 30 September 2009
  - (3) 30 September 2010
  - (4) 30 September 2011

2009 Gunns Woodlot Scheme

- (i) In relation to Andrew Gray:
  - (1) 30 September 2009
  - (2) 30 September 2010
  - (3) 30 September 2011

13. The Tenth to Eleventh Defendants are hereafter referred to as “**KPMG**” and the firm of which they were partner is referred to as “**KPMG (the firm)**”.

**CATLIN**

13A. Catlin was at all material times:

13A.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style; and

13A.2 the underwriter of the first excess layer of Investment Management Insurance issued to GPL.

**CHUBB**

13B. Chubb was at all material times:

13B.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style; and

13B.2 the underwriter of an excess layer of insurance issued to GPL (“the **Chubb Policy**”).

**C2. OPERATION OF THE GUNNS WOODLOT SCHEMES**

**Background of Woodlot Schemes**

14. The Gunns Woodlot Schemes were managed investment schemes within the meaning of Chapter 5C of the Act.

15. The six Gunns Woodlot Schemes the subject of this proceeding were among nine such schemes established by GPL, one in each year from 2002 to 2009 (except 2004 and 2007) and had terms of up to 25 years.

**Particulars**

- (a) 2002 Gunns Woodlot Scheme;
- (b) 2003 Gunns Woodlot Scheme;
- (c) 2005 Gunns Woodlot Scheme;
- (d) 2006 Gunns Woodlot Scheme;
- (e) 2008 Gunns Woodlot Scheme; and
- (f) 2009 Gunns Woodlot Scheme.

15A. GPL released a Prospectus or Product Disclosure Statement (PDS) for each of the relevant Gunns Woodlot Schemes.

**Particulars**

- (a) Prospectus for the 2002 Gunns Woodlot Scheme dated 27 February 2002;
- (b) Supplementary Prospectus for the Gunns Woodlot Scheme dated 13 May 2002;
- (c) Further Supplementary Prospectus for the Gunns Woodlot Scheme dated 24 May 2002;
- (d) Further Supplementary Prospectus for the Gunns Woodlot Scheme dated 26 June 2002;
- (e) PDS for the 2003 Gunns Woodlot Scheme dated 11 April 2003;
- (f) PDS for the 2005 Gunns Woodlot Scheme dated 1 March 2005;
- (g) PDS for the 2006 Gunns Woodlot Scheme dated 14 March 2006;
- (h) Supplementary PDS for the 2006 Gunns Woodlot Scheme dated 14 July 2006;
- (i) Supplementary PDS for the 2006 Gunns Woodlot Scheme dated 17 June 2009;
- (j) PDS for the 2008 Gunns Woodlot Scheme dated 18 January 2008; and
- (k) PDS for the 2009 Gunns Woodlot Scheme dated 8 April 2009.

16. At all relevant times, the Gunns Group was a group of companies that carried on Australia's largest integrated hardwood and softwood forest products business.

**Particulars**

- (a) The timber products business involved the manufacture and supply of value added hardwood and softwood products for use in the building industry; and

- (b) The forest products business involved the management of natural forests and plantations, which involved general forest management, road construction and maintenance, timber harvesting and haulage, pulp wood processing and marketing of products for export markets.

17. Each of the Gunns Woodlot Schemes was governed by scheme documents comprising their respective:

17.1 Constitutions;

17.2 Management Agreements;

17.3 Maintenance Services Sub-contracting Agreements, Maintenance and Planting Services Sub-contracting Agreements or Maintenance and Pruning Services Sub-contracting Agreements (collectively, **Maintenance Services Sub-contracting Arrangements**);

17.4 Forestry Right Deeds;

17.5 Sub-Forestry Right Deeds or Forestry Right Lease Deeds; and

17.6 Compliance Plans,

which were in materially the same terms (**Scheme Documents**).

### Particulars

#### 2002 Gunns Woodlot Scheme

- (a) Constitution dated 12 February 2002;
- (b) Supplemental Constitution dated 3 July 2002;
- (c) Management Agreements annexed as Schedule 2 to the Constitution;
- (d) Maintenance and Planting Services Sub-contracting Agreement (undated  
~~date to be provided upon discovery~~);
- (e) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (f) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;

- (g) Compliance Plan Gunns Plantations Woodlot Project 2002 lodged with the Australian Securities and Investments Commission (**ASIC**) on 13 February 2002; and
- (h) Amended 2002 Compliance Plan lodged with ASIC on 12 October 2010.

2003 Gunns Woodlot Scheme

- (i) Constitution dated 24 March 2003;
- (j) Supplemental Constitution dated 10 April 2003;
- (k) Management Agreements annexed as Schedule 2 to the Constitution;
- (l) Maintenance and Planting Services Sub-contracting Agreement dated 1 May 2003;
- (m) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (n) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (o) Compliance Plan Gunns Plantations Woodlot Project 2003 lodged with ASIC on 25 March 2003; and
- (p) Amended 2003 Compliance Plan lodged with ASIC on 12 October 2010.

2005 Gunns Woodlot Scheme

- (q) Constitution dated 1 March 2005;
- (r) Management Agreements annexed as Schedule 2 to the Constitution;
- (s) Maintenance Services Sub-contracting Agreement dated 1 March 2005;
- (t) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (u) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (v) Compliance Plan Gunns Plantations Woodlot Project 2005 lodged with ASIC on 23 February 2005; and
- (w) Amended 2005 Compliance Plan lodged with ASIC on 12 October 2010.



2006 Gunns Woodlot Scheme

- (x) Constitution dated 7 March 2006;
- (y) Management Agreements annexed as Schedule 2 to the Constitution;
- (z) Maintenance Services Sub-contracting Agreement (date to be provided upon discovery);
- (aa) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (bb) Sub-Forestry Right Deed annexed as Schedule 3 to the Constitution;
- (cc) Compliance Plan Gunns Plantations Woodlot Project 2006 lodged with ASIC on 9 March 2006; and
- (dd) Amended 2006 Compliance Plan lodged with ASIC on 12 October 2010.

2008 Gunns Woodlot Scheme

- (ee) Constitution dated 27 December 2007;
- (ff) Management Agreements annexed as Schedule 2 to the Constitution;
- (gg) Maintenance Services Sub-contracting Agreement dated (date to be provided upon discovery);
- (hh) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (ii) Sub-Forestry Right Deed annexed as Schedule 3 to the Constitution;
- (jj) Compliance Plan Gunns Plantations Woodlot Project 2008 lodged with ASIC on 13 December 2007; and
- (kk) Amended 2008 Compliance Plan lodged with ASIC on 30 November 2010.

2009 Gunns Woodlot Scheme

- (ll) Constitution dated 6 February 2009;
- (mm) Supplemental Constitution dated 3 March 2009;

- (nn) Management Agreements annexed as Schedule 2 to the Constitution;
- (oo) Maintenance and Pruning Services Sub-contracting Agreement dated (date to be provided upon discovery);
- (pp) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (qq) Sub-Forestry Right Deed annexed as Schedule 3 to the Constitution; and
- (rr) 2009 Compliance Plan lodged with ASIC on 12 October 2010.

18. The parties' respective roles under the Scheme Documents were as follows:

18.1 the Plaintiffs and Group Members were:

- (a) "Members" under the 2002 to 2009 (except for the 2004 and 2007) Constitutions; and
- (b) "Growers" under the 2002 to 2009 (except for the 2004 and 2007) Constitutions, upon entering into the Management Agreements and the Forestry Right Lease Deeds with GPL for each of the Gunns Woodlot Schemes,

### **Particulars**

The First Plaintiff (Investor Number 20500456) became a Member of the following Gunns Woodlot Schemes:

- (i) 2002 Gunns Woodlot Scheme on:
  - (1) 2 March 2009 – 2 x Woodlots for Option 1 Eucalypt Pulpwood;
  - (2) 13 March 2003 – 6 x Woodlots for Option 1 Eucalypt Pulpwood;  
and
  - (3) ~~28~~ June 2002 – 8 x Woodlots for Option 1 Eucalypt Pulpwood;
- (ii) 2005 Gunns Woodlot Scheme on 28 June 2005 – 2 x Woodlots for Option 1 Eucalypt Pulpwood; and

- (iii) 2008 Gunns Woodlot Scheme on 30 June 2008 – 2 x Woodlots for Option 2 Eucalypt Veneer & Pulpwood.

The Second Plaintiff (Investor Number 20500117) became a Member of the following Schemes:

- (i) 2002 Gunns Woodlot Scheme on:
- (1) 24 April 2009 – 5 x Woodlots for Option 1 Eucalypt Pulpwood;
  - (2) 1 October 2009 – 10 x Woodlots for Option 1 Eucalypt Pulpwood; and
  - (3) 1 October 2009 – 20 x Woodlots for Option 2 Eucalypt Veneer & Pulpwood,
- (ii) 2003 Gunns Woodlot Scheme on:
- (1) 30 June 2009 – 10 x Woodlots for Option 1 Eucalypt Pulpwood; and
  - (2) 30 June 2009 – 20 x Woodlots for Option 2 Eucalypt Veneer & Pulpwood,
- (iii) 2005 Gunns Woodlot Scheme on 29 June 2005 – ~~5~~ 20 x Woodlots for Option ~~1~~ 2 Eucalypt ~~Veneer & Pulpwood~~;
- (iv) 2006 Gunns Woodlot Scheme on 30 June 2007 – ~~40~~ 5 x Woodlots for Option ~~2~~ 4 Eucalypt Veneer & Pulpwood;
- (v) 2008 Gunns Woodlot Scheme on 30 June 2008 – 10 ~~42~~ x Woodlots for Option 2 Eucalypt Veneer & Pulpwood; and
- (vi) 2009 Gunns Woodlot Scheme on:
- (1) 30 June 2009 – 6 x Woodlots for Option 1 Eucalypt Pulpwood;
  - (2) 30 June 2009 – 3 x Woodlots for Option 2 Eucalypt Veneer & Pulpwood; and

~~(3) — 30 June 2009 — 3 x Woodlots for Option 3 Radiata Pine Sawlog & Pulpwood.~~

Further particulars will be provided by way of discovery and evidence.

18.2 GPL was:

- (a) the RE under the Constitutions;
- (b) the “Manager” under the Management Agreements;
- (c) a party to the Maintenance Services Sub-contracting Agreements with Gunns Ltd;
- (d) the holder of the “Forestry Rights” granted by landowners under the Forestry Right Deeds;
- (e) the “Lessor” of the Forestry Rights to Growers under the Forestry Right Lease Deeds;
- (f) the RE under the Original and Amended Compliance Plans (as defined below); and
- (g) the agent for Growers, as appointed under the Management Agreements, in respect of the Draft Wood Sale Agreements with Gunns Ltd.

18.3 Gunns Ltd was:

- (a) the Custodian for the purposes of the Constitutions as appointed under the Management Agreements;

### **Particulars**

Gunns Ltd was appointed as Custodian for each of the Schemes no later than the date of issue of the relevant Prospectus and PDS for each of the Schemes, being:

- (i) 2002 Gunns Woodlot Scheme – 27 February 2002;
- (ii) 2003 Gunns Woodlot Scheme – 11 April 2003;

- (iii) 2005 Gunns Woodlot Scheme – 1 March 2005;
- (iv) 2006 Gunns Woodlot Scheme – 14 March 2006;
- (v) 2008 Gunns Woodlot Scheme – 18 January 2008; and
- (vi) 2009 Gunns Woodlot Scheme – 8 April 2009.

The particulars to paragraph 15A above are repeated.

- (b) a party to the Management Agreements for the purpose of the off-take arrangements provided for under those agreements and the Draft Wood Sale Agreements;

**Particulars**

Further particulars will be provided by way of evidence.

- (c) an agent of GPL for the purposes of performing the Maintenance Services (as defined below) and paying the Forestry Right Fees on behalf of the RE as required by the Management Agreements; and

**Particulars**

Gunns Ltd became responsible for the Maintenance Services for each of the Gunns Woodlot Schemes on each of the following dates under the following agreements:

- (i) 2002 Maintenance Services Sub-contracting Agreement – prior to 2003;
- (ii) 2003 Maintenance Services Sub-contracting Agreement – 1 May 2003;
- (iii) not used;
- (iv) 2005 Maintenance Services Sub-contracting Agreement – 1 March 2005;
- (v) 2006 Maintenance Services Sub-contracting Agreement – 14 March 2006;

- (vi) 2008 Maintenance Services Sub-contracting Agreement – 27 December 2007; and
  - (vii) 2009 Maintenance Services Sub-contracting Agreement – 6 February 2009.
- (d) the would-be purchaser of wood from Growers under the Draft Wood Sale Agreements, upon execution of the Management Agreements.

**Particulars**

Management Agreements, cl.12.

19. The Gunns Woodlot Schemes were offered on the basis that:
- 19.1 an investor would become a Grower of eucalyptus wood on “Woodlots” located in Tasmania;
  - 19.2 Growers were offered up to three options for investing in the Gunns Woodlot Schemes: a thirteen (13) year pulpwood option (**Option 1**), a twenty (20) year pulpwood and veneer option (**Option 2**), or a twenty five (25) year sawlog and pulpwood option (**Option 3**);
  - 19.3 fees payable by Growers (on application, and for pruning if Option 1 was not selected) were to be tax deductible;
  - 19.4 GPL would manage the growing and harvesting of the plantations;
  - 19.5 Gunns Ltd was committed to purchasing Growers’ wood after the relevant period of the option selected by Growers; and
  - 19.6 Growers would receive payment from wood sale proceeds, after the deduction of certain other fees payable to GPL in accordance with the Scheme Documents.

**Particulars**

“Key Features” described in the Prospectus for the 2002 Gunns Woodlot Scheme and the PDS ~~Product Disclosure Statements~~ for the other Gunns Woodlot Schemes.

20. The land on which the plantations were located was owned by entities which were either members of the Gunns Group or third parties.

**Particulars**

- (a) There were approximately eight hundred (800) leases which related to the land on which the Gunns Woodlot Schemes were conducted; and
  - (b) The major landholders of these leases were:
    - (1) Gunns Ltd – at least 194 leases;
    - (2) Associated Forest Holdings Pty Ltd (a company in the Gunns Group) – approximately 184 leases;
    - (3) Forestry Tasmania – approximately 20 leases; and
    - (4) Australian Forestry Plantations Trust and Australian Forestry Plantations Trust No. 2. – approximately 13 leases.
21. For the purposes of the Gunns Woodlot Schemes, GPL entered into Forestry Right Deeds with landowners.
22. Under the Forestry Right Deeds, GPL was to pay “Forestry Right Fees” to landowners for each year the landowners’ land would be used for the purposes of the Gunns Woodlot Schemes.

**Particulars**

Forestry Right Deeds, cl.6.

23. The landowners the subject of the Forestry Right Deeds would grant the following “Forestry Rights” to GPL upon payment of the Forestry Right Fees:
- 23.1 the right to establish, plant, tend, maintain and harvest trees on the woodlots;
  - 23.2 all right, title and interest in the trees;
  - 23.3 all right title and interest in any benefit resulting from the trees having the ability to absorb greenhouse gases (**Carbon Rights**); and

- 23.4 the right to access the relevant land for the purpose of carrying out the activities identified in subparagraph 23.1 above.

**Particulars**

Forestry Right Deeds, cl.1.1, 3.1, 3.2 and 6.1.

24. A party to a Forestry Right Deed could terminate the Forestry Right Deed if the other party breached a provision of the Forestry Right Deed and that breach was unremedied for 60 days from the date that the first mentioned party gave the other party written notice of the breach.

**Particulars**

Forestry Right Deeds, cl.11.1.

25. It was a term of the Forestry Right Deed that GPL was able to licence or lease some or all of the rights granted to it under the Forestry Right Deed to a third party.

**Particulars**

Forestry Right Deeds, cl.9.2.

26. GPL granted or leased its rights under the Forestry Right Deeds to Growers by entering into leases or licences for the "Forestry Rights" under the Sub-Forestry Right Deeds or Forestry Right Lease Deeds.

**Particulars**

- (a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.3.
- (b) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.3.

27. The Sub-Forestry Right Deeds and Forestry Right Lease Deeds terminated automatically if the Forestry Right Deeds terminated for any reason.



**Particulars**

- (a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.3.
- (b) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.3.

**Establishment and Management of the Woodlots**

- 28. Under the Management Agreements, GPL's responsibilities in relation to the Gunns Woodlot Schemes were divided into two phases:
  - 28.1 establishing the Woodlots (**Establishment and Planting Services**); and
  - 28.2 rearing and maintaining the trees in the Woodlots (**Maintenance Services**).

**Particulars**

Management Agreements, cl.4-5.

- 29. The Establishment and Planting Services were the tasks required to establish the plantation and included the ploughing and cultivation required for the purpose of planting the seedlings, including the procuring of those seedlings.

**Particulars**

Management Agreements, cl.4.

- 30. The Establishment and Planting Services were to be completed in accordance with a timetable set out in the Management Agreements.

**Particulars**

Management Agreements, cl.4.

- ~~31.~~ Not used.

- 32. GPL was required, inter alia, to:

- ~~32.1~~ not used;

32.2 pay Forestry Right Fees to landowners.

**Particulars**

- (a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.2(a) and 6.1;
- (a1) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.2(a) and 6.1; and

33. GPL delegated the Maintenance Services to Gunns Ltd under the Maintenance Services Sub-contracting Agreements.

**Particulars**

- (a) For the 2002 and 2003 Gunns Woodlot Schemes, Maintenance and Planting Services Sub-contracting Agreements, cl.3.1, 3.2.
- (b) For the 2005, 2006 and 2008 Gunns Woodlot Schemes, Maintenance Services Sub-contracting Agreements, cl.3.1, 3.2.
- (c) For the 2009 Gunns Woodlot Scheme, Maintenance and Pruning Services Sub-Contracting Agreement, cl.3.1, 3.2.

34. In consideration for GPL entering into the Maintenance Services Sub-contracting Agreements, Gunns Ltd agreed to assume all of GPL's obligations to pay Forestry Right Fees under the Forestry Right Deeds.

**Particulars**

Maintenance Services Sub-contracting Agreements, cl.4.4.

34A. GPL could at its absolute discretion, terminate the Maintenance Services Sub-contracting Agreements with Gunns Ltd by written notice to Gunns Ltd, if:

34A.1 Gunns Ltd ceased or threatened to cease to carry on its activities in performing the Maintenance Services and Establishment and Planting Services;

34A.2 Gunns Ltd failed to duly and punctually observe or perform any material undertaking, duty or obligation under the Maintenance Services Sub-contracting Agreements which was not substantially remedied within 30 days after receipt by

Gunns Ltd of a notice given by GPL specifying the breach and requesting the breach be remedied within a thirty (30) day period;

34A.3 in the reasonable opinion of GPL, Gunns Ltd was not acting in a professional manner in the performance of its duties and obligations under the Maintenance Services Sub-contracting Agreements; or

34A.4 Gunns Ltd failed to duly and punctually to meet its obligations outlined above in paragraph 34, to pay the Forestry Right Fees that were due and payable by GPL under the Forestry Right Deed and Gunns Ltd had not remedied its breach within a period of 30 days after receipt by Gunns Ltd of a notice given by GPL specifying the breach and requesting the breach to be remedied within a thirty (30) day period.

#### **Particulars**

Maintenance Services Sub-contracting Agreements, cl.5.1.

34B. If the Maintenance Services Sub-contracting Agreements were terminated by GPL in respect to default by Gunns Ltd as set out in paragraph 34A above:

34B.1 no consideration was payable to Gunns Ltd in respect to the Maintenance Services and Establishment and Planting Services performed by Gunns Ltd up to the date of termination; and

34B.2 Gunns Ltd had no claim against GPL in respect of the Maintenance Services and Planting and Establishment Services performed up to the date of termination.

#### **Particulars**

Maintenance Services Sub-contracting Agreements, cl.4.3.

34C. In correspondence with ASIC in or about 2010, GPL confirmed the matters in paragraphs 34A and 34B above.

#### **Particulars**

Letters from GPL to ASIC dated 26 March 2010, 19 May 2010, 9 July 2010, and 13 October 2010.

35. GPL was the beneficiary of a bank guarantee pursuant to which Australia and New Zealand Banking Group Ltd (**ANZ Bank**) agreed to pay GPL \$4M on demand (**GPL Bank Guarantee**).

**Particulars**

Bank Guarantees issued by ANZ Bank in favour of GPL on 11 July 2011 and 20 April 2012.

36. The GPL Bank Guarantee was arranged in order to provide finance to GPL:
- 36.1 in the event of Gunns Ltd failing to pay the Forestry Right Fees and/or being unable to perform the Maintenance Services; and/or
- 36.2 to enable GPL to temporarily meet its obligations in relation to the Gunns Woodlot Schemes while replacement service providers or a replacement RE were secured.

**Particulars**

Letters from GPL to ASIC dated 26 March 2010, 9 July 2010, and 13 October 2010.

**RE Remuneration under the Schemes**

37. GPL was appointed as agent for Growers in respect of the sale of wood harvested from the trees in the Woodlots and Carbon Rights.

**Particulars**

Management Agreements, cl.11.1 and 11.2.

38. For its role as RE of each of the Gunns Woodlot Schemes, and its proper performance of its duties, GPL was entitled to:
- 38.1 payment of the “Woodlot Establishment Expenses”, being the RE’s reasonable costs and expenses ~~of~~ actually incurred in performing the duties and obligations under clause 4.1 of the Management Agreements, from the “Application Money”;

**Particulars**

- (a) Proper Construction of the Constitutions, cl.1.1, 7-8.
- (b) The pleading and particulars in paragraph 29 above are repeated.

38.2 the income earned from the “Application Portion” of the “Fund”, being the interest on sums paid into a trust Bank account in accordance with clauses 3.4(b) and 5.1, and 12.1 of the Constitutions;

**Particulars**

Constitutions, cl.1.1, 9.

38.3 reimbursement for payment of the Baseline Pruning Expenses by Growers who chose Options 2 and Option 3;

**Particulars**

Constitutions, cl.1.1, 11.1.

38.4 fees, comprising the Planting Fee, Maintenance Fee Sales Commission and Rental Fee, amounting to between 9% and 12% of the Wood Sales Proceeds;

**Particulars**

Constitutions, cl.1.1, 24, 29.4(a).

38.5 50% of the Carbon Rights Proceeds, being the proceeds of commercial exploitation of any benefit resulting from the trees in the Woodlots having the ability to absorb greenhouse gases procured or obtained by GPL as agent for the Growers under clause 11.2 of the Management Agreements; and

**Particulars**

Constitutions, cl.1.1, 24, 29.4(b).

38.6 reimbursement out of the relevant “Section” of the “Woodlot Proceeds Portion” for costs and expenses in relation to the proper performance of its duties in accordance with the Constitution, Management Agreements and Forestry Right Lease Deeds, and taxes, duties and fees payable to regulatory authorities.

**Particulars**

Constitutions, cll.1.1, 28.2.

38A. GPL at no time disclosed the proportion of the “Application Portion” not being used for the purposes of “Woodlot Establishment Expenses”.

38B. GPL was entitled to remuneration in accordance with clause 24 of the Constitutions.

38C. On the proper construction of the Constitutions, GPL was not entitled to be paid the balance of the “Application Portion” not used for the purpose of the “Woodlot Establishment Expenses” (whether as remuneration, profit, or otherwise).

**Particulars**

Constitutions, cl 24(a).

38D. The Prospectus and PDS for each of the Gunns Woodlot Schemes were required to comply with, inter alia, section 1013D of the Act, including subsections 1013D(1)(d) and (e) which require disclosure of money to be paid to GPL as a fee or profit.

**Particulars**

- (a) The pleadings and particulars at paragraph 15A above are repeated.
- (b) A Prospectus and PDS must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire a financial product:
  - (1) information about the amounts paid in respect to a financial product and the amounts paid in respect of other financial products are paid into a common fund - any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and
  - (2) if the product will or may generate a return for the holder of the product – information about any commission, or other similar payments, that will or may impact on the amount of such return.

### **Growers' Interests in the Gunns Woodlot Schemes**

39. Each of the Growers' financial contribution to a Gunns Woodlot Scheme consisted of an "Application Fee" per Woodlot constituting each of the Growers' "Application Money" paid to the Custodian (as appointed by the RE) or the RE, to be held upon trust.

#### **Particulars**

- (a) Constitutions, cl.3.3, 3.4, 4.1; and
  - (b) Management Agreements, cl.1.1.
40. The amount of the Application Fee per Woodlot was provided for under the Management Agreements for each of the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes and under the Constitution for the 2009 Gunns Woodlot Scheme.

#### **Particulars**

The respective Application Fees per Woodlot were:

- (a) \$4,345 (inclusive of GST) for the 2002 Gunns Woodlot Scheme;
  - (b) \$4,400 (inclusive of GST) for the 2003 Gunns Woodlot Scheme;
  - (c) \$6,820 (inclusive of GST) for the 2005 Gunns Woodlot Scheme;
  - (d) \$6,820 (inclusive of GST) for the 2006 Gunns Woodlot Scheme;
  - (e) \$6,820 (inclusive of GST) for the 2008 Gunns Woodlot Scheme; and
  - (f) \$7,480 (inclusive of GST) for woodlots not chosen as part of a Blended Option for the 2009 Gunns Woodlot Scheme.
41. The First Plaintiff invested \$ 83,765 (inclusive of GST) in the Gunns Woodlot Schemes.

#### **Particulars**

- (a) 2002 Gunns Woodlot Scheme – 13 lots x \$4,345 per lot = \$56,485;
- (b) 2005 Gunns Woodlot Scheme – 2 lots x \$6,820 per lot = \$13,640; and
- (c) 2008 Gunns Woodlot Scheme – 2 lots x \$6,820 per lot = \$13,640.

(d) The particulars for subparagraph 18.1 above are repeated.

42. The Second Plaintiff invested \$590,095.00 (inclusive of GST) ~~608,047~~ in the Gunns Woodlot Schemes.

**Particulars**

(a) 2002 Gunns Woodlot Scheme – 35 lots x \$4,345 per lot = \$152,075;

(b) 2003 Gunns Woodlot Scheme – 30 lots x \$4,400 per lot = \$132,000;

(c) 2005 Gunns Woodlot Scheme – 20 lots x \$6,820 per lot = \$136,400;

(d) 2006 Gunns Woodlot Scheme – 5 lots x \$6,820 per lot = \$34,100;

(e) 2008 Gunns Woodlot Scheme – 10 lots x \$6,820 per lot = \$68,200; and

(f) 2009 Gunns Woodlot Scheme – ~~9~~ 12 lots x ~~\$7,480~~ \$7,106 per lot = \$67,320 ~~85,272~~.

(g) The particulars for subparagraph 18.1 above are repeated.

43. GPL was trustee for the Growers in respect of their Application Moneys:

43.1 the “Assets” of the scheme were to be held by the RE on trust for Members; and

43.2 a Grower’s Application Money was lodged in a trust “Bank” account to create the Application Portion.

**Particulars**

Constitutions, cl.3.2, 3.4, 13.1(a).

44. GPL was to place the Application Moneys, or ensure that the Application Moneys were placed, in the Application Portion until they could be released in accordance with clause 8 of the Constitution.

**Particulars**

Constitutions, cl.5.1.



45. The Plaintiffs held a “Proportional Interest” in the Application Portion, being the proportion of the Application Fees paid by all Growers (excluding any part of the Application Fee released pursuant to clause 8 of the Constitution, any Application Money held pending receipt of a completed application, and any interest on the Application Money) comprised by the Plaintiffs’ Application Money.

**Particulars**

Constitutions, cl.1.1, 3.6.

46. Upon GPL being satisfied of “certain matters” and being in possession of “certain executed documents”, GPL could release or instruct the Custodian to release that part of the Application Money necessary to pay the Woodlot Establishment Expenses, being GPL’s reasonable costs and expenses of performing the duties and obligations under clause 4.1 of the Management Agreements.

**Particulars**

Proper construction of the:

- (a) Constitutions, cl.1.1, 7-8; and
- (b) Management Agreements, cl.10.1.

47. The Woodlot Establishment Expenses under the Constitution were the reasonable costs and expenses of performing the Establishment and Planting Services, for which the Establishment Fee was paid under the Management Agreements.

**Particulars**

Proper construction of the:

- (a) Constitutions, cl.1.1; and
- (b) Management Agreements, cl.1.1, 4.1, 10.1.

48. The Establishment Fee payable by a Grower for the performance of the “Establishment Services” was not to exceed the Application Fee.

**Particulars**

- (a) Management Agreements, cl. 1.1, 4.1, 10.1.
- (b) ~~Further particulars will be provided by way of evidence.~~

**Growers' Trust Funds**

49. To the extent GPL's reasonable costs and expenses of performing the duties and obligations under clause 4.1 of the Management Agreements did not exceed the Application Fee, but rather were less than the amount of the Application Fee, the balance remained part of the Application Portion (**Growers' Express Trust Funds**).

**Particulars**

Proper construction of the:

- (a) Constitutions, cl.1.1, 7-8; and
  - (b) Management Agreements, cl.1.1, 4.1, 10.1.
50. The Application Portion, including any Growers' Express Trust Funds, was to be invested in an interest bearing account with a Bank nominated by GPL and not in any other form of investment.

**Particulars**

Constitutions, cl.12.1(b).

51. GPL was able to on an interim basis, and was to in the event of termination of the "Project," divide the balance of, inter alia, the Application Portion according to the Growers' Proportional Interests.

**Particulars**

Constitutions, cl.1.1, 34.1(b), 34.5.

52. After the harvesting of the wood, and the deduction of all relevant costs and fees payable to GPL, Growers were entitled to distribution of their Proportional Interest in the "Wood Proceeds Portion" and the "Carbon Rights Proceeds Portion."

**Particulars**

Constitutions, cl.29.1, 29.4.

- 52A. In the alternative to paragraphs 49 to 52 above, to the extent that GPL released or instructed the Custodian to release the Application Money to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released, the residue was held on resulting trust for Growers (**Growers' Resulting Trust Funds**).

**Particulars**

This consequence arises in accordance with the principle that, where property has been conveyed to trustees for certain purposes and the property conveyed has been found to be more than sufficient for those purposes, leaving a surplus after those purposes have been fulfilled, the surplus is held on resulting trust for the person who conveyed the property (see, e.g., *Jacob's Law of Trusts in Australia*, 8<sup>th</sup> ed., at pp.209-211 [12-07]-[12-08]; Young, Croft, Smith, *On Equity* (2009) at pp.468-470 [6.1000]-[6.1020]).

- 52B. Together Growers' Express Trust Funds and Growers' Resulting Trust Funds are referred to as "**Growers' Trust Funds**".

**GPL Unauthorised Retention of Growers' Trust Funds**

- 52C. In the alternative to paragraphs 49 to 52A above, to the extent that GPL released or instructed the Custodian to release the Application Money to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released, and that residue amount was retained by GPL, it was an unauthorised retention of the Growers' Trust Funds (**GPL Unauthorised Retention of Growers' Trust Funds**).

**Particulars**

The pleadings and particulars at paragraphs 38 above are repeated.

**Auditor oversight and the Compliance Plans**

53. As the auditor of the Gunns Woodlot Schemes, KPMG:

- 53.1 examined the compliance plans for each of the Gunns Woodlot Schemes for each year as set out in paragraphs 54 and 55 below (**Compliance Plans**); and
- 53.2 carried out an audit of GPL's compliance (as the RE) with each of the Compliance Plans; and
- 53.3 in carrying out the audit of the Compliance Plans, reviewed (by the lead auditor) GPL's financial documents, Woodlot Scheme Documents, Board Minutes, reports(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes, and financial and company reports prepared by GPL annually.

### **Particulars**

- (a) The Plaintiffs repeat the particulars provided in paragraph 12 above and paragraph 77 below.
- (b) GPL's financial documents and report(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes were listed in the Compliance Plan audit reports prepared by KPMG and were as follows:
- (1) appropriate financial records to determine whether GPL has maintained net tangible assets at a minimum of \$50,000;
  - (2) a copy of GPL's annual budget, in particular cash flows, to ensure the scheme has access to sufficient cash for 3 months at any point during the financial year;
  - (3) due diligence documentation in respect to issuing prospectus or PDS or supplementary prospectus or PDS;
  - (4) quarterly report to the board to ensure identified breaches are reported;
  - (5) independent forester's report;
  - (6) the register for applicants and Growers;
  - (7) a sample of Growers' files where application have been accepted before 30 June ensuring executed lease and management

- agreements have been completed and finance approved and statements to Growers;
- (8) documents relevant to appointment of independent forester and determining timing of the annual independent forester's report;
  - (9) sign off by Executive Director that fees and expenses are correctly calculated and properly incurred prior to Administration and Compliance Officer invoicing Growers;
  - (10) a copy of the sign off provided or to be provided to the board by Executive Director – Compliance Management confirming procedures are complied with;
  - (11) a copy of the complaints procedures manual;
  - (12) the register of related parties maintained by the Administration and Compliance Officer and enquire as to how related party transactions are identified;
  - (13) GPL's draft financial statements to ensure and determine:
    - (A) they have been prepared by the Administration Manager have been reviewed and signed off by Executive Director and the board;
    - (B) whether the Executive Director provided an annual sign-off to the board that procedures are complied with; and
    - (C) financial statements are subject to external auditor's sign-off;
  - (14) whether payments are checked on a monthly basis by the executive and sign off by the executive director that payments are made in accordance with the Constitution and the Act;
  - (15) GPL's code of ethics;
  - (16) title searches for sample of properties; and

- (17) the certification from an internal expert confirming that no material matters have arisen since the last quarter which would be required to be disclosed in the last quarter.

54. In the relevant periods up to about 12 October 2010, each of the Gunns Woodlot Schemes had a Compliance Plan containing the same compliance rules.

**Particulars**

- (a) Compliance Plan Gunns Plantations Woodlot Project 2002 lodged with ASIC on 27 February 2002;
- (b) Compliance Plan Gunns Plantations Woodlot Project 2003 lodged with ASIC on 25 March 2003;
- (c) Compliance Plan Gunns Plantations Woodlot Project 2005 lodged with ASIC on 23 February 2005;
- (d) Compliance Plan Gunns Plantations Woodlot Project 2006 lodged with ASIC on 9 March 2006; and
- (e) Compliance Plan Gunns Plantations Woodlot Project 2008 lodged with ASIC on 13 December 2007,

**(Original Compliance Plans).**

55. Between about 12 October and about 30 November 2010, pursuant to s.601HB of the Act, the compliance plan for the Gunns Plantations Ltd Woodlot Project 2009 (ARSN 135 490 292) was incorporated into each of the Gunns Woodlot Schemes' Compliance Plans, replacing the Original Compliance Plans.

**Particulars**

- (a) Replacement for the 2002 Compliance Plan lodged with ASIC on 12 October 2010;
- (b) Replacement for the 2003 Compliance Plan lodged with ASIC on 12 October 2010;

- (c) Replacement for the 2005 Compliance Plan lodged with ASIC on 12 October 2010;
- (d) Replacement for the 2006 Compliance Plan lodged with ASIC on 12 October 2010;
- (e) Replacement for the 2008 Compliance Plan lodged with ASIC on 30 November 2010; and
- (f) Replacement for the 2009 Compliance Plan lodged with ASIC on 12 October 2010,

**(Amended Compliance Plans).**

**External Administration and Distributions – Gunns Financing and Security Arrangements**

55A. On or about 24 December 1998, an International Swap Dealers Association, Inc Master Agreement (**ISDA Master Agreement**) was entered into between the ANZ Bank and Gunns Ltd to govern existing or anticipated transactions between them.

55B. On or about 29 May 2001:

55B.1 a Security Trust Deed (**2001 Security Trust Deed**) was entered into between Gunns Ltd, the ANZ Bank and ANZ Capel Court Ltd (**ANZ Capel Court**) acting as security trustee; and

55B.2 a Fixed and Floating Charge was entered into between Gunns Ltd and ANZ Capel Court as security trustee.

55C. On or about 31 January 2007:

55C.1 a Working Capital Facility Agreement (**2007 Working Capital Agreement**) was entered into by the ANZ Bank and Gunns Ltd and certain of its subsidiaries, relevantly including GPL, for the provision of financial accommodation for certain approved purposes;

55C.2 a Facility Agreement was entered into (**2007 Facility Agreement**):

- (a) for Gunns Ltd, arranged by ANZ Investment Bank with the ANZ Bank acting as agent for certain lenders and ANZ Capel Court acting as security trustee;
- (b) pursuant to which \$720 million was made available to Gunns Ltd in the form of letters of credit and loan notes under three facilities:
  - (i) a \$400 million loan titled 'Facility A', which was to be drawn down by Gunns Ltd so as to refinance an existing syndicated debt facility; assist with the development costs for a pulp and paper mill development at Bell Bay, Tasmania (**Bell Bay Project**); provide letters of credit support for the Bell Bay Project; and be used for general corporate purposes;
  - (ii) a \$270 million loan titled 'Facility B', which was to be drawn down by Gunns Ltd for the purpose of providing for the Bell Bay Project development costs; and
  - (iii) a \$50 million loan titled 'Facility C', which was to be drawn down by Gunns Ltd so as to provide performance guarantees to support obligations in relation to the Bell Bay Project; and
- (c) pursuant to which Gunns Ltd and certain of its subsidiaries, relevantly including GPL, were described as 'original guarantors' which would provide fixed and floating charges in favour of the security trustee, ANZ Capel Court.

### **Particulars**

2007 Facility Agreement cl. 1.1, 2.1, 3.1 and Sch. 1.

55C.3 a Security Trust Deed (entitled 'Deed of Amendment No. 3') (**2007 Security Trust Deed**) was entered into:

- (a) between the ANZ Bank both in its own right and as agent, Gunns Ltd and certain of its subsidiaries, relevantly including GPL, ANZ Capel Court acting as security trustee, and ANZ National Bank Limited;
- (b) which amended and restated the 2001 Security Trust Deed; and



- (c) which provided in its amended form for each 'Security Provider', which relevantly included GPL, to guarantee the payment by each 'Debtor', which relevantly included Gunns Ltd, of obligations including under the 2007 Facility Agreement; and

**Particulars**

2007 Security Trust Deed cl. 2.1; and Annexure A cl. 1.1 and 11.1.

55C.4 a Fixed and Floating Charge was entered into (**2007 Charge**):

- (a) between Gunns Ltd and certain of its subsidiaries, relevantly including GPL, as security providers, and ANZ Capel Court as security trustee;
- (b) which provided for a charge in favour of ANZ Capel Court of the security providers' property to secure the punctual payment of monies, including those provided for under the 2007 Facility Agreement;
- (c) which further provided that the Secured Property included all of GPL's property but excluded in the case only of Gunns Ltd that property which it held as custodian of a Gunns Woodlot Scheme or which was 'Growers' Property'; and
- (d) which further provided, in the event of enforcement of the charge, for the security trustee to appoint a receiver of the 'Secured Property' of a 'Secured Party'.

**Particulars**

2007 Charge cl. 1.1, 2.1, 6.1.

55D. On or about 8 February 2010:

55D.1 a Fixed and Floating Charge was entered into (**2010 Charge**):

- (a) between Gunns Ltd and certain of its subsidiaries, relevantly including GPL, as security providers, and ANZ Capel Court as security trustee;

- (b) which provided for a charge in favour of ANZ Capel Court of the security providers' property to secure the punctual payment of monies, including those provided for under the 2007 Facility Agreement; and
- (c) which further provided, in the event of enforcement of the charge, for the security trustee to appoint a receiver of the 'Secured Property' of a 'Secured Party'.

**Particulars**

2010 Charge cl. 1.1, 2.1, 6.1.

- 55E. On or about 2 June 2010, Gunns requested cancellation of the Facility B and Facility C loans under clause 10.3 of the 2007 Facility Agreement.

**Particulars**

Cancellation Notice dated 1 June 2010 sent by email from Malcolm Matthews to Theona Mitsakos on 2 June 2010 at or about 11.15 am.

- 55F. On or around 18 June 2010 Gunns made a voluntary repayment of \$20 million to its Facility A loan under clause 10.4 of the 2007 Facility Agreement, thereby reducing the amount drawn down on the facility to \$380 million.
- 55G. On or about 16 February 2011, the 2007 Facility Agreement was amended to provide, inter alia, that:
- 55GH.1 the total funds available to Gunns Ltd would increase by \$125 million until 30 June 2011 to provide additional short term working capital to refinance the purchase of the Bell Bay Project assets; and
  - 55GH.2 security was provided over the Bell Bay Project assets.
- 55H. On or about 30 January 2012:
- 55H.1 an Amendment and Restatement Deed was entered into (**2012 Facility Agreement**):
    - (a) between Gunns Ltd, the ANZ Bank acting as agent for certain lenders and ANZ Capel Court acting as security trustee;

- (b) which amended and restated the 2007 Facility Agreement; and
- (c) the purposes of which included to refinance the existing syndicated debt facility to a 'Total Facility Commitment' of \$340 million;

**Particulars**

2012 Facility Agreement cll. 1.1, 2.2, 3.1; and Schedule 1, Part 2.

55H.2 a Security Trust Deed (entitled 'Deed of Amendment No. 4') (**2012 Security Trusts Deed**) was entered into:

- (a) between the ANZ Bank both in its own right and as agent, Gunns Ltd and certain of its subsidiaries, relevantly including GPL, ANZ Capel Court acting as security trustee, and ANZ National Bank Limited;
- (b) which further amended and restated the 2001 Security Trust Deed as amended in the form of the 2007 Security Trust Deed; and
- (c) which provided in its amended form for each Security Provider, which relevantly included GPL, to guarantee the payment by each Debtor, which relevantly included Gunns Ltd, of obligations including under the 2007 Facility Agreement as amended in the form of the 2012 Facility Agreement; and

**Particulars**

2012 Security Trust Deed cll. 2.1; and Annexure A cll. 1.1 and 11.1.

55I. Together paragraphs 55C to 55H above describe the "**Gunns Financing and Security Arrangements**".

55J. ~~Prior to the establishment of the Gunns Financing and Security Arrangements, GPL had not provided security in respect of borrowings by Gunns Ltd.~~ Since in or about 31 January 2007, the Gunns Financing and Security Arrangements were:

55J.1 relevant to and considered for the purpose of the financial audit of Gunns Ltd and GPL conducted by KPMG (the firm); and

**Particulars**

- (a) in January 2007 the Gunns Financing and Security Arrangements made \$720 million available to be drawn down by Gunns;
- (b) the Gunns Financing and Security Arrangements was the senior debt facility in the Gunns Group; and
- (c) as pleaded in paragraph 55F above, by 18 June 2010, Gunns had borrowed \$380 million under the Gunns Financing and Security Arrangements, which was the entire amount of Facility A at that time;
- (d) certain subsidiaries of Gunns Ltd, relevantly including GPL, would be liable as guarantors for the maximum prospective liability drawn down by Gunns Ltd; and
- (e) the Gunns Financing and Security Arrangements are referred in the financial reports of Gunns Ltd from 2007 to 2011 which KPMG (the firm) reviewed for the purpose of conducting their audits. The independent auditor's report provided during the relevant years identified the auditor's role as 'performing procedures to obtain audit evidence about... the disclosures in the financial report...' The Gunns Financing and Security Arrangements were such a disclosure within the financial reports, and therefore the subject of the audits.

55J.2 relevant to the audit of GPL's compliance with the Compliance Plans and Amended Compliance Plans conducted by KPMG.

**Particulars**

- (i) Rule 15 of the Compliance Plans, and rule 13 of the Amended Compliance Plans prohibited GPL from giving a related party a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;
- (ii) the guarantee provided to GPL under the Gunns Financing and Security Arrangements was a related party financial benefit of the kind the subject of the rules referred to in (i) above.

55J1 The Tenth Defendant had actual knowledge of the Gunns Financing and Security Arrangements from at least 2007, including the maximum prospective liability for participating entities, relevantly including GPL.

Particulars

- (a) The Tenth Defendant's knowledge is to be inferred from the following matters:
- (i) the matters pleaded and particularised in paragraph 55J.1 above;
  - (ii) the fact that the Tenth Defendant worked on the financial audits of GPL and Gunns Ltd from at least 2007;
  - (iii) the fact that, where some of the staff of the firm conducting the audit of the financial statements of the responsible entity are also engaged in the audit of the compliance plan (as was the case here, as pleaded in paragraph 12 above) it was and is reasonable and common practice for the compliance plan auditor to make enquiries of those staff as to whether there are matters arising from the audit of the financial statements of the responsible entity that are germane to the audit of the compliance plan (as described in paragraphs 5.38 to 5.39 of the Westworth Report served on the defendants 31 August 2021);
  - (iv) for the audit of GPL's compliance with the Compliance Plans for the 2007, 2008, 2009, 2010, and 2011 financial years, the team within KPMG (the firm) conducting the audits of the Compliance Plans (of which the Tenth Defendant was the lead auditor) was the same team (or at least included common members) as the team conducting the financial audits of GPL and Gunns Ltd;

- (v) further to (iv), and consistently with the practice in (iii), the Tenth Defendant decided that formal meetings to identify issues relevant to the Compliance Plan audits (of which the Gunns Financing and Security Arrangements were, as pleaded and particularised in paragraph 55J) were unnecessary, as recorded in the “CP Planning Document” signed by the Tenth Defendant for each of these periods [KPG.001.006.0004]; [KPG.001.008.0097]; [KPG.001.001.0076]; and
- (vi) the fact that, as lead auditor of the audits of the Compliance Plans for the 2009, 2010, and 2011 financial years the Tenth Defendant met with the financial auditor of GPL and Gunns Ltd for the purpose of identifying issues relevant to the audits of the Compliance plans (of which the Gunns Financing and Security Arrangements were, as pleaded and particularised in paragraph 55J), as recorded in the “CP Planning Document” signed by the Tenth Defendant for each of these periods [KPG.001.006.0004]; [KPG.001.008.0097]; [KPG.001.001.0076].

### **Correspondence with ASIC**

55K. In 2010, ASIC made enquiries of GPL in respect of GPL’s financial capacity as RE including requesting details of:

55K.1 any covenants or debt facilities of GPL to its parent Gunns Ltd; and

55K.2 any loan arrangements between GPL and Gunns Ltd and any other related parties.

### **Particulars**

ASIC’s Letters to GPL dated 12 March 2010 and 5 May 2010.

55L. In 2010, GPL advised ASIC in correspondence that:

55L.1 there are no loan agreements between GPL and other related entities within the Gunns Group and there are no financial covenants in these loans;

55L.2 GPL lends money received from the Growers to Gunns Ltd to fund the Management Services ahead of payment of the harvest proceeds and this is noted as a receivable in GPL's management accounts lodged with ASIC;

55L.3 GPL does not have any external debt facilities and as such is not subject to any financial covenants (in either its personal capacity or its capacity as RE); and

55L.4 GPL has not given any guarantees in respect to Gunns Ltd liabilities.

#### **Particulars**

GPL's Letters to ASIC dated 26 March 2010, 19 May 2010 and 13 October 2010.

55M. On 22 September 2010, in conducting the Compliance Plan audit, the correspondence between GPL and ASIC dated 12 March 2010, 26 March 2010, 5 May 2010, 19 May 2010, 21 June 2010 and 9 July 2010 formed part of the materials reviewed and considered by KPMG and KPMG noted:

55M.1 GPL's responses to ASIC, that GPL did not have any external debt facilities and as such was not subject to any financial covenants, or any loan agreements with other related entities within the Gunns Group subject financial covenants;

55M.2 there was no Compliance Plan reporting issues; and

55M.3 the responses to ASIC appeared complete and adequate.

#### **Particulars**

(a) KMPG 'Correspondence with ASIC Summary' dated 22 September 2010.

55N. On 3 September 2011, in conducting the Compliance Plan audit, the correspondence between ASIC and GPL dated 21 September 2010, 13 October 2010, 22 November 2010 and 30 November 2010 formed part of the materials reviewed and considered by

KPMG and KMPG did not note any significant issues arising from the correspondence, and particularly:

55N.1 did not note any Compliance Plan issues in respect to the Gunns Financing and Security Arrangements;

55N.2 noted the amount of \$4million was considered adequate to fund operations for a period of 12 months during which an alternative RE could be found; and

55N.3 noted there were no significant issues in respect to the correspondence, requiring additional work to be performed.

#### **Particulars**

- (a) Letters from ASIC to GPL dated 21 September 2010, 22 November 2010, 30 November 2010.
- (b) Letters from GPL to ASIC dated 13 October 2010 and 30 November 2010.
- (c) KPMG 'ASIC Correspondence' dated 3 September 2011 prepared by R O'Halloran.

#### **External Administration and Distributions**

56. From at least 8 March 2012, GPL was aware of media reports indicating delays in payments of Forestry Right Fees for the Gunns Woodlot Schemes to landowners.

#### **Particulars**

- (a) ASIC Letter dated 8 March 2012 to the GPL Directors.
- (b) Further particulars will be provided by way of evidence.

57. On 8 November 2012, landowners sent default notices to GPL in respect of unpaid Forestry Right Fees for the Gunns Woodlot Schemes.

#### **Particulars**

- (a) Fourth Affidavit of Daniel Mathew Bryant dated 26 November 2012 in the Supreme Court of Victoria matter no. SCI 2012 5485.



(b) Further particulars will be provided by way of evidence.

58. On or about 25 September 2012:

58.1A ANZ issued to the borrowers under the 2007 Working Capital Agreement (as amended in the intervening period) a notice terminating its obligations to provide all facilities under that agreement and requiring immediate payment of moneys owing;

58.1B ANZ issued to the borrowers under the 2007 Facility Agreement, as amended in the form of the 2012 Facility Agreement, a notice cancelling the facility and terminating its obligations in relation to the facility, and stating that the total amount owing was immediately due and payable;

58.1 Messrs Mark Korda and Bryan Webster of Korda Mentha were appointed as receivers and managers to the Gunns Group (**Receivers**) by ANZ Capel Court in its capacity as security trustee for the Gunns Financing Security Trust pursuant to the 2001 Security Trust Deed originally dated 29 May 2001; and

58.2 Administrators were appointed to Gunns Ltd and each of its wholly owned subsidiaries, including GPL (**Administrators**).

58A. On or about 27 September 2012, ANZ issued to Gunns Ltd a notice designating early termination of the ISDA Master Agreement.

59. On or about 8 November 2012, the Receivers (on behalf of Gunns Ltd and its associated entities as landowners) sent correspondence to the Administrators alleging various breaches by GPL of the Forestry Right Deeds.

### **Particulars**

(a) Letters from Korda Mentha to Mr Ian Carson, Mr Daniel Bryant and Mr David Crosbie in their capacity as Administrators of GPL dated 8 November 2012 titled "Notice of Breach under Clause 11.1 of the Forestry Right Deeds in the Projects as more particularly described in the schedule to this letter".

(b) The Receivers alleged, inter alia:

- (1) Breach of the Forestry Right Deeds by non-payment of Forestry Right Fees to the entities identified in particular (a) to paragraph 75 below;
  - (2) Breaches of clause 7(c) of Forestry Right Deeds;
  - ~~(3)~~ Not used; and
  - (4) Outstanding maintenance on Gunns Woodlot Schemes of approximately \$887,000.
60. On or about 5 March 2013, the Administrators were appointed liquidators of Gunns Ltd and each of its wholly owned subsidiaries, including GPL (**Liquidators**).
61. Concerned that Growers would lose all rights in the assets of the Gunns Woodlot Schemes due to the default notices received from the Receivers (on behalf of Gunns Ltd and its associated entities as landowners) and other landowners, the Liquidators obtained directions from the Supreme Court of Victoria to procure GPL to amend the Constitutions to enable the Liquidators to terminate Growers' rights and sell the assets of the Gunns Woodlot Schemes.

**Particulars**

- (a) Affidavit of Daniel Mathew Bryant dated 6 June 2013; and
  - (b) Orders dated 31 May 2013 and 21 June 2013 in Supreme Court of Victoria matter no. S CI 2013 02095.
62. On or about 11 August 2014, all rights of Growers in the assets of the Gunns Woodlot Schemes were terminated.

**Particulars**

- (a) Orders dated 11 August 2014 in Supreme Court of Victoria matter no. S CI 2013 02095; and
- (b) The Court determined that the Liquidators were acting properly and reasonably in entering the joint sale process with the Receivers.

63. On or about 5 September 2014, the sale of the Gunns Woodlot Scheme assets on land leased from Gunns Ltd and its associated entities was completed.
64. Liquidation distributions were made to Growers in late 2016 to early 2017.

### Particulars

- (a) Total joint sale proceeds for the sale of the Gunns Woodlot Scheme assets on land leased from Gunns Ltd and its associated entities was 12.5% or \$40.6 million, and was allocated to investors in the Gunns Woodlot Schemes;
- (b) The remaining Gunns Woodlot Scheme assets located on land owned by other landowners were sold to those third party landowners to settle their claims for unpaid past and future rent;
- (c) The sale proceeds from the sale agreements with third party landowners were to benefit the pool of Growers in each of the relevant schemes; and
- (d) On or around late 2016 or early 2017, the First Plaintiff received a liquidation distribution for its investment in the Woodlot Schemes of \$14,754.88 ~~14,432.44~~, and the Second Plaintiff received a liquidation distribution for his investment in the Woodlot Schemes of \$39,372.22 ~~35,644.45~~ (**Liquidation Distributions**).

## **C3. THE DUTIES OF GPL, GUNNS LTD AND THE DEFENDANTS**

### **GPL**

#### *GPL Management Duties*

65. GPL had the following duties in relation to managing the Gunns Woodlot Schemes:
- 65.1 under the Constitutions, to ensure that any goods or services which were required to be provided or performed under the terms of the Forestry Right Lease Deeds and Management Agreements were provided or performed in accordance with the relevant material agreements and the Constitutions;

**Particulars**

Constitutions, cl.13.4.

65.2 under the Management Agreements:

- (a) to do all things necessary to rear the trees and maintain the Growers' Woodlots in accordance with good silvicultural practice; and
- ~~(b)~~ not used;
- (c) to ensure that the Establishment and Planting Services, Maintenance Services and "Pruning Services" were carried out in a proper and diligent manner,

**Particulars**

Management Agreements, cll.5, 13.2, 14(b) and 14(c).

65.3 under the Forestry Right Lease Deeds:

- (a) not to breach the Forestry Right Deeds; and
- (b) not to do anything that may end the Forestry Right Deeds or the registration of the Forestry Right Deeds,

**Particulars**

- (i) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.1.
- (ii) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.1.

65.4 under the Forestry Right Deeds, and as a consequence of the obligations pleaded in subparagraph 65.3 above:

- (a) to pay the Forestry Right Fees to landowners quarterly in arrears on each of the payment dates specified in the Forestry Right Deeds. ~~÷ and~~

**Particulars**

Forestry Right Deeds, cl.6.1(a), 7(c), 7(f), Schedule 1.

65.5 under the Original Compliance Plans:

(a) Rule 1: to comply with, inter alia:

(1A) net tangible asset requirements; and

(1) the scheme related cash needs requirement, ~~and~~

(2) ~~the insurance requirements,~~

(a1) Rule 3: to issue a Prospectus or PDS which complies with the Act;

(b) Rule 8: to provide the establishment, maintenance and tending services for Growers' woodlots in a proper and efficient manner;

(c) Rule 10: to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;

(d) Rule 12: to ensure that as RE it was only paid fees, or reimbursed for expenses or liabilities, out of the scheme property in accordance with the Constitution, Management Agreement and Prospectus and PDS documents;

(e) Rule 15: to not give a financial benefit to, inter alia, a related party out of scheme property or that could diminish or endanger scheme property (unless an exception applied or the benefit was approved by the scheme members or "applicants and growers");

(f) Rule 16: to ensure that suitably qualified agents were appointed;

(g) Rule 17: to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;

(h) Rule 22: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

- (i) Rule 26: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the “Law”; and
- (j) Rule 27: to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests of the Growers, was reported to ASIC as soon as practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution.

65.6 under the Amended Compliance Plans:

- (a) Rule 1: to comply with the conditions of the AFSL including:
  - (1) being able to pay debts as and when they became due and payable (cl.5(a) of the AFSL);
  - (2) the Gunns Woodlot Scheme-related cash needs (cl.5(c) of the AFSL); and
  - ~~(3) the insurance requirements (cl.15 of the AFSL);~~
- (a1) Rule 3: to issue a Prospectus or PDS which complies with the Act;
- (b) Rule 5: to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;
- (c) Rule 7: to provide establishment, maintenance and harvesting services for the project in a proper and efficient manner;
- (d) Rule 10: to not pay itself fees, or be reimbursed for expenses or liabilities, out of the Gunns Woodlot Scheme property other than in accordance with the Constitution, “Land Rights Agreement”, Management Agreement and product disclosure statement;
- (e) Rule 13: to not give a financial benefit to, inter alia, a related party out of Gunns Woodlot Scheme property or that could diminish or endanger Gunns Woodlot Scheme property (unless an exception applied or the benefit was approved by Growers);

- (f) Rule 15: to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;
  - (g) Rule 19: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;
  - (h) Rule 23: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and
  - (i) Rule 24: to report to ASIC any breach of the Act that related to the Gunns Woodlot Schemes and which had, or was likely to have, a materially adverse effect on the interest of the Growers; and report any breach of the Constitution.
66. Further, GPL was subject to the following statutory duties:
- 66.1 by s.601FC(1)(b) of the Act, to exercise the degree of care and diligence that a reasonable person would exercise in the RE's position;
  - 66.2 not used;
  - 66.3 by s.601FC(1)(h) of the Act, to comply with the Gunns Woodlot Schemes' Compliance Plans; and
  - 66.4 by s.601FC(1)(l) of the Act, to report to ASIC any breach of the Act that related to the scheme and had, or was likely to have, a materially adverse effect on the interests of members, as soon as practicable after it became aware of the breach; and
  - 66.4A by s.601LC of the Act, to disclose to and seek approval from the scheme members for the giving of a financial benefit to a related party.
- (together paragraphs 65 and 66 above describe the **GPL Management Duties**).

#### GPL Trust Fund Duties

67. In relation to the Growers' Trust Funds, GPL had the following duties:
- 67.1 to preserve the Growers' Trust Funds as trust property;

**Particulars**

- (a) GPL, as the Responsible Entity of the Gunns Woodlot Schemes under the Act, acted as both trustee for the scheme members and was responsible for the conduct of the schemes.
  - (b) The Plaintiffs repeat paragraphs 43 to 51 above and 73 to 74 below.
- 67.2 to act in good faith and in the best interests of the Growers;
- ~~67.3~~ not used;
- 67.4 by s.601FC(1)(h) of the Act, to comply with the Gunns Woodlot Schemes Compliance Plans;
- 67.5 by s.601FC(1)(i) of the Act, to ensure that Gunns Woodlot Scheme property was:
- (a) clearly identified as scheme property; and
  - (b) held separately from property of the RE and property of any other scheme,
- 67.6 by s.601FC(1)(k) of the Act, to ensure that all payments out of scheme property were made in accordance with the Gunns Woodlot Scheme Constitutions and the Act;
- 67.7 by s.601FC(1)(m) of the Act, to carry out or comply with any other duty, not inconsistent with the Act, that was conferred on GPL by the Gunns Woodlot Schemes Constitutions;
- 67.8 by s.601FC(2) of the Act, to hold the Gunns Woodlot Scheme property on trust for the Growers;
- 67.9 by s.601LC of the Act, to disclose to and seek approval from the scheme members for the giving of a financial benefit to a related party;
- 67.10 under the Original Compliance Plans:
- (a) Rule 10: to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;



- (b) Rule 12: to ensure that as RE it was only paid fees, or reimbursed for expenses or liabilities, out of the scheme property in accordance with the Constitution, Management Agreement and Prospectus and PDS documents;
- (c) Rule 15: to not give a financial benefit to, inter alia, a related party, out of scheme property or that could diminish or endanger scheme property (unless an exception applied or the benefit was approved by the scheme members or “applicants and growers”);
- (d) Rule 17: to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;
- (e) Rule 22: to ensure that a Gunns Woodlot Scheme’s property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;
- (f) Rule 26: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and
- (g) Rule 27: to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests of the Growers, was reported to ASIC as soon as practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution,

67.11 under the Amended Compliance Plans:

- (a) Rule 5: to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;
- (b) Rule 10: to not pay itself fees, or be reimbursed for expenses or liabilities, out of the Gunns Woodlot Scheme property other than in accordance with the Constitution, Land Rights Agreement, Management Agreements and product disclosure statement;
- (c) Rule 13: to not give a financial benefit, inter alia, to a related party out of Gunns Woodlot Scheme property or that could diminish or endanger

Gunns Woodlot Scheme property (unless an exception applied or the benefit was approved by Growers);

- (d) Rule 15: to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;
- (e) Rule 19: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;
- (f) Rule 23: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and
- (g) Rule 24: to report to ASIC any breach of the Act that related to a Gunns Woodlot Scheme and which had, or was likely to have, a materially adverse effect on the interest of the Growers; and report any breach of the Constitution,

**(GPL Trust Funds Duties).**

*GPL duties arising from its position as RE*

67A. Further or in the alternative to paragraph 67 above, GPL:

67A.1 as a fiduciary had a duty to act in good faith and in the best interests of Growers;  
and

**Particulars**

GPL was a fiduciary in its roles as the RE under the Constitutions and the Manager under the Management Agreements.

67A.2 by s.601FC(1)(h) of the Act, had a duty to comply with the Gunns Woodlot Schemes Compliance Plans

**(GPL RE Duties).**

## Gunns Ltd

68. As the Custodian of the Gunns Woodlot Schemes, Gunns Ltd had the following fiduciary duties:

- 68.1 to preserve the Growers' Trust Funds as trust property, in particular:
- (a) to hold the Application Money until it was disbursed in payment of the Establishment Expenses;
  - (b) to hold the proceeds from the sale of harvested wood until they were disbursed to Growers;
  - (c) to hold the proceeds from the sale of Carbon Rights, if any, until they were disbursed to Growers; and
  - (d) to hold any Pruning Services fees paid by Growers, which the Custodian would pay to GPL in accordance with the Constitutions; and

### Particulars

The Plaintiffs repeat the particulars provided at subparagraph 18.3.

68.2 to act in good faith and in the best interests of the Growers; ~~and~~

~~68.3 to avoid any conflict between interest and duty,~~

**(Gunns Duties).**

## The GPL Directors

69. The GPL Directors in their capacities as officers of the RE of the Gunns Woodlot Schemes were subject to the following duties:

69.1 by s.601FD(1)(b) of the Act, to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;

~~69.2 by s.601FD(1)(c) of the Act, to act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the interests of the RE, to give priority to the scheme members' interests;~~

- 69.3 by s.601FD(1)(e) of the Act, not to make improper use of their position as an officer to cause detriment to the members of the Gunns Woodlot Schemes;
- 69.4 by s.601FD(1)(f) of the Act, to take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with:
- (a) the Act;
  - (b) any conditions imposed on the RE's AFSL;
  - (c) the Scheme Documents; and
  - (d) the Original and Amended Compliance Plans;
- 69.5 under the common law, to act with the due care and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE; and
- 69.6 to ensure that GPL complied with the GPL Management Duties, ~~and~~ the GPL Trust Funds Duties and the GPL RE Duties.

**(Directors Duties).**

### **Particulars**

The Plaintiffs repeat paragraphs 65 to 67A as particularised above.

### **KPMG**

70. The Plaintiffs repeat paragraphs 53 to 55, 65.5 to 65.6 and subparagraphs 67.10 to 67.11 above.
71. KPMG in its capacity as the auditor of the Compliance Plans, was subject to the following statutory duties:
- 71.1 by s.601HG(3) of the Act, within 3 months after the end of a financial year of the scheme, to:
- (a) examine the relevant Compliance Plan;

- (b) carry out an audit of GPL's compliance with the relevant Compliance Plan during each relevant financial year; and
- (c) give to GPL a report stating, inter alia, whether in KPMG's opinion GPL had complied with the relevant Compliance Plan during each relevant financial year,

71.2 to exercise reasonable care, skill and diligence in carrying out an audit of, and reporting upon, GPL's compliance with the Compliance Plans in accordance with s.601HG(3)(b)-(c); and

71.3 by s.601HG(4A) of the Act, to notify ASIC in writing as soon as practicable and in any case within 28 days after the lead auditor became aware of circumstances that provided reasonable grounds to suspect that there had been a significant contravention of the Act.

71A. The report prepared by KPMG and given to GPL as pleaded above in paragraph 71.1(c):

(a) was required to be lodged with ASIC by GPL pursuant to s.601HG(7) of the Act; and

(b) would thereafter be accessible and available for inspection by Growers.

72. KPMG in its capacity as the auditor of the Compliance Plans had a duty at common law to exercise reasonable care, skill and diligence in auditing GPL's compliance with the Compliance Plans of the Gunns Woodlot Schemes, so as to avoid reasonably foreseeable damage to the Growers' interests because:

72.1 at all relevant times, KPMG held itself out as an auditor with the necessary knowledge, skills and experience to carry out the audits of the Compliance Plans and GPL's compliance with the Compliance Plans;

### **Particulars**

- (a) By accepting the engagement as the Compliance Plan auditor and ~~filling~~ filing the Compliance Plan Audits of the Gunns Woodlot Schemes with ASIC, KPMG represented to GPL, the GPL Directors, the Growers and to ASIC that KPMG were qualified to conduct these audits.

- (b) The Plaintiffs rely upon the terms of the “Auditor’s Responsibility” contained in the filed Compliance Plan Audits by KPMG, as particularised in paragraph 77 below.
- (c) Further particulars will be provided by way of evidence.

72.2 at all relevant times KPMG voluntarily accepted its appointment and engagement as the auditor of the Compliance Plans, and by doing so accepted a general professional obligation to ensure that the tasks of carrying out audits of the Compliance Plans and issuing reports in respect of those audits were undertaken with reasonable care, skill and diligence;

### **Particulars**

The Plaintiffs repeat the particulars provided in subparagraph 72.1 above and provided in subparagraph 72.5 below.

72.3 KPMG was paid for its professional services in carrying out the audits of the Compliance Plans and reporting on those audits;

72.4 in accordance with s.601HG(5)-(6) of the Act, KPMG:

- (a) had a right of access to the books of the Gunns Woodlot Schemes in the conduct of the audits of their Compliance Plans; and
- (b) could require any officer of GPL to give it information, explanations or other assistance for the purposes of the audits of the Compliance Plans;

72.5 KPMG was obliged to conduct its audits of the Compliance Plans in accordance with the relevant professional auditing principles and practices, including Accounting Professional & Ethical Standard (**APES**) 3100 and APES 013.

### **Particulars**

In accordance with ASAE 3100 and APES 013, KPMG was obligated to:

- (a) Perform the audits of the Compliance Plans with an attitude of professional scepticism recognising that circumstances may have existed that would cause GPL to be non-compliant with its requirements as measured by the suitable criteria; and

- (b) Obtain an understanding of GPL and the Gunns Woodlot Schemes, the requirements, suitable criteria and other compliance engagement circumstances, sufficient to identify and assess the risks of GPL's non-compliance and sufficient to design and perform further evidence-gathering procedures considering the elements of the compliance framework, including:
  - (1) Identifying where special consideration may be necessary, for example factors indicative of fraud, and the need for specialised skills or the work of an expert;
  - (2) Establishing and evaluating the continued appropriateness of quantitative materiality levels (where appropriate), and/or considering qualitative materiality factors;
  - (3) Designing and performing further evidence-gathering procedures to reduce compliance engagement risk to an acceptable level; and
  - (4) Evaluating evidence, including the reasonableness of the responsible party's oral and written representations on which to base KPMG's conclusions on in relation to compliance by GPL with the Compliance Plans.

72.6 KPMG represented in its reports of its audits of the Compliance Plans that they were conducted in accordance with Australian Auditing Standards;

#### **Particulars**

- (a) The Plaintiffs repeat the particulars provided in paragraph 77 below.
- (b) Further particulars will be provided by way of evidence.

72.7 at all material times, KPMG was aware, or ought to have been aware, that:

- (a) Compliance Plan audit reports would be lodged with ASIC, and be available to members of the Gunns Woodlot Schemes and potential acquirers of interests in the Gunns Woodlot Schemes; and

- (b) the contents of the Compliance Plan audit reports would have a material effect on the market for, and the price or value of interests in, the Gunns Woodlot Schemes;

**Particulars**

- (i) KPMG's knowledge of the requirement of, and consequences of, lodgement of its Compliance Plan audit reports with ASIC is to be inferred from its participation in the circumstances leading to the relevant lodgements particularised in paragraph 77 below.
- (ii) Further particulars will be provided by way of discovery and evidence.

72.8 members of the Gunns Woodlot Schemes and potential acquirers of interests in the Gunns Woodlot Schemes:

- (a) were not at any time in a position to undertake, or cause to be undertaken, the same or corresponding tasks of carrying out audits of the Compliance Plans;
- (b) were vulnerable in that they were not able to protect themselves from the consequences of KPMG failing to exercise reasonable care and skill in carrying out audits of the Compliance Plans; and
- (c) could suffer loss or damage if KPMG failed to exercise reasonable care and skill in carrying out the audits of the Compliance Plans, and reporting on those audits.

**Particulars**

The "potential acquirers of interest" being the persons who were not Growers of the Gunns Woodlot Schemes (but later became Growers or were potentially considering becoming Growers) at the time the relevant Compliance Plan Audits were performed and filed by KPMG.

(Together paragraphs 70 to 72 above describe the **KPMG Duties**).



#### C4. CONDUCT OF GPL, GUNNS LTD AND KPMG

##### Payments to Gunns Ltd

73. In respect of each of the Gunns Woodlot Schemes, there were Growers' Trust Funds.

##### Particulars

- (a1) The Application Fees paid by Growers exceeded the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements.
- (a) The GPL annual reports set out amounts wrongly claimed as income or profit, being the balance between Application Fees paid by Growers and the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements;
- (b1) The amounts wrongly claimed as income or profit were not disclosed to Growers in the Prospectus or PDS for the relevant Gunns Woodlot Scheme;
- (b) Percentage of Application Fee used for the Woodlot Establishment Expenses:

Scheme Year	Percentage
2002	36.53%
2003	33.93%
2005	44.23%
2006	28.26%
2008	<del>48</del> 38.62%
2009	54.11%

- (c) Further particulars will be provided by way of expert evidence.

74. Without Growers' approval, GPL paid, or caused to be paid (by the release of funds held by Gunns Ltd), some or all of the Growers' Trust Funds to Gunns Ltd.

**Particulars**

(a) Amounts accounted for as loans by GPL to Gunns Ltd:

<b>Year</b>	<b>Amount</b>
2002	\$2,584,000
2003	\$36,330,000
2004	\$71,420,000
2005	\$112,797,000
2006	\$29,053,000
2008	\$2,163,000
2009	\$89,826,000
2010	\$71,669,000
2011	\$70,315,000

**(GPL Advances)**

(b) Amounts paid by GPL to Gunns Ltd as purported dividends:

(1A) \$8M for the year ending 30 June 2003;

(1) \$8M for the year ending 30 June 2004;

(2) \$50M for the year ending 30 June 2006;

(3) \$50M for the year ending 30 June 2007; and

(4) \$10M for the year ending 30 June 2009,

**(GPL Dividends).**

(c) Further particulars will be provided by way of evidence.

74A In the alternative to paragraphs 73 and 74 above, in respect of each of the Gunns Woodlot Schemes, there were the amounts comprising the GPL Unauthorised Retention of Growers' Trust Funds.

**Particulars**

The particulars to paragraph 73 above are repeated.

74B GPL paid, or caused to be paid (by the release of funds held by Gunns Ltd), some or all of the amounts comprising the GPL Unauthorised Retention of Growers' Trust Funds to Gunns Ltd.

**Particulars**

The particulars to paragraph 74 above are repeated.

**Gunns Financing and Security Arrangements**

74C. GPL, without the approval of the Growers, was party to and entered into the Gunns Financing and Security Arrangements.

**Particulars**

The pleadings in paragraphs 55C to 55H, 65.5(e), 65.6(e), 66.3 and 66.4A above are repeated.

**Forestry Right Fees and Insurances**

75. GPL did not make all required payments of the Forestry Right Fees pursuant to its obligation to do so set out in subparagraphs 65.1 to 65.4 above.

**Particulars**

- (a) Forestry Right Deed, Schedule 1.
- (b) No Forestry Rights Fees were paid at any time to the following landowners (which were subsidiaries of Gunns Ltd at all relevant times):
  - (1) Gunns Ltd;
  - (2) Associated Forest Holdings Pty Ltd (ACN 004 352 078);
  - (3) East Coast Pastoral Co Pty Ltd (ACN 009 519 528);
  - (4) Gunns Forest Products Pty Ltd (ACN 004 208 904);
  - (5) Kauri Timber Company Ltd (ACN 004 085 714); and
  - (6) Tasmanian Pulp & Forest Holdings Ltd (ACN 009 488 733); and

- (c) Forestry Rights Fees were not paid to the remaining holders of land from at least March 2012.

~~76.~~ Not used.

### **KPMG Compliance Plan audit reports**

77. KPMG issued Compliance Plan audit reports for each of the Gunns Woodlot Schemes, in respect of each relevant financial year, which did not raise any issue regarding the conduct pleaded in paragraphs 74 to ~~75~~ ~~76~~ above and subparagraphs 80.10 and 80.11 below.

#### **Particulars**

For the financial year ended in 2003:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2003; and
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2003.

For the financial year ended in 2004:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2004; and
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2004.

For the financial year ended in 2005:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 29 September 2005;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 29 September 2005; and
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 29 September 2005.

For the financial year ended in 2006:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 29 September 2006;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 29 September 2006;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 29 September 2006; and
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 29 September 2006.

For the financial year ended in 2007:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 28 September 2007;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 28 September 2007;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 28 September 2007; and
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 9 October 2007.

For the financial year ended in 2008:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2008;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2008;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2008
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2008; and

- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2008.

For the financial year ended in 2009:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2009;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2009;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2009;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2009;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2009; and
- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2009.

For the financial year ended in 2010:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2010;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2010;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2010;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2010;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2010; and

- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2010.

For the financial year ended in 2011:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2011;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2011;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2011;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2011;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2011; and
- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2011.

78. In respect of each relevant financial year, KPMG did not notify ASIC in writing within 28 days after the lead auditor became aware of circumstances that provided reasonable grounds to suspect that there had been a significant contravention of the Act, or at all.

#### **Particulars**

- (a) The Plaintiffs repeats the particulars provided in paragraphs 12, 53 and 77 above, and 86.2 below.
- (b) Further particulars will be given after discovery.

#### **C5. BREACHES OF DUTY**

##### **GPL**

##### *GPL Management Duties*

79. GPL breached the GPL Management Duties set out in paragraphs 65 to 66 above by failing:

79.1 under the Constitutions, to ensure that any goods or services which were required to be provided or performed under the terms of a Forestry Right Lease Deed and the Management Agreements were provided or performed in accordance with the relevant agreement and the Constitution;

**Particulars**

- (a) GPL did not pay, or cause to be paid, the Forestry Right Fees for the Gunns Woodlot Schemes in accordance with the Forestry Right Deeds;
- (b) Schedule A to the Default Notices for each of the Gunns Woodlot Schemes 2002, 2003, 2005, 2006, 2008 and 2009 issued by the Receivers to GPL dated 8 November 2012;
- (c) GPL did not ensure that Gunns Ltd as agent of GPL paid the Forestry Right Fees;
- (d) GPL did not issue any notice to Gunns Ltd of a breach of the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees when GPL knew or ought to have known that Gunns Ltd was not complying with the terms of the Maintenance Services Sub-contracting Agreements;
- (e) GPL did not exercise its right to terminate the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees as agent of GPL; and
- (f) Further particulars will be given after discovery.

79.2 under the Management Agreements to:

- (a) ~~not used; insure the land the subject of the Gunns Woodlot Schemes against public risk; and~~
- (b) ensure that the Establishment Services, Maintenance Services and Pruning Services were carried out in a proper and diligent manner;



**Particulars**

The particulars at subparagraph 79.1 above are repeated.

79.3 under the Forestry Right Lease Deeds to:

- (a) refrain from breaching the Forestry Right Deed; and
- (b) refrain from doing anything that may end the Forestry Right Deed or the registration of the Forestry Right Deed;

**Particulars**

The particulars at subparagraph 79.1 above are repeated.

79.4 under the Forestry Right Deeds to:

- (a) pay the Forestry Right Fees to landowners quarterly in arrears on each of the payment dates specified in the Forestry Right Deed; ~~and~~
- ~~(b) keep current with a reputable insurer a public risk insurance policy covering GPL's liability in respect of its interest in the land the subject of the Gunns Woodlot Schemes;~~

**Particulars**

The particulars at subparagraph 79.1 above are repeated.

79.5 to comply with obligations under the Original Compliance Plans (pleaded in subparagraph 65.5 above) by:

- (a) contrary to Rule 1: failing to comply with the NTA requirements and ensure that the scheme related cash needs and insurance requirements were maintained;

**Particulars**

GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees when they became due and payable.

- (a1) contrary to Rule 3: failing to issue Prospectuses and PDS which comply with the Act;

**Particulars**

As pleaded and particularised in paragraphs 38C to 38D and 73 above, the Prospectus and PDS for the relevant Gunns Woodlot Schemes did not disclose the profit or income paid to GPL from the Application Portion.

- (a2) contrary to Rule 8: failing to provide the establishment, maintenance and tending services for Growers' woodlot in a proper and efficient manner;

**Particulars**

The particulars at subparagraph 79.1 are repeated.

- (b) contrary to Rule 10: failing to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;

**Particulars**

As pleaded in paragraphs 73 to 74B above, GPL improperly released Application Money out of the Application Portion in making the GPL Advances and paying the GPL Dividends.

- (c) contrary to Rule 12: paying itself, or reimbursing itself for expenses or liabilities, out of the scheme property not in accordance with the Constitution, Management Agreements and prospectus;

**Particulars**

- (i) The pleading and particulars at paragraph 73 above are repeated.
- (ii) The balance between Application Fees paid by Growers and the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements was treated by GPL wrongly as its own property and paid to its own account.
- (d) contrary to Rule 15: giving a related party a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

**Particulars**

- (i) In making the GPL Advances and paying the GPL Dividends:
- a. GPL gave a financial benefit to a related party under the Act, Gunns Ltd;
  - b. GPL did not have the prior approval of the Growers;
  - c. GPL's conduct was not within an exception set out in ss.210-216 of the Act; ~~and~~
  - d. GPL diminished or endangered scheme property by failing to retain sufficient assets to be able to pay the Forestry Right Fees and perform the outstanding Maintenance Services; ~~and~~ -
  - e. the pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.
- (ii) By entering into the Gunns Financing and Security Arrangements:
- a. GPL gave a financial benefit to a related party under the Act, Gunns Ltd;
  - b. GPL did not have the prior approval of the Growers;
  - c. GPL's conduct was not within an exception set out in ss.210-216 of the Act; and
  - ~~d. GPL exposed itself to the insolvency of Gunns in a manner which endangered scheme property by reason of GPL's obligations to, among other things, pay Forestry Rights Fees, failure in respect of which threatened Growers' interests.~~
  - e. GPL exposed itself to the insolvency of Gunns Ltd in a manner which endangered scheme property and undermined the structure of the Gunns Woodlot Scheme by:
    - (A) placing it in a position whereby GPL could be called upon to meet Gunns Ltd's liability, rendering GPL insolvent and

unable to perform its obligations as RE, including inter alia, payment of the Forestry Right Fees, termination of which threatened Growers interest;

- (B) depriving GPL of the benefit of being able to terminate the Maintenance Services Sub-contracting Agreements pursuant to cl. 5.1 when Gunns Ltd defaulted in its obligations to, inter alia, pay the Forestry Right Fees; and
- (C) depriving GPL of the benefit of being able to replace Gunns Ltd as Manager of the Gunns Woodlot Schemes with the new Manager taking the benefit of cl. 4.3 of the Maintenance Services Sub-contracting Agreements.

(d1) contrary to Rule 16: failing to ensure that suitably qualified agents were appointed;

#### **Particulars**

The particulars at subparagraph 79.1 are repeated.

- (e) contrary to Rule 17: failing to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;

#### **Particulars**

The pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.

- (f) contrary to Rule 22: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

#### **Particulars**

The pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.

- (g) contrary to Rule 26: failing to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and

**Particulars**

The pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.

- (h) contrary to Rule 27: failing to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests on the Growers, was reported to ASIC as soon as practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution.

**Particulars**

- (i) No notification was made to ASIC of any breach of the Act.
- (ii) GPL Letters to ASIC dated 26 March 2010, 19 May 2010, 9 July 2010, 13 October 2010, 30 November 2010, 30 April 2012.
- (iii) As to breaches of Law the pleading and particulars in paragraphs 38A to 38C, 73 and subparagraphs 79.7 and 79.9 are repeated.
- (iv) As to breaches of the Constitution, the pleadings and particulars at paragraphs 38A to 38C, 73 and subparagraph 79.1 above are repeated.

79.6 to comply with obligations under the Amended Compliance Plans (pleaded in subparagraph 65.6 above) by:

- (a) contrary to Rule 1: failing to ensure that the cash needs of the project were maintained;

**Particulars**

GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees when they became due and payable.

- (a1) contrary to Rule 3: failing to issue Prospectuses and PDS documents which comply with the Act;

**Particulars**

The particulars to subparagraph 79.5(a1) above are repeated.

- (b) contrary to Rule 5: failing to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;

**Particulars**

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- (b1) contrary to Rule 7: failing to provide establishment, maintenance and harvesting services for the project in a proper and efficient manner;

**Particulars**

The pleadings to subparagraph 79.5(a2) above are repeated.

- (c) contrary to Rule 10: paying itself fees, or reimbursing itself for expenses or liabilities, out of the Gunns Woodlot Scheme property not in accordance with the Constitution, Forestry Right Deeds, Management Agreements and PDS;

**Particulars**

- (1) The pleading and particulars at subparagraph 79.5(c) above are repeated.

- (2) The pleadings and particulars at paragraphs 38A to 38C and 73 above are repeated.

- (d) contrary to Rule 13: giving a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

**Particulars**

- (i) In respect to the GPL Advances and GPL Dividends the pleadings and particulars at paragraphs 50, 73 to 74B and 79.5(d)(i) above are repeated.
  - (ii) In respect to the Gunns Financing and Security Arrangements the pleadings and particulars in paragraph 79.5(d)(ii) above are repeated.
- (e) contrary to Rule 15: failing to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;

**Particulars**

The particulars at subparagraph 79.5(e) above are repeated.

- (f) contrary to Rule 19: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme; and

**Particulars**

The particulars at subparagraph 79.5(f) above are repeated.

- (g) contrary to Rule 23: failing to ensure all payments out of the Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act.

**Particulars**

The particulars at subparagraph 79.5(g) above are repeated.

- (h) contrary to Rule 24: failing to report any breach of the Act that related to the Gunns Woodlot Schemes and which had had, or was likely to have, a materially adverse effect on the interests of the Grower; and report any breach of the Constitution.

**Particulars**

- (i) The particulars at subparagraph 79.5(h) above are repeated.
- (ii) The pleadings and particulars at paragraphs 38A to 38C and 73 above are repeated.

79.7 to exercise the degree of care and diligence that a reasonable person would exercise if they were in the RE's position (as required by s.601FC(1)(b) of the Act);

**Particulars**

- (a) The GPL Bank Guarantee was not, but should have been, called on before GPL and Gunns Ltd were placed into external administration:
  - (1) By the roles of the Third Defendant and Mr Gay as directors and/or officers of both GPL and Gunns Ltd, GPL and the GPL Directors knew or should have known that Gunns Ltd was not paying Forestry Rights Fees;
  - (2) At the time the GPL Bank Guarantee was called upon, Gunns Ltd's secured creditor asserted that the guarantee fell within the creditor's security interests and in settlement of that dispute the GPL Bank Guarantee was compromised and only \$500,000 was paid to GPL; and
  - (3) The amount of \$500,000 was insufficient to fund the ongoing operations of the Gunns Woodlot Schemes,
- (b) GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees when they became due and payable,

79.8 not used;

79.9 to comply with the Gunns Woodlot Schemes Compliance plans (as required by s.601FC(1)(h) of the Act);



**Particulars**

The pleadings and particulars at subparagraphs 79.5 to 79.6 above are repeated.

79.10 to report to ASIC any breach of the Act that related to the Gunns Woodlot scheme and has had, or was likely to have, a materially adverse effect on the interests of Gunns Ltd, as soon as practicable after it became aware of the breach (as required by s.601FC(1)(l) of the Act); and

**Particulars**

~~(a) — No notification was made to ASIC of any breach of the Act; and~~

~~(b) — As to the breaches of the Act, subparagraphs 79.7 to 79.9 above, and 80.4 to 80.9 below are repeated.~~

(c) The particulars in subparagraph 79.5(h) above are repeated.

79.10A disclose to and seek approval from the scheme members for (as required by s.601LC of the Act) the giving of a financial benefit to a related party;

**Particulars**

The particulars to paragraph ~~79.5(d)~~ and 79.6(d) are repeated.

**GPL Trust Fund Duties**

80. GPL breached the GPL Trust Funds Duties set out at paragraph 67 above by failing to:

80.1 preserve the Growers' Trust Funds as trust property;

**Particulars**

The pleadings and particulars at paragraphs 73 and 74B above are repeated.

80.2 act in good faith and in the best interests of the Growers;

**Particulars**

The particulars at subparagraph 80.1 above are repeated.

80.3 not used;

80.4 comply (as required by s.601FC(1)(h) of the Act) with the Gunns Woodlot Schemes Compliance Plans as pleaded in subparagraphs 80.10 to 80.11 below.

80.5 ensure (as required by s.601FC(1)(i) of the Act) that Gunns Woodlot Scheme property was clearly identified as scheme property, and held separately from property of the RE and property of any other scheme,

**Particulars**

The pleading and particulars at subparagraph 79.5(f) above are repeated.

80.6 ensure (as required by s.601FC(1)(k) of the Act) that all payments out of scheme property were made in accordance with the Gunns Woodlot Scheme Constitutions and the Act;

**Particulars**

The pleading and particulars at subparagraph 79.5(g) above are repeated.

80.7 carry out or comply with (as required by s.601FC(1)(m) of the Act) any other duty, not inconsistent with this Act, conferred on GPL by the Gunns Woodlot Schemes Constitutions;

**Particulars**

The pleadings and particulars at paragraphs 39, 43 to 52A and 73 to 74B above are repeated.

80.8 hold (as required by s.601FC(2) of the Act) the Gunns Woodlot Scheme property on trust for the Growers;

**Particulars**

The particulars at subparagraph 80.1 above are repeated.

80.9 disclose to and seek approval from the scheme members for (as required by s.601LC of the Act) the giving of a financial benefit to a related party;

**Particulars**

The particulars at paragraph 79.5(d) are repeated.

80.10 comply with the Original Compliance Plans (pleaded in subparagraph 67.10 above) by:

- (a) contrary to Rule 10: failing to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;

**Particulars**

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- (b) contrary to Rule 12: paying itself, or reimbursing itself for expenses or liabilities, out of scheme property not in accordance with the Constitution, Management Agreements, Prospectus and PDS documents;

**Particulars**

The pleading and particulars at subparagraph 79.5(c) above are repeated.

- (c) contrary to Rule 15: giving inter alia a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

**Particulars**

- (1) The pleading and particulars at subparagraphs 79.5(d) above are repeated.
- (2) The pleadings and particulars at paragraphs 38A to 38C and 73 above are repeated.
- (d) contrary to Rule 17: failing to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;

**Particulars**

The pleading and particulars at subparagraph 79.5(e) above are repeated.

- (e) contrary to Rule 22: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

**Particulars**

The pleading and particulars at subparagraph 79.5(f) above are repeated.

- (f) contrary to Rule 26: failing to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and

**Particulars**

The pleading and particulars at subparagraph 79.5(g) above are repeated.

- (g) contrary to Rule 27: failing to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests of the Grower, was reported to ASIC as soon as reasonably practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution.

**Particulars**

The particulars at subparagraph 79.5(h) above are repeated.

80.11 comply with the Amended Compliance Plans (pleaded in subparagraph 67.11 above) by:

- (a) contrary to Rule 5: failing to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;

**Particulars**

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- (b) contrary to Rule 10: paying itself fees, or reimbursing itself for expenses or liabilities, out of the Gunns Woodlot Scheme property not in accordance with the Constitution, Forestry Right Deeds, Management Agreements, Prospectus and PDS documents;

**Particulars**

The pleading and particulars at subparagraph 79.5(c) above are repeated.

- (c) contrary to Rule 13: giving inter alia a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

**Particulars**

(i) The pleading and particulars at subparagraph 79.5(d) above are repeated.

(ii) The pleadings and particulars at paragraphs 38A to 38C and 73 above are repeated.

- (d) contrary to Rule 15: failing to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;

**Particulars**

The particulars at subparagraph 79.5(e) above are repeated.

- (e) contrary to Rule 19: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;

**Particulars**

The particulars at subparagraph 79.5(f) above are repeated.

- (f) contrary to Rule 23: failing to ensure all payments out of the Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and

**Particulars**

The particulars at subparagraph 79.5(g) above are repeated.

- (g) contrary to Rule 24: to report to ASIC any breach of the Act that related to the Gunns Woodlot Schemes and which had had, or was likely to have, a materially adverse effect on the interest of the Growers; and report any breach of the Constitution.

**Particulars**

The particulars at subparagraph 79.5(h) above are repeated.

GPL duties arising from its position as RE

80A. Further or in the alternative to paragraph 80 above, GPL breached the duties arising from its position as an RE set out at paragraph 67A above by failing to:

80A.1 as a fiduciary, act in good faith and in the best interests of Growers; and

80A.2 comply (as required by s.601FC(1)(h) of the Act) with the Gunns Woodlot Schemes Compliance Plans.

**Particulars**

The pleadings and particulars at subparagraphs 79.9 and 80.4 above are repeated.

81. Not used.

## The GPL Directors

82. In relation to GPL's failure to ensure payment of the Forestry Rights Fees the GPL Directors breached the Directors Duties by failing to:

82.1 exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

### Particulars

- (a) The GPL Directors failed to ensure that GPL paid the Forestry Right Fee, and performed the Maintenance Services;
- (b) The GPL Directors failed to ensure that GPL had funds available to cover liabilities including the Forestry Right Fees, and the performance of the Maintenance Services;
- (c) The GPL directors failed to ensure that GPL's agent, Gunns Ltd, paid the Forestry Right Fees and performed the Maintenance Services;
- (d) The GPL Directors failed to cause GPL to issue any notice to Gunns Ltd of a breach of the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
- (e) The GPL Directors failed to exercise GPL's right to terminate the Maintenance Services Sub-contracting Agreements with Gunns Ltd due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
- (f) The GPL Directors failed to cause GPL to call upon the GPL Bank Guarantee in a timely manner; and
- (g) In relation to the matters set out in (a)-(f) above, the relevant periods for the GPL Directors are as follows:
  - (1) For the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;

- (1A) For Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010;
- (2) For the Fifth Defendant, while a director of GPL from 2000 to 2012;
- (3) For the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
- (4) For the Seventh Defendant while a director of GPL from 16 April 2008 to 27 November 2012;
- (5) For the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
- (6) For the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.

82.2 refrain from making improper use of their positions as officers to cause detriment to the members of the Gunns Woodlot Schemes (as required by s.601FD(1)(e) of the Act);

**Particulars**

The particulars at subparagraph 82.1 above are repeated.

82.3 take all steps that a reasonable person would take in the officers' position to ensure (as required by s.601FD(1)(f) of the Act) that GPL as RE complied with its obligations under the Act, the AFSL, and the Scheme Documents; and the Compliance Plans;

**Particulars**

The particulars at subparagraph 82.1 above are repeated.

82.4 act with the due care, skill and diligence that a reasonable person would exercise if the person were in GPL Directors' position as the Directors of the responsible entity; and



**Particulars**

The particulars at subparagraph 82.1 above are repeated.

- 82.5 ensure that GPL complied with its obligations under the Management Agreements, Forestry Rights Lease Deeds and the Forestry Right Deeds.

**Particulars**

The particulars at subparagraph 82.1 above are repeated.

83. In relation to the Growers' Trust Funds, the GPL Directors breached the Directors Duties by failing to:

- 83.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

**Particulars**

- (a) The GPL Directors failed to ensure GPL preserved the Growers' Trust Funds;
- (b) The GPL Directors approved the use by GPL of the Growers' Trust Funds for each of the financial years 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009 for its own purposes;
- (c) ~~The Third, Fifth and Sixth Defendants and Mr Gay approved the use by GPL of the Growers' Trust Funds for its own purposes for the years 2004, 2006 and 2007 and the Third and Fifth to Eighth Defendants approved the use by GPL of the Growers' Trust Funds for its own purposes for 2009;~~  
The GPL Directors identified below, recognised the Growers' Trust Funds as part of the profit of GPL in the following financial years as follows:
- (1) The Third Defendant in for the financial years 2002 to 2009;
- (2) Mr Gay in for the financial years 2002 to 2009;
- (3) The Fifth Defendant in the financial years 2002 to 2009;
- (4) The Sixth Defendant in the financial years 2002 to 2009;

(5) The Seventh Defendant in the financial years 2008 and 2009;

(6) The Eighth Defendant in the financial year 2009;

(d1) By way of further particulars to paragraph (c) above, the Plaintiffs refer to paragraph 6 of the letter from Piper Alderman to the solicitors for the Eighth Defendant, copied to all defendants, dated 12 November 2021,

(d) The ~~relevant~~ GPL Directors identified below, as set out in (c) above resolved to declare and caused to be paid the GPL Dividends from funds that were Growers' Trust Funds and not properly classifiable as profit of GPL in the following financial years: ; and

(1) The Third Defendant in the financial years 2003, 2004, 2006, 2007 and 2009;

(2) Mr Gay for the the financial years 2003, 2004, 2006, 2007 and 2009;

(3) The Fifth Defendant in the financial years 2003, 2004, 2007 and 2009;

(4) The Sixth Defendant in the financial years 2003, 2004, 2007 and 2009;

(5) The Seventh Defendant in the financial year 2009; and

(6) The Eighth Defendant in the financial year 2009,

(e1) By way of further particulars to paragraph (d) above, the Plaintiffs refer to paragraph 7 of the letter from Piper Alderman to the solicitors for the Eighth Defendant, copied to all defendants, dated 12 November 2021,

(e) The GPL Directors identified below, as set out in (c) above permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances with Growers' Trust Funds in the periods as follows:

(1) In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;

- (1A) In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010;
- (2) In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;
- (3) In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
- (4) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;
- (5) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
- (6) ~~In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.~~

83.2 ensure that GPL sought member approval for the GPL Advances and paying the GPL Dividends to Gunns Ltd in accordance with s.208 of the Act as replaced by s.601LC;

#### **Particulars**

The particulars to paragraph 83.1 are repeated

83.3 ~~Not used. act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act);~~

#### **Particulars**

- ~~(a) The GPL Directors permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances and pay the GPL Dividends to Gunns Ltd;~~
- ~~(1) The Third, Fifth and Sixth Defendants and Mr Gay approved the GPL Dividends for the years 2004, 2006 and 2007, and the Third and Fifth to Eighth Defendants and Mr Gay approved the~~

use by GPL of the Growers' Trust Funds for 2009 for its own purposes; and

~~(2) — In relation to the GPL Advances, the particular (d) to paragraph 83.1 above is repeated.~~

~~(b) — Gunns Ltd was a related party of GPL under the Act;~~

~~(c) — Making the GPL Advances and paying the GPL Dividends to Gunns Ltd bestowed a benefit on Gunns Ltd;~~

~~(d) — GPL did not obtain the approval of the Growers before making the GPL Advances and paying the GPL Dividends to Gunns Ltd;~~

~~(e) — Making the GPL Advances and paying the GPL Dividends to Gunns Ltd was not within an exception set out in ss.210-216 of the Act; and~~

~~(f) — By permitting GPL to make the GPL Advances and pay the GPL Dividends to Gunns Ltd, the GPL Directors caused GPL to breach its duty to the scheme members and fail to act in their best interests.~~

83.4 refrain from making improper use of their position (as required by s.601FD(1)(e) of the Act) as an officer to cause detriment to the members of the Gunns Woodlot Schemes;

#### **Particulars**

The particulars at subparagraphs 83.1 and ~~83.3~~ above are repeated.

83.5 take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with (as required by s.601FD(1)(f) of the Act) the Act, the AFSL, the Scheme Documents, and the Compliance Plans;

#### **Particulars**

The particulars at subparagraph 83.1 above are repeated.

83.6 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law); and

**Particulars**

The particulars at subparagraph 83.1 above are repeated.

83.7 ensure that GPL complied with the GPL Trust Obligations.

**Particulars**

The pleadings and particulars at subparagraphs 83.1 to 83.6 above are repeated.

83A. In the alternative to paragraph 83 above, in relation to the GPL Unauthorised Retention of Growers' Trust Funds, the GPL Directors breached the Directors Duties by failing to:

83A.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

**Particulars**

(a) The GPL Directors approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for each of the financial years 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009 for its own purposes;

~~(b) The Third, Fifth and Sixth Defendants and Mr Gay approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for its own purposes for the years 2004, 2006 and 2007 and the Third and Fifth to Eighth Defendants and Mr Gay approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for its own purposes for 2009; Each~~ The GPL Directors identified below, approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for its own purposes, by recognising the Growers' Trust Funds as part of the profit of GPL, as follows:

(1) The Third Defendant in for the financial years 2002 to 2009;

(2) Mr Gay in for the financial years 2002 to 2009;

(3) The Fifth Defendant in the financial years 2002 to 2009;

(4) The Sixth Defendant in the financial years 2002 to 2009;

(5) The Seventh Defendant in the financial years 2008 and 2009;

(6) The Eighth Defendant in the financial year 2009;

(c1) By way of further particulars to paragraph (b) above, the Plaintiffs refer to paragraph 10 of the letter from Piper Alderman to the solicitors for the Eighth Defendant, copied to all defendants, dated 12 November 2021,

(c) The relevant GPL Directors ~~as set out in (b) above~~ identified below, resolved to declare and caused to be paid the GPL Dividends from funds that were GPL Unauthorised Retention of Growers' Trust Funds and not properly classifiable as profit of GPL in the following financial years: ; and

(1) The Third Defendant in the financial years 2003, 2004, 2006, 2007 and 2009;

(2) Mr Gay in the financial years 2003, 2004, 2006, 2007 and 2009;

(3) The Fifth Defendant in the financial years 2003, 2004, 2007 and 2009;

(4) The Sixth Defendant in the financial years 2003, 2004, 2007 and 2009;

(5) The Seventh Defendant in the financial year 2009; and

(6) The Eighth Defendant in the financial year 2009;

(d1) By way of further particulars to paragraph (c) above, the Plaintiffs refer to paragraph 10 of the letter from Piper Alderman to the solicitors for the Eighth Defendant, copied to all defendants, dated 12 November 2021,

(d) The GPL Directors identified below, ~~as set out in (b) above~~ permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances with the GPL Unauthorised Retention of Growers' Trust Funds in the periods as follows:

(1) In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;

- (2) In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010;
- (3) In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;
- (4) In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
- (5) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;
- (6) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
- ~~(7) In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.~~

83A.2 ensure that GPL sought member approval for the GPL Advances and paying the GPL Dividends to Gunns Ltd in accordance with s.208 of the Act as replaced by s.601LC;

### **Particulars**

The particulars to paragraph 83A.1 are repeated

83A.3 ~~Not used. act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act);~~

### **Particulars**

- ~~(a) The GPL Directors permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances and pay the GPL Dividends to Gunns Ltd;~~
- ~~(1) The Third, Fifth and Sixth Defendants approved the GPL Dividends for the years 2004, 2006 and 2007, and the Third and Fifth to Eighth Defendants approved the use by GPL of the GPL~~

~~Unauthorised Retention of Growers' Trust Funds for 2009 for its own purposes; and~~

~~(2) — In relation to GPL Advances, particular (d) to paragraph 83.1 above is repeated.~~

~~(b) — Gunns Ltd was a related party of GPL under the Act;~~

~~(c) — Making the GPL Advances and paying the GPL Dividends to Gunns Ltd bestowed a benefit on Gunns Ltd;~~

~~(d) — GPL did not obtain the approval of the Growers before making the GPL Advances and paying the GPL Dividends to Gunns Ltd;~~

~~(e) — Making the GPL Advances and paying the GPL Dividends to Gunns Ltd was not within an exception set out in ss.210-216 of the Act; and~~

~~(f) — By permitting GPL to make the GPL Advances and pay the GPL Dividends to Gunns Ltd, the GPL Directors caused GPL to breach its duty to the scheme members and fail to act in their best interests.~~

83A.4 refrain from making improper use of their position (as required by s.601FD(1)(e) of the Act) as an officer to cause detriment to the members of the Gunns Woodlot Schemes;

#### **Particulars**

The particulars at subparagraphs 83A.1 and 83A.3 above are repeated.

83A.5 take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with (as required by s.601FD(1)(f) of the Act) the Act, the AFSL, the Scheme Documents, and the Compliance Plans; and

#### **Particulars**

The particulars at subparagraph 83A.1 above are repeated.

83A.6 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law).



**Particulars**

The particulars at subparagraph 83A.1 above are repeated.

83B. In relation to the Gunns Financing and Security Arrangements, the GPL Directors breached the Directors Duties by failing to:

83B.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

**Particulars**

(a1) The particulars in subparagraph 79.5(d)(ii) above are repeated.

- (a) ~~Not used. GPL entering into the Gunns Financing and Security Arrangements exposed GPL to the insolvency of Gunns in a manner which endangered scheme property by reason of GPL's obligations to, among other things, pay Forestry Rights Fees, failure in respect of which threatened Growers' interests;~~
- (b) GPL did not obtain any benefit by its participation in the Gunns Financing and Security Arrangements;
- (c) The ~~following~~ GPL Directors identified below, approved GPL's participation in the Gunns Financing and Security Arrangements by signing the constituent documents on behalf of GPL as follows: in the periods as follows:
- (1) ~~In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;~~
  - (2) ~~In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010~~
  - (3) ~~In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;~~
  - (4) ~~In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;~~

- ~~(5) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;~~
  - ~~(6) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and~~
  - ~~(7) In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.~~
  - (8) Mr Gay and the Third Defendant signed the 2007 Working Capital Agreement on or about 31 January 2007;
  - (9) Mr Gay and the Third Defendant signed the 2007 Facility Agreement on or about 31 January 2007;
  - (10) Mr Gay and the Third Defendant signed the 2007 Charge on or about 31 January 2007;
  - (11) Mr Gay and the Third Defendant signed the 2010 Charge on or about 8 February 2010;
  - (12) The Fifth Defendant signed the 2012 Facility Agreement on 30 January 2012; and
  - (13) The Fifth Defendant signed the 2012 Security Trust Deed on or about 30 January 2012.
- (d) For each of the GPL Directors that did not sign a document comprising the Gunns Financing and Security Arrangements
- (1) it is to be inferred that the GPL Directors knew or ought to have known about the constituent documents forming the Gunns Financing and Security Arrangements by reason of them being a Director of GPL;
  - (2) it is to be inferred they made, or that they ought to have made reasonable enquiries to form a view in respect to whether the Gunns Financing and Security Arrangements breached GPL's duties as particularised in paragraphs 79.5(d)(ii), 79.6(d)(ii) and 79.9 above;

(3) ought, by reason of the matters in (2) above, to have identified one or more of the alleged breaches and notified ASIC, or caused GPL to notify ASIC so as to comply with its obligations to notify ASIC in accordance with:

(A) the Compliance Plans and Amended Compliance Plans as set out in paragraphs 79.5(h), 79.6(h) and 79.9 above; and

(B) the Act as set out in paragraphs 79.9 and 79.10 above.

83B.2 ~~Not used. act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act); and~~

#### **Particulars**

~~The particulars at 83B.1 above are repeated.~~

83B.2A take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with (as required by s.601FD(1)(f) of the Act) the Act, the AFSL, the Scheme Documents, and the Compliance Plans; and

#### **Particulars**

The particulars at subparagraph 83B.1 above are repeated.

83B.3 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law);

#### **Particulars**

The particulars at 83B.1 above are repeated.

83B.4 ensure that GPL complied with the GPL Management Duties and GPL RE Duties.

**Particulars**

- (a) The pleadings and particulars in paragraphs 79 to 80A above are repeated.
- (b) The pleadings and particulars at paragraphs and subparagraphs 79.9, 79.10, 79.10A and 80A.2 above are repeated.

84. The GPL Directors are liable to discharge the whole or a part of the liability of GPL for the matters pleaded in paragraphs 79 to 80 above (pursuant to s.197 of the Act).

**Particulars**

- (a) GPL have not discharged, and cannot discharge, the liability or part of it as set out in paragraphs 79 to 80 above; and
- (b) GPL is not entitled to be fully indemnified against the liability out of the Gunns Woodlot Schemes.

85. Not used.

**KPMG**

86. KPMG breached the KPMG Duties set out in paragraphs 71 and 72 above by:

86.1 in breach of the duty pleaded in paragraph 71.2, not exercising due skill and care in the provision of the audit reports of the Compliance Plans in accordance with s.601HG(3)(b)-(c) of the Act during the 2003 to 2006, 2007 to 2009 and 2009 to 2011 financial years, because:

- (a) KPMG provided audit reports in which the lead auditor provided an opinion that GPL complied with the Compliance Plans, when in fact GPL had not complied with the Compliance Plans; and

**Particulars**

- (1) ~~KPMG provided audit reports in which the lead auditor provided an opinion that GPL complied with the Compliance Plans, where that was not the case. In this respect, the~~ The pleadings and particulars at paragraphs

12,55K-55N, 77, 78, 79.5, 79.6, 80.10 and 80.11 above are repeated;

~~(2) The lead auditor for each of the Compliance Plans was:~~

~~(A) The Tenth Defendant for the years 2005 to 2011;  
and~~

~~(B) The Eleventh Defendant for the years 2003 to 2004,~~

- (b) KPMG actually knew that GPL had not complied with the Compliance Plans, and any auditor exercising due skill and care in the provision of the audit reports of the Compliance Plans in accordance with s.601HG(3)(b)-(c) of the Act would have included that matter in a report so prepared if that matter were known to them; or

### **Particulars**

KPMG's actual knowledge is to be inferred from the following:

(i) As pleaded in paragraph 53.3 above, when conducting an audit of the Compliance Plans, the lead auditor reviewed GPL's financial documents, Woodlot Scheme Documents, Board Minutes, report(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes, and financial and company reports prepared by GPL annually;

(ii) A review of the documents set out in (i) above reveals the following significant contraventions of the Act by GPL:

- (1) GPL made the GPL Advances and paid the GPL Dividends to Gunns Ltd in breach of trust, and contravened the Act, the Constitution and the Compliance Plans and the Prospectus and PDS; and
- (2) the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds with such a

failure being a contravention of the Act, the Constitution and the Compliance Plans; and

- (3) GPL had entered into the Gunns Financing and Security Arrangements in contravention of the Act and the Compliance Plans;

(iii) Further to (i) and (ii), and for the reasons pleaded and particularised above in paragraph 55J1, from 2007 onwards it is to be inferred that the Tenth Defendant knew that GPL had entered into the Gunns Financing and Security Arrangements in contravention of the Act and the Compliance Plans.

- (c) In the alternative to (b) – that is, if KPMG did not have actual knowledge that GPL had not complied with the Compliance Plans – in circumstances where the reason that KPMG did not have such actual knowledge (and therefore did not include that matter in the audit reports) was that because it failed to exercise reasonable care, skill, and diligence in conducting the audits of the Compliance Plan so as to obtain that actual knowledge.

### **Particulars**

(i) As pleaded in paragraph 53.3 above, when conducting an audit of the Compliance Plans, the lead auditor reviewed GPL's financial documents, Woodlot Scheme Documents, Board Minutes, report(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes, and financial and company reports prepared by GPL annually;

(ii) An auditor acting with reasonable care, skill, and diligence would have, upon reviewing the documents referred to in (i), ~~would have~~ identified the following significant contraventions of the Act by GPL:

(1) GPL made the GPL Advances and paid the GPL Dividends to Gunns Ltd in breach of trust, and contravened the Act, the Constitution and the

Compliance Plans and the Prospectus and PDS;  
and

(2) the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds with such a failure being a contravention of the Act, the Constitution and the Compliance Plans; and

(3) GPL had entered into the Gunns Financing and Security Arrangements in contravention of the Act and the Compliance Plans;

(iii) Further to (i) and (ii), an auditor in the position of the Tenth Defendant given the matters set out in particulars (i) to (vi) to paragraph 55J1 above, and acting with reasonable care, skill, and diligence, would have known that GPL had entered into the Gunns Financing and Security Arrangements in contravention of the Act and the Compliance Plans.

(iv) Further to (i) to (iii) above, but in respect of the Tenth Defendant and the audits of the 2010 and 2011 financial years only, an auditor in the position of the Tenth Defendant, given the matters set out in paragraphs 55K and 55L, acting with reasonable care, skill, and diligence would have directed the audit so as to include the matters identified in those paragraphs, and in so doing would have then come to know that GPL had entered into the Gunns Financing and Security Arrangements in contravention of the Act and the Compliance Plans.

(v) Further particulars as to KPMG's failure to exercise reasonable care, skill, and diligence in conducting the audits of the Compliance Plan are listed in the following paragraphs of the Expert Report of Chris Westworth of Westworth Kemp dated 31 August 2021 (a copy of which has been served upon each of the defendants):

- (A) For the financial years 2002 to 2006: paragraphs 6.36 items (a) to (g) and 6.37 items (a) and (b);
- (B) For the financial years 2007 to 2009: paragraph 6.38 items (a) to (d); and
- (C) For the financial years 2010 to 2011: paragraphs 6.38 items (a) to (d) and 6.39 items (a) to (c).

86.2 in breach of the duty pleaded in paragraph 71.3 (and further to paragraph 86.1(b) but in the alternative to paragraph 86.1(c)) contrary to s.601HG(4A)(a)(i), where the lead auditor for the audit was aware of circumstances that gave the lead auditor reasonable grounds to suspect a contravention of the Act by GPL, and the contravention was a significant one, the lead auditor not notifying ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor became aware of those circumstances;

### **Particulars**

- (a1) The Plaintiffs repeats the particulars provided in paragraph 12, and subparagraph 86.1(b) above, and the particulars (a) and (b) provided in subparagraph 86.3 below.
- ~~(a) — In conducting an audit of the Compliance Plans, the lead auditor reviewed GPL's financial documents, Woodlot Scheme Documents, Board Minutes, report(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes, and financial and company reports prepared by GPL annually;~~
- ~~(b) — A review of the documents set out in (a) above reveals the following significant contraventions of the Act by GPL:~~
  - ~~(1) — GPL made the GPL Advances and paid the GPL Dividends to Gunns Ltd in breach of trust, and contravened the Act, the Constitution and the Compliance Plans; and~~
  - ~~(2) — the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds with such a failure being a~~



contravention of the Act, the Constitution and the Compliance Plans;

- (c) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in ~~the particulars (ii)(1) to paragraph 86.186.2(b)(4)~~ paragraph 86.2(b)(4) above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:
- (1) where the lead auditor had knowledge of the fact that the total of the Application Monies in fact exceeded the reasonable cost of the Woodlot Establishment Expenses, resulting in an unused surplus;
  - (2) where the lead auditor had knowledge of the fact that under the Constitutions, such monies constituted trust monies and were to be held in a separate trust account on trust for the Growers;
  - (3) where the lead auditor had knowledge of the fact that there was (i) no such trust account; or (ii) in the alternative, that such surplus monies were not in the trust account; and
  - (4) where the lead auditor had knowledge of the fact that the unused surplus trust monies were not returned to the Growers;
- (d) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in particular (ii)(2) to paragraphs 86.1(b) ~~the particulars at 86.2(b)(2)~~ above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:
- (1) where the lead auditor had knowledge that the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds;
  - (2) where the lead auditor had knowledge that GPL consequently had not complied with the Compliance Plans;
  - (3) where the lead auditor had knowledge or awareness that in the matters set out above at (d)(1) and (d)(2), the lead auditor had

reasonable grounds to suspect GPL had acted in contravention of the Act, the Constitution and the Compliance Plans; and

(e1) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in particular (ii)(3) to paragraphs 86.1(b) above that provided reasonable grounds to suspect there has been significant contraventions of the Act:

(1) where the lead auditor had knowledge of the Gunns Financing and Security Arrangements which required the approval of Growers and such approval was not obtained;

(2) where the lead auditor had knowledge that GPL consequently had not complied with the Compliance Plans;

(3) where the lead auditor had knowledge or awareness that in the matters set out above at (e1)(1) and (e1)(2), the lead auditor had reasonable grounds to suspect GPL had acted in contravention of the Act and the Compliance Plans; and

~~.(e) — The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in the particulars at (b)(3) above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:~~

~~(1) where the lead auditor had knowledge that GPL had not purchased the public liability insurances in accordance with the Forestry Right Deeds;~~

~~(2) where the lead auditor had knowledge that GPL consequently had not complied with the Compliance Plans; and~~

~~(3) where the lead auditor had knowledge or awareness that in the matters set out above at e(1) to (e)(2), the lead auditor had reasonable grounds to suspect GPL had acted in contravention of the Act, the Constitution the Compliance Plans.~~

86.3 in breach of the duty pleaded in paragraph 72, failing to act with the requisite degree of skill, care and diligence that an auditor would exercise in KPMG's position as the auditor of the Compliance Plans;

**Particulars**

- (a1) The Plaintiffs repeats the particulars provided in subparagraphs 86.1 and 86.2 above.
- (a) KPMG failed to perform the audits of the Compliance Plans in accordance with its professional obligations, including complying with ASAE 3100 and APES 013, by:
  - (1) Failing to perform a compliance engagement with an attitude of professional scepticism recognising that circumstances may exist that cause the entity to be non-compliant with the requirements as measured by the suitable criteria; and
  - (2) Failing to obtain an understanding of GPL and the Gunns Woodlot Schemes, the requirements, suitable criteria and other compliance engagement circumstances, sufficient to identify and assess the risks of GPL's non-compliance and sufficient to design and perform further evidence-gathering procedures considering the elements of the compliance framework.
- (b) KPMG failed to identify in their audits of the Compliance Plans the breaches by GPL of the Act, the Scheme Documents, the Prospectus and PDS documents, and the Compliance Plans as set out in subparagraphs 79.5 and 79.6 and 80.10 and 80.11 above.
- ~~(c) Further particulars will be provided by way of evidence.~~

**C6. CAUSATION AND LOSS**

**GPL**

**Causation: Loss of Growers' investment**

86A1. If GPL had (in compliance with the GPL Management Duties and RE Duties pleaded above in subparagraphs 65.5(e), 65.6(e), 66.3, 66.4A and 67A.2 above) sought the

approval of Growers prior to it entering the Gunns Financing and Security Arrangements, then:

(a) that approval would have been refused:

(b) GPL would not have entered and been a party to the Gunns Financing and Security Arrangements; and

(c) GPL would thus not have been exposed to the insolvency of Gunns Ltd, because:

(i) had Gunns Ltd defaulted on any of its obligations under the Maintenance Services Sub-contracting Agreements, GPL would have terminated Gunns Ltd as Manager for the Gunns Woodlot Schemes and appointed a replacement Manager to assume Gunns Ltd's obligations, including, inter alia, Maintenance Services and payment of Forestry Right Fees; and

(ii) GPL would have called upon the GPL Bank Guarantee to enable GPL to meet its obligations in relation to the Gunns Woodlot Schemes temporarily while a replacement Manager was secured.

~~86A. But for GPL entering into the Gunns Financing and Security Arrangement, which exposed GPL to the insolvency of Gunns and endangered scheme property by reason of GPL's obligation to, among other things, perform the Maintenance Services and pay the Forestry Rights Fees, failure in respect of which threatened Growers' interests, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.~~

~~87. But for GPL's failure to ensure performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes (by not maintaining funds to cover these costs, and/or ensuring that any agent appointed to do so was performing those services), the Plaintiffs would not have suffered the loss. claimed at subparagraphs 104.1 and 104.3 below.~~

~~88. Further and in the alternative, but for GPL's failure to, by no later than 8 March 2012, call upon the GPL Bank Guarantee, maintain adequate funds in order to pay any outstanding Forestry Rights Fees and provide the Maintenance Services, the Plaintiffs would not have suffered the loss. claimed at subparagraphs 104.1 and 104.3 below.~~

88A Further and in the alternative to paragraphs 86A1 to 87, but for GPL's failure to notify ASIC of any of the breaches of the GPL Management Duties, GPL Trust Fund Duties and GPL RE Duties (as pleaded in paragraphs 79 to 80A above), in accordance with its duties (as pleaded above in subparagraphs 65.5(j), 65.6(i), 66.3, 66.4) ASIC would have been on notice that:

- (a) the GPL Advances were paid in breach of trust and the Act;
- (b) the GPL Dividends were not classifiable as a GPL profit and were made in breach of trust and the Act;
- (c) GPL was acting in contravention of its duties under the Act;
- (d) GPL was acting in breach of its obligations under the Compliance Plans; and
- (e) GPL did not ensure performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes.

88B By reason of the matters pleaded in paragraph 88A above, had GPL complied with its obligations under the Compliance Plans and the Act to notify ASIC (as pleaded in paragraph 88A above), that would have caused:

- (a) ASIC to have required GPL to rectify its breaches of the Act, the Constitutions, and the Compliance Plans; and/or
- (b) ASIC to have required GPL to disclose the breaches of the Act, the Constitutions and the Compliance Plans to Growers; and/or
- (c) ASIC, if GPL had not rectified the breaches of the Act, to seek "relief":
  - (i) pursuant to ss.601FN and 601FP of the Act, to have GPL replaced with an RE which would have complied with the Compliance Plans, and the Court to grant such relief, and/or
  - (ii) otherwise suspend, or eventually cancel GPL's AFSL if the breaches could not be rectified;
- (d) Further:

- (i) if ASIC had suspended or cancelled GPL's AFSL then it would have caused Growers to apply to the Court for orders to appoint a temporary RE pursuant to sections 601FP of the Act; or
- (ii) if ASIC had otherwise caused GPL to disclose to Growers its breaches of the Act, the Constitutions and the Compliance Plans, then it would have caused Growers to call a meeting to consider and vote on resolutions pursuant to section 601FM of the Act to remove GPL as the RE and appoint a company to be the new RE,

in either case with the result that GPL would have been replaced with a new RE which would have complied with the Compliance Plans.

- (e) the new RE to assume its responsibilities in accordance with the Scheme Documents and the Act and terminate Gunns Ltd as the Manager of the Gunns Woodlot Schemes and appoint a new Manager;
- (f) the GPL Bank Guarantee to be called upon to provide temporary funding while a new RE and Manager were appointed; and
- (g) the performance of the Maintenance Services, payment of the Forestry Right Fees, and the ongoing operation of the Gunns Woodlot Schemes to be ensured.

89. As a direct consequence of GPL's entering into the Gunns Financing and Security Arrangements and its failure to fulfil its obligations to pay the Forestry Rights Fees and, provide the Maintenance Services and notify ASIC of any breaches of the Act as outlined in paragraphs 86A.1 to 88B, the Growers lost the value of their interests in the Gunns Woodlot Schemes as claimed in sub-paragraphs 104.1 to 104.3 below.

89A. Further and in the alternative to paragraph 89 above, by reason of the matters pleaded in paragraphs 88A and 88B above, GPL's failure to notify ASIC (as pleaded in paragraph 88A above) caused the Growers to lose the chance or opportunity to appoint a new RE to replace GPL and thereby avoid the loss of the value of their interests in the Gunns Woodlot Schemes as claimed in sub-paragraph 104.4 below.

### **Causation: breaches of trust**

90. In addition to paragraphs 87 to 88 above, because of GPL's breaches of the GPL Trust Duties by not:

1.2 preserving the Growers' Trust Funds; and/or

1.3 arranging the return of these amounts to Growers,

the Plaintiffs were not returned their Proportional Interest in the amount of Growers' Trust Funds and suffered the loss claimed at subparagraph 104.2 below.

90A In the alternative to paragraph 90 above, in addition to paragraphs 87 to 88 above, because of the breach of fiduciary duty in respect of the GPL Unauthorised Retention of Growers' Trust Funds, the Plaintiffs suffered the loss claimed at subparagraph 104.2A below.

### **Particulars**

Further particulars will be provided by way of evidence.

#### **GPL Directors**

##### **Causation: Loss of Growers' investment**

~~90B. But for the GPL Directors approving GPL's entry into the Gunns Financing and Security Arrangements, which exposed GPL to the insolvency of Gunns and endangered scheme property by reason of GPL's obligations to, among other things, perform the Maintenance Services and, pay the Forestry Right Fees, failure in respect of which threatened Growers' interests, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.~~

90C. If the GPL Directors had (in accordance with GPL Directors Duties pleaded in paragraph 69 above) caused GPL to seek the approval of the Growers prior to it entering the Gunns Financing and Security Arrangements, then the matters pleaded in paragraphs 86A1(a), (b), and (c) would have occurred.

91. But for the GPL Directors' failure to ensure performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes (by requiring that sufficient funds be maintained to cover these costs, and/or ensuring that any agent appointed to do so was performing those services), the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

**Particulars**

Further particulars will be provided by way of evidence.

~~92. Further and in the alternative, but for the GPL Directors' failure to retain enough funds cause GPL to, by no later than 8 March 2012, call upon the GPL Bank Guarantee in order to pay any outstanding Forestry Rights Fees and Maintenance Services, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.~~

**Particulars**

~~(a) Paragraphs 82 and 83 above are repeated here.~~

~~(b) Further particulars will be provided by way of evidence.~~

92A. Further and in the alternative to paragraphs 90C to 91, but for the GPL Directors' failure to cause GPL to notify ASIC of any of the breaches of the GPL Management Duties, GPL Trust Fund Duties and GPL RE Duties (as pleaded in paragraphs 79 to 80A above), in accordance with its duties (as pleaded above in subparagraphs 65.5(j), 65.6(i), 66.3, 66.4) ASIC would have been on notice of the matters pleaded in paragraph 88A (a) to (e) above.

92B. By reason of the matters pleaded in paragraph 92A above, had the GPL Directors caused GPL to comply with its obligations under the Compliance Plans and the Act to notify ASIC (as pleaded in paragraph 92A above), that would have caused the matters pleaded above in paragraph 88B (a) to (g) to occur.

93. As a direct consequence of the conduct of the GPL Directors set out in paragraphs 82 to 83B above which caused GPL to enter into the Gunns Financing and Security Arrangements , exposing GPL to the insolvency of Gunns Ltd, GPL's failure GPL failed to fulfil its obligations to pay the Forestry Rights Fees and provide the Maintenance Services , and notify ASIC of any breaches of the Act, the Growers lost the value of their interests in the Gunns Woodlot Schemes as claimed in sub-paragraphs 104.1 to 104.3 below.

**Particulars**

Further particulars will be provided by way of evidence.



93A. Further and in the alternative to paragraph 93 above, by reason of the matters pleaded in paragraphs 92A and 92B above, the GPL Directors' failure to cause GPL to notify ASIC (as pleaded in paragraph 92A above) caused the Growers to lose the chance or opportunity to appoint a new RE to replace GPL and thereby avoid the loss of the value of their interests in the Gunns Woodlot Schemes as claimed in sub-paragraph 104.4 below.

**Causation: breaches of trust**

94. In addition to paragraphs 90CB to 92 above, but for the GPL Directors' failure to ensure that GPL did not breach the GPL Trust Fund Duties by not:

94.1 preserving the Growers' Trust Funds; and/or

94.2 arranging the return of these amounts to Growers,

the Plaintiffs were not returned their Proportional Interest in the amount of Growers' Trust Funds and suffered the loss claimed at subparagraph 104.2 below.

**Particulars**

(a) Paragraph 83 above is repeated here.

(b) Further particulars will be provided by way of evidence.

94A In the alternative to paragraph 942 above, in addition to paragraphs ~~88B~~90CB to 9092 above, because of the breach of fiduciary duty in respect of the GPL Unauthorised Retention of Growers' Trust Funds, the Plaintiffs suffered the loss claimed at subparagraph 104.2A below.

**Particulars**

(a) Paragraph 83A above is repeated here.

(c) Further particulars will be provided by way of evidence.

95. Not used.

96. Not used.

97. Not used.

## **KPMG**

### **Causation**

98. But for KPMG's breaches (pleaded in paragraph 86 above) of the KPMG Duties (pleaded in paragraphs 71 and 72 above), GPL, the GPL Directors, the Growers and ASIC would have been on notice that:

98.1 the GPL Advances were paid in breach of trust and the Act;

98.2 the GPL Dividends were not classifiable as a GPL profit and were made in breach of trust and the Act;

98.2A GPL's retention of the GPL Unauthorised Retention of Growers' Trust Funds was in breach of its fiduciary obligations;

98.3 GPL was acting in contravention of its duties under the Act;

98.4 GPL was acting in breach of its obligations under the Compliance Plans; and

98.5 GPL did not ensure performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes.

**Particulars**

The Plaintiffs repeat paragraphs 79-80A and the particulars provided in paragraph 12 above.

98A. If the KPMG Duties (pleaded in paragraphs 71 and 72 above) had been performed, then:

(a) KMPG would have advised GPL that in order to comply with the Compliance Plans and the Act, GPL required Growers approval prior to entering into the Gunns Financing and Security Arrangements;

(b) GPL would have sought that approval; and

(c) the matters pleaded above in paragraph 86A1 (a), (b), and (c) would have occurred.

99. ~~In the premises~~ Further and in the alternative to paragraph 98A above, if the KPMG Duties (pleaded in paragraphs 71 and 72 above) had been performed, that would have caused:

99.1 KPMG to request GPL to rectify the breaches in connection with the conduct pleaded at paragraphs 73 to ~~76~~ 75 above; and, if GPL had refused so to do, KPMG would have qualified the audit reports of the Compliance Plans;

99.2 KPMG to have notified ASIC pursuant to s.601HG(4A) of the Act of GPL's breaches of the Compliance Plans; and

99.3A the matters pleaded above in paragraph 88B (a) to (g) to occur.

~~99.3 ASIC to have required GPL to rectify its breaches of the Act, the Constitution, and the Compliance Plans; and/or~~

~~99.4 ASIC, if GPL had not rectified the breaches of the Act, to seek "relief":~~

~~(a) pursuant to s.1324(1) of the Act, to ensure the breaches were rectified, and the Court to grant such relief; and/or~~

~~(b) pursuant to ss.601FN and 601FP of the Act, to have GPL replaced with an RE which would have complied with the Compliance Plans, and the Court to grant such relief,~~

~~therefore ensuring the performance of the Maintenance Services and payment of the Forestry Right Fees for the Gunns Woodlot Schemes.~~

**Particulars**

~~(a) — The “relief” that would have been sought had the KPMG Duties been performed would have taken the form of a Court order that GPL be replaced as RE.~~

~~(b) Further particulars will be provided by way of evidence.~~

100. Had the conduct set out in paragraphs 98 ~~and~~to 99 above occurred, the Plaintiffs would not have suffered the damage claimed at paragraph 104.1 to 104.3 below.

101. Alternatively to paragraph 100 above, because the conduct set out in paragraphs 98 ~~and~~to-99 above did not occur, and as a result of KPMG’s conduct pleaded at paragraph 86 above, the Plaintiffs lost the chance or opportunity to avoid the loss of their interests in the Gunns Woodlot Schemes claimed at paragraph 104.4 below.

**The Plaintiffs’ loss**

102. By reason of the matters pleaded in paragraphs 86A.1 to 101 above and as a direct consequence of the conduct of GPL, Gunns Ltd and the Third and Fifth to Eleventh Defendants and Mr Gay, the Gunns Woodlot Schemes assets, being the Gunns Woodlot Schemes’ woodlots and the Growers’ interests therein, were exposed to the Gunns Ltd insolvency.

**Particulars**

~~The Plaintiffs repeat and rely upon the pleadings and particulars provided in paragraphs 97 and 98 above.~~

103. By reason of the matters pleaded in paragraphs 90, 94, ~~97-98~~ to 99 above, the Growers Trust Funds were not preserved and were not returned to Growers.

104. By reason of the matters pleaded in paragraphs 86A1 to 100 above, but for the actions of GPL, Gunns Ltd and the Third and Fifth to Eleventh Defendants and Mr Gay, the Plaintiffs and the Group Members would not have suffered the damage comprised by:

- 104.1 the loss of their respective Proportional Interests in the Wood Proceeds Portion and the Carbon Rights Portion for each of the Gunns Woodlot Schemes, less the Liquidation Distributions;
- 104.2 the loss of the Plaintiffs' and each of the Group Members' portion of the Growers' Trust Funds;
- 104.2A the loss of funds comprising the GPL Unauthorised Retention of Growers' Trust Funds; ~~and~~
- 104.3 the loss of their respective initial investments in the Gunns Woodlot Schemes; and
- 104.4 the loss of the chance or opportunity to receive back their initial investment plus a return following the completion of the Gunns Woodlot Schemes.

#### **Particulars**

Further particulars will be provided by way of evidence.

### **CLAIMS AGAINST CATLIN AND CHUBB**

#### **Primary IMI Policy**

105. GPL and Chartis Australia Insurance Ltd (**Chartis**) are parties to a contract of liability insurance described as 'Investment Management Insurance' and numbered 107092 (**Primary IMI Policy**).

#### **Particulars**

The Primary IMI Policy, which comprises a Schedule, a policy wording and 15 Endorsements, bears a 'Date of Policy Issuance' of 6 February 2012, and a 'Policy Period' of 30 November 2011 to 30 November 2012.

106. The Primary IMI Policy is the primary layer of investment management insurance arrangements effected on behalf of GPL for the period 30 November 2011 to 30 November 2012 with a 'Limit of Liability' of \$2.5 million and a 'Retention' for a 'Non-US Claim/Direct Financial Loss' of \$250,000.

107. The Primary IMI Policy relevantly provided the following cover in respect of 'Investment Manager Management Liability':

1.1 Investment Manager Professional Civil Liability

*The Insurer will:*

- (i) pay the Loss of any Insured Person;*
- (ii) reimburse any Insured Entity for any Loss it pays on its own behalf or on behalf of an Insured Person;*

*which arises out of a Claim first made during the Policy Period for a Wrongful Managerial Professional Act and notified to the Insurer as soon as practicable during the Policy Period.*

1.3 Investment Manager Management Liability

*The Insurer will:*

- (i) pay the Loss of any Insured Person;*
- (ii) reimburse any Insured Entity for any Loss it pays on behalf of an Insured Person;*

*which arises out of a Claim first made during the Policy Period for a Wrongful Managerial Act and notified to the Insurer as soon as practicable during the Policy Period.*

**Particulars**

The terms 'Insurer', 'Loss', 'Insured Person', 'Insured Entity', 'Policy Period', and 'Wrongful Managerial Act' and 'Wrongful Professional Act' are defined in the 'Definitions' section of the Primary IMI Policy. The Plaintiffs refer to those definitions as if set out in full in this pleading.

108. GPL and the GPL Directors are each an 'Insured' under the Primary IMI Policy.

**Particulars**

- (a) GPL is an 'Insured Entity' as the 'Policyholder' identified in the Schedule to the Primary IMI Policy.

- (b) The GPL Directors are each an 'Insured Person' as a 'Director or Officer of ... an Insured Entity'.

108A. The matters pleaded above in relation to GPL and the GPL Directors constitute 'Claims' for 'Wrongful Professional Acts' within the meaning of the Primary IMI Policy.

**Particulars**

- (a) In respect to GPL, paragraphs 65-67A, 79-80A, 86A.1-90A and 102-104 are referred to.
- (b) In respect to the GPL Directors, paragraphs 69, 82-83B, 90C-94A and 102-104 are referred to.

109. The matters pleaded above in relation to GPL and the GPL Directors constitute 'Claims' for 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

**Particulars**

- (a) In respect of GPL, paragraphs 65-67A, 79-80A, ~~88-86A.1-90A~~ and ~~401-403-102-104~~ are referred to.
- (b) In respect of the GPL Directors, paragraphs 69, 82-83B, ~~90CB-94A~~ and ~~401-403~~ 102-104 are referred to.

**First Excess IMI Policy**

110. GPL and Catlin are parties to a contract of liability insurance described as 'Financial and Professional Risks Excess Insurance' and numbered 923424 (**First Excess IMI Policy**).

**Particulars**

The First Excess IMI Policy, which comprises a Schedule and a policy wording, bears a certificate date of 1 February 2012, and a 'Period of Insurance' from 30 November 2011 to 30 November 2012.

111. The First Excess IMI Policy is the first excess layer of investment management insurance arrangements effected on behalf of GPL with a 'Limit' of AUD 10,000,000.

112. The First Excess IMI Policy relevantly provided the following cover:

*... the Insurer will indemnify the Insured against their legal liability to pay damages or compensation for and/or arising out of any event covered by the Underlying Policies and in the manner and to the extent stated herein.*

**Particulars**

The terms 'Insurer', 'Insured', and 'Underlying Policies' are defined in the 'Definitions' section of the First Excess IMI Policy. The Plaintiffs refer to those definitions as if set out in full in this pleading.

113. GPL and the GPL Directors were each an 'Insured' under the First Excess IMI Policy.

**Particulars**

- (a) GPL is the 'Insured' identified in the Schedule to the First Excess IMI Policy and as a 'party indemnified by the Underlying Policies'.
- (b) The GPL Directors are each an 'Insured' as a 'party indemnified by the Underlying Policies'.
- (c) The pleadings and particulars at paragraph 107 are repeated.

114. The Primary IMI was an Underlying Policy under the First Excess IMI Policy.

**Particulars**

The Schedule to the First Excess IMI Policy identifies Chartis Australia Policy Number 107092 as the 'Underlying Insurance'.

115. The matters pleaded above in relation to GPL and the GPL Directors give rise to legal liability to pay damages or compensation for and/or arising out of events covered by an Underlying Policy, namely the Primary IMI Policy.

**Particulars**

The particulars at paragraph 108 above are repeated.

**The Chubb Policy**

116. GPL and Chubb are parties to the Chubb Policy.



**Particulars**

The Policy is styled as Elite Excess Investment Management Insurance and the policy period is 30 November 2011 to 30 November 2012.

- 117. The Chubb Policy is an excess layer of insurance effected on behalf of GPL with a limit of indemnity of AUD 2,500,000.
- 118. The Chubb Policy provided (in the Schedule) that the Primary IMI Policy was defined as the "Primary Policy".
- 119. The Chubb Policy provided (in clause 1.3) that the Chubb Policy was subject to the same terms and conditions as the Primary IMI Policy.
- 120. GPL and the GPL Directors were each an 'Insured' under the Chubb Policy.

**Particulars**

- (a) GPL is an 'Insured' in the Primary IMI Policy;
  - (b) The GPL Directors are each an 'Insured' in the Primary IMI Policy;
  - (c) The pleadings and particulars at paragraph 108 are repeated.
121. The matters pleaded above in relation to GPL and the GPL Directors give rise to legal liability to pay damages or compensation for and/or arising out of events covered by the Primary IMI Policy.

**Particulars**

The particulars at paragraph 108 above are repeated.

**Leave to proceed against GPL and the indemnity position**

- 122. These proceedings were commenced by the Plaintiffs against, relevantly, GPL on 19 March 2018, at which time GPL was in liquidation.
- 123. Leave was granted to the Plaintiffs for the commencement and maintenance of these proceedings against, relevantly, GPL pursuant s.500 of the Act on 13 April 2018.

**Particulars**

Orders of Hammerschlag J dated 13 April 2018.

124. By letters dated 3 May 2018 and 7 December 2018, Chartis confirmed indemnity under the Primary IMI Policy for the claim against GPL and the GPL Directors in these proceedings in accordance with insuring clause 1.1.
125. By letter dated 14 February 2019, Catlin set out its formal position on policy response to the effect that the claims in these proceeding were excluded and no indemnity would be provided to GPL or the GPL Directors.

**Particulars**

- (i) The exclusions relied upon were those contained in Endorsements 15 (Conflict of Interest), 4 (Lender's Liability), and clause 3.8/Endorsement 11 (Insolvency).
- (ii) Catlin also reserved its rights in respect of exclusions in clause 3.1 (Prior Knowledge), clause 3.3 (Established Misdeeds), clause 3.13 (Contractual Liability), clause 3.14 (Fees and Commissions), Endorsement 8 (Forecast Exclusion) and Endorsement 9 (Failure to Insure).
126. By letter dated 29 May 2019, Chubb set out its formal position on policy response to the effect that the claims in these proceeding were excluded and no indemnity would be provided to GPL or the GPL Directors.

**Particulars**

- (iii) The exclusions relied upon were those contained in Endorsements 15 (Conflict of Interest), 4 (Lender's Liability), and clause 3.8/Endorsement 11 (Insolvency).
127. On 4 December 2019, on the application of GPL, leave to proceed against GPL pursuant s.500 of the Act was revoked due to the exhaustion of funds under the Primary IMI Policy that had been used to defend the proceedings.

**Particulars**

Decision of Ball J delivered *ex tempore* on 4 December 2019.

128. Due to the revocation of leave to proceed against GPL on 4 December 2019, the Plaintiff and Group Members will not be able to obtain a judgment against it in respect of the matters pleaded above.

### **The Third Party Claims Act**

129. In the premises, GPL and each of the GPL Directors is:

129.1 an 'Insured' within the meaning of the First Excess IMI Policy; and

129.2 an 'insured person' within the meaning of that term in the ss.3-4 of the Third Party Claims Act;

129.3 an 'Insured' within the meaning of the Chubb Policy; and

129.4 an 'insured person' within the meaning of that term in the ss.3-4 of the Third Party Claims Act.

130. In the premises, the matters pleaded above in relation to GPL and the GPL Directors:

130.1 give rise to legal liability to pay damages or compensation for and/or arising out of events covered by an Underlying Policy (namely the Primary IMI Policy) within the meaning of the First Excess IMI Policy and the Chubb Policy; and

130.2 constitute an 'insured liability' within the meaning of that term in ss.3-4 of the Third Party Claims Act.

131. Pursuant to s.4 of the Third Party Claims Act, the Plaintiffs and Group Members may recover directly from the Catlin and Chubb the amount of the insured liability of GPL and the GPL Directors.

### **D QUESTIONS APPROPRIATE FOR REFERRAL TO REFEREE**

None.

### **E A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION**

The ~~parties have not yet~~ Plaintiffs and Third to Eleventh Defendants have attempted mediation which was unsuccessful. The Plaintiffs are willing to proceed to mediation at the appropriate time.

## SIGNATURE OF LEGAL REPRESENTATIVE

I certify under Schedule 2 clause 4(2) of 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 that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Solicitor on record for the Plaintiffs

Date of signature

21 August 2020

## 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	Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

## PARTY DETAILS

### PARTIES TO THE PROCEEDINGS

#### Plaintiffs

**Giabal Pty Ltd**

First Plaintiff

**Geoffry Edward Underwood**

Second Plaintiff

#### Defendants

**Wayne Leonard Chapman**

Third Defendant

**Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay in place of Mr Gay**

Fourth Defendant

**Rodney John Loone**

Fifth Defendant

**Leslie Ralph Baker**

Sixth Defendant

**Robert Henry Graham**

Seventh Defendant

**Robin Gray**

Eighth Defendant

**Paul Desmond Teisseire**

Ninth Defendant

**Andrew Gray**

Tenth Defendant

**Mathew Gary Wallace**

Eleventh Defendant

**Catlin Australia Pty Ltd**

Twelfth Defendant

**Chubb Insurance Australia Limited**

Thirteenth Defendant

### FURTHER DETAILS ABOUT PLAINTIFFS

#### First Plaintiff

Name

Giabal Pty Ltd

Address

C/- Sands & Associates

156 Hume Street

TOOWOOMBA QLD 4350

**Second Plaintiff**

Name Geoffrey Edward Underwood  
 Address Sixth Floor Wentworth Chambers  
 180 Phillip Street  
 SYDNEY NSW 2000

**Legal representative for plaintiffs**

Name Gordon Grieve  
 Practising certificate number 30216  
 Firm Piper Alderman  
 Contact solicitor McKenzie Moore  
 Address Level 23  
 Governor Macquarie Tower  
 1 Farrer Place  
 Sydney NSW 2000  
 DX address DX 10216 Sydney Stock Exchange  
 Telephone +61 2 9253 9999  
 Fax +61 2 9253 9900  
 Email ggrieve@piperalderman.com.au

**DETAILS ABOUT DEFENDANTS****Third Defendant**

Name Wayne Leonard Chapman  
 Address

**Fourth Defendant**

Name Robert Watson and Erica Gay as the legal personal  
 representatives for the estate of the late John  
 Eugene Gay in place of Mr Gay

Address

**Fifth Defendant**

Name Rodney John Loone  
 Address Leslie Ralph Baker

**Sixth Defendant**

Name  
 Address

**Seventh Defendant**

Name Robert Henry Graham

Address

**Eighth Defendant**

Name Robin Gray

Address

**Ninth Defendant**

Name

Address

Paul Desmond Teisseire

Andrew Gray

**Tenth Defendant**

Name

Address

Mathew Gary Wallace

**Eleventh Defendant**

Name

Address

Catlin Australia Pty Limited

ABN 64 108 319 786

Angel Place

Level 28, 123 Pitt Street SYDNEY

NSW 2000

**Twelfth Defendant**

Name

Address

Chubb Insurance Australia Limited

ABN 23 001 642 020

Level 38, Grosvenor Place

225 George Street

SYDNEY NSW 2000

**Thirteenth Defendant**

Name

Address