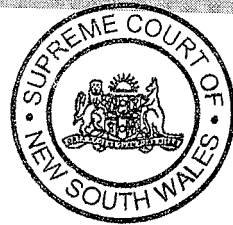


# AMENDED COMMERCIAL LIST RESPONSE

(Filed pursuant to orders made by Justice Hammerschlag on 3 August 2018; omissions being indicated by being struck through with a single line and insertions being indicated by being underlined with a single line)

## COURT DETAILS

Court	Supreme Court of New South Wales	<b>FILED</b>
Division	Equity	
List	Commercial	27 AUG 2018
Registry	Sydney	
Case number	2018/00076580	<b>(S.G.)</b>



## TITLE OF PROCEEDINGS

First plaintiff	<b>Giabal Pty Ltd</b>
Second plaintiff	Geoffry Underwood
First defendant	<b>Gunns Plantations Limited (in Liquidation)</b>
Number of defendants	11

## FILING DETAILS

Filed for	<b>Andrew Gray</b> , Tenth Defendant <b>Matthew Wallace</b> , Eleventh Defendant
Legal representative	<u>Peter Haig</u> <u>Ross Drinnan</u> Allens
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## PRELIMINARIES

- A Headings are used in this Amended Commercial List Response for convenience only. They do not form part of the Tenth and Eleventh Defendants' response to the Amended Commercial List Statement filed by the Plaintiffs on 6 August~~20 March~~ 2018 (the **ACLS**).
- B The terms defined by the Plaintiffs in the ACLS have the same meaning in this document, unless otherwise defined or stated. The Tenth and Eleventh Defendants do not admit any factual assertions contained in, or in any way implied by, any defined term used in the ACLS and repeated in this document.

## A NATURE OF DISPUTE

- 1 The Tenth and Eleventh Defendants were each the lead auditor for the compliance plan audits of the Gunns Woodlot Schemes for the 2003 financial year (the Eleventh Defendant) and the 2005 to 2011 financial years (the Tenth Defendant). Neither was the lead auditor for the compliance plan audits for the 2002 financial year or the 2004 financial year.
- 2 The Tenth and Eleventh Defendants deny the allegations made against them by the Plaintiffs in the ACLS, including that they each owed a duty of care to the Plaintiffs or, if they did, that they failed to perform the compliance plan audits of the Gunns Woodlot Schemes to the standard required at the relevant times.
- 3 The Plaintiffs have confirmed in a letter dated 25 June 2018 from Piper Alderman to Allens and subsequently by the ACLS that they and the Group Members do not pursue any claims in relation to the 2004 Gunns Woodlot Scheme and the compliance plan audit of the 2002 Gunns Woodlot Scheme for the 2002 financial year. Accordingly, Part C of this Amended Commercial List Response does not plead to those claims, but the Tenth and Eleventh Defendants do not thereby admit any of the allegations related to those claims.

## B ISSUES LIKELY TO ARISE

In addition to the issues identified in B1.11, B1.12 and B1.13 of the ACLS, the key issues likely to arise as between the Plaintiffs and the Tenth and Eleventh Defendants are the following:

- 1 Whether the Plaintiffs have standing to sue for the relief sought, or whether their loss and damage is merely a reflection of the loss or damage suffered by the Gunns Woodlot Schemes such that GPL (by its liquidators) is the proper plaintiff.
- 2 Whether, upon the proper construction of the scheme documents, the "Application Fee" (as defined in the Constitutions) payable by each Applicant upon subscribing for Woodlots in a Gunns Woodlot Scheme was the price of the Establishment and Planting Services and thus entitled to be wholly appropriated by GPL for that use, or whether only some part of the Application Fee was to be used for that purpose and the remainder to be held in trust and returned to Growers.
- 3 Whether s 601HG of the *Corporations Act 2001* (Cth) (the **Act**) imposes a statutory duty on an auditor to carry out a compliance plan audit with due care and skill, or whether the proper remedy for such claims is the law of negligence.
- 4 Whether the Plaintiffs' claims are time-barred.

- 5 Whether the Tenth and Eleventh Defendants' liability (if any) should be reduced, having regard to the extent of liability of the Tenth and Eleventh Defendants for the damage or loss compared to the responsibility of other concurrent wrongdoers (including the other Defendants).
- 6 Whether the Tenth and Eleventh Defendants' liability (if any) should be reduced pursuant to the Court's discretion under s 1325(2) of the Act for the same reasons.
- 7 Whether, if liable, the Tenth and Eleventh Defendants should be relieved from liability under s 1318 of the Act.

## **C RESPONSES TO PLAINTIFFS' CONTENTIONS**

The Tenth and Eleventh Defendants note that the Plaintiffs have not pleaded as to their status and/or capacity to sue. The Tenth and Eleventh Defendants allege that the Plaintiffs are not the proper plaintiffs in relation to certain of the claims made in the proceeding. This is pleaded at paragraph 103 below.

### **C1. THE DEFENDANTS**

#### **GPL**

- 1 The Tenth and Eleventh Defendants admit the allegations in paragraph 1.

#### **Gunns Ltd**

- 2 In answer to paragraph 2, the Tenth and Eleventh Defendants:

- (a) in answer to paragraph 2.4, repeat paragraph 18(d)(i) below; and
- (b) otherwise admit the allegations in paragraph 2.

- 3 The Tenth and Eleventh Defendants admit the allegations in paragraph 3.

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

- 4 The Tenth and Eleventh Defendants admit the allegations in paragraph 4.

- 5 The Tenth and Eleventh Defendants admit the allegations in paragraph 5.

- 6 In answer to paragraph 6, the Tenth and Eleventh Defendants:

- (a) admit the allegations in paragraph 6; and
- (b) say further that Mr Loone was a director of GPL from 21 February 2000 to 27 November 2012.

- 7 The Tenth and Eleventh Defendants admit the allegations in paragraph 7.

- 8 The Tenth and Eleventh Defendants admit the allegations in paragraph 8.

- 9 The Tenth and Eleventh Defendants admit the allegations in paragraph 9.
- 10 The Tenth and Eleventh Defendants admit the allegations in paragraph 10.
- 11 The Tenth and Eleventh Defendants do not plead to paragraph 11 as it makes no allegation against them.

## KPMG

12 In answer to paragraph 12, the Tenth and Eleventh Defendants:

(a) in relation to paragraph 12.1:

(i) as to sub-paragraph (a):

(1) admit that the Tenth Defendant (between 2004 and 2012) and the Eleventh Defendant (between 2002 and 2012) were each partners of a partnership, as constituted from time to time, operating under the name KPMG, which operated from (amongst others) offices in Hobart and Launceston and provided (amongst other things) audit, advisory and tax services (referred to below as “**KPMG (A Firm)**”);

(2) otherwise deny the allegations that the Tenth and Eleventh Defendants were partners of KPMG (A Firm) at all relevant times;

(ii) admit the allegations in sub-paragraph (b);

(iii) as to sub-paragraph (c):

(1) say that:

A. the Tenth Defendant was the lead auditor for the compliance plan audits of the Gunns Woodlot Schemes for the 2005 to 2011 financial years;

B. the Eleventh Defendant was the lead auditor for the compliance plan audits of the Gunns Woodlot Schemes for the 2003 financial year;

C. the Plaintiffs have confirmed in the letter dated 25 June 2018 from Piper Alderman to Allens and subsequently by the ACLS that they and the Group Members do not pursue any claims in relation to the 2004 Gunns Woodlot Scheme or the compliance plan audit of the 2002 Gunns Woodlot Scheme for the 2002 financial year;

- D. neither the Tenth nor the Eleventh Defendant was the lead auditor for the compliance plan audits of the Gunns Woodlot Schemes for the 2002 or 2004 financial years;
- (2) admit that at all material times KPMG (A Firm) was the compliance plan auditor for the Gunns Woodlot Schemes; and
- (3) otherwise deny the allegations in sub-paragraph (c);
- (b) in relation to paragraph 12.2:
- (i) repeat paragraph 12(a)(iii) above; and
- (ii) otherwise deny the allegations in paragraph 12.2; and
- (c) otherwise deny the allegations in paragraph 12.

### **Particulars**

*Compliance Plan Audit Report of a Registered Scheme (Form 5111) for Gunns Plantations Woodlot Schemes 2002, 2003, 2005, 2006, 2008 and 2009, for financial years between 2003 and 2011 (ASIC Documents 019901192, 019901193, 020737475, 020737476, 022274035, 022274036, 022274039, 023264800, 023264801, 023264804, 023264806, 023542877, 023542878, 023542880, 024153240, 025220199, 025220200, 025220202, 025220203, 025220204, 025940891, 025940892, 025940894, 025940895, 025940896, 025940897, 027126778, 027126779, 027126780, 027126781, 027126783, 027126784, 027775477, 027775478, 027775480, 027775481, 027775482, 027775483).*

- 13 The Tenth and Eleventh Defendants do not plead to paragraph 13 as it makes no allegation against them.

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

### **Background of the Gunns Woodlot Schemes**

- 14 The Tenth and Eleventh Defendants admit the allegations in paragraph 14.
- 15 In answer to paragraph 15, the Tenth and Eleventh Defendants:
- (a) say that the Plaintiffs have confirmed by the letter dated 25 June 2018 from Piper Alderman to Allens and subsequently by the ACLS that they and the Group Members do not pursue any claims in relation to:
- (i) the 2004 Gunns Woodlot Scheme; and

- (ii) the compliance plan audit of the 2002 Gunns Woodlot Scheme for the 2002 financial year;
- (b) admit that the six Gunns Woodlot Schemes the subject of this proceeding (being 2002, 2003, 2005, 2006, 2008 and 2009) were among nine woodlot schemes established by GPL;
- (c) say that, hereafter, the Tenth and Eleventh Defendants will refer to the 2002, 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes as the “**Gunns Woodlot Schemes**” and do not plead to the allegations made in the ACLs in relation to the 2004 Gunns Woodlot Scheme and the compliance plan audit of the 2002 Gunns Woodlot Scheme for the 2002 financial year (as the Plaintiffs have abandoned any claim in relation to them as against the Tenth and Eleventh Defendants), but they do not thereby admit any of those allegations;
- (d) say that the Management Agreements for each of the 2002, 2003 and 2005 Gunns Woodlot Schemes provided that the “Final Harvest” as defined in the relevant Management Agreement would commence, subject to the discretion of GPL as to the timing of the Final Harvest, when the trees planted on the Woodlots (as defined in the relevant Management Agreements) had reached approximately:
  - (i) 13 years of age, for trees subject to “Planting Option 1”; and
  - (ii) 20 years of age, for trees subject to “Planting Option 2”;

**Particulars**

*Management Agreements, cll 7.1 and 9.*

- (e) say that the Management Agreements for each of the 2006, 2008 and 2009 Gunns Woodlot Schemes provided that the “Final Harvest” as defined in the relevant Management Agreement would commence, subject to the discretion of GPL as to the timing of the Final Harvest, when the trees planted on the Woodlots had reached approximately:
  - (i) 13 years of age, for trees subject to “Planting Option 1”;
  - (ii) 20 years of age, for trees subject to “Planting Option 2”; and
  - (iii) 25 years of age, for trees subject to “Planting Option 3”; and

**Particulars**

*Management Agreements, cll 7.1 and 9.*

- (f) otherwise deny the allegations in paragraph 15.

- 16 In answer to paragraph 16, the Tenth and Eleventh Defendants:
- (a) admit that in the period 2003-2012, Gunns Ltd and its subsidiaries was a group of companies that carried on (amongst other things) a hardwood forest products business (throughout the period) and a softwood forest products business (from around 2008 onwards) in Australia; and
  - (b) otherwise do not admit the allegations in paragraph 16.
- 17 In answer to paragraph 17, the Tenth and Eleventh Defendants:
- (a) admit that each of the Gunns Woodlot Schemes was governed by a Constitution (which was in some cases amended by a Supplemental Constitution or First Supplemental Deed);
  - (b) admit that for each of the Gunns Woodlot Schemes, there were also the following documents:
    - (i) Management Agreements between GPL and Growers (for the 2002 Gunns Woodlot Scheme) or between Gunns Ltd, GPL and Growers (for the 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes);
    - (ii) Forestry Right Deeds between GPL and the owners of the land on which the Woodlots were located;
    - (iii) Forestry Right Lease Deeds (for the 2002, 2003 and 2005 Gunns Woodlot Schemes) or Sub-Forestry Right Deeds (for the 2006, 2008 and 2009 Gunns Woodlot Schemes) between GPL and the Growers;
    - (iv) a Maintenance and Planting Services Sub-contracting Agreement (for each of the 2002-2003 Gunns Woodlot Schemes), a Maintenance Services Sub-contracting Agreement (for each of the 2005, 2006 and 2008 Gunns Woodlot Schemes), and a Maintenance and Pruning Services Sub-contracting Agreement (for the 2009 Gunns Woodlot Scheme), each between GPL and Gunns Ltd; and
    - (v) a Compliance Plan (for each of the Gunns Woodlot Schemes) and replacement Compliance Plan for each of the 2002, 2003, 2005, 2006, and 2008 Gunns Woodlot Schemes (**Replacement Compliance Plans**);
  - (c) will rely on the terms of each of the documents referred to above for their full terms, meaning and effect; and
  - (d) otherwise deny the allegations in paragraph 17.

18 In answer to paragraph 18, the Tenth and Eleventh Defendants:

- (a) do not admit the allegations in paragraph 18.1;
- (b) say that, if and when they were granted Woodlots, then the Plaintiffs and Group Members were “Growers” under the Constitutions and were not “Applicants”;
- (c) in relation to paragraph 18.2:
  - (i) admit the allegations in sub-paragraphs (a)-(b);
  - (ii) as to sub-paragraph (c), admit that GPL was a party with Gunns Ltd to the Maintenance Services Sub-contracting Agreements or the equivalent documents identified in paragraph 17(b)(iv) above;
  - (iii) admit the allegations in sub-paragraph (d);
  - (iv) as to sub-paragraph (e), admit that GPL was a “Lessor” under the Forestry Right Lease Deeds but say it was a “Grantor” under the Sub-Forestry Right Deeds;
  - (v) as to sub-paragraph (f), admit that GPL was the “Responsible Entity” referred to in the Original Compliance Plans, the Replacement Compliance Plans and the Compliance Plan for the 2009 Gunns Woodlot Scheme;
  - (vi) as to sub-paragraph (g), admit that GPL was appointed as the Growers’ “sole agent” under the Management Agreements in respect of the Draft Wood Sale Agreements (as defined in the Management Agreements), but do not thereby admit the nature and scope of that relationship or the obligations assumed by GPL; and
  - (vii) rely on the documents referred to in sub-paragraphs (i)-(vi) above for their full terms, meaning and effect;
- (d) in relation to paragraph 18.3:
  - (i) admit the allegations in sub-paragraph (a) in respect of the 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes but do not admit the allegations in respect of the 2002 Gunns Woodlot Scheme;
  - (ii) as to sub-paragraph (b), admit that Gunns Ltd was a party to the Management Agreements for the purpose of clause 12 (“Off-take arrangement”) only in relation to the 2003, 2005, 2006, 2008 and 2009



Gunns Woodlot Schemes but do not admit the allegations in respect of the 2002 Gunns Woodlot Scheme;

(iii) as to sub-paragraph (c), say that:

- (1) GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services (as defined in the Management Agreements) (as well as other services) under each of the Management Agreements on the terms and conditions set out in the Maintenance Services Sub-contracting Agreements (or equivalent documents specified in paragraph 17(b)(iv) above);

**Particulars**

*Maintenance and Planting Services Sub-contracting Agreement (for the 2002-2003 Gunns Woodlot Schemes), cl 3.1.*

*Maintenance Services Sub-contracting Agreement (for the 2005-2006 and 2008 Gunns Woodlot Schemes), cl 3.1.*

*Maintenance and Pruning Services Sub-contracting Agreement (for the 2009 Gunns Woodlot Scheme), cl 3.1.*

- (2) in consideration for GPL entering into the Maintenance Services Sub-contracting Agreements (or equivalent documents specified in paragraph 17(b)(iv) above), Gunns Ltd agreed to assume all of GPL's obligations to pay Forestry Right Fees under each of the Forestry Right Deeds; and

**Particulars**

*Maintenance and Planting Services Sub-contracting Agreement (for the 2002-2003 Gunns Woodlot Schemes), cl 4.4.*

*Maintenance Services Sub-contracting Agreement (for the 2005-2006 and 2008 Gunns Woodlot Schemes), cl 4.4.*

*Maintenance and Pruning Services Sub-contracting Agreement (for the 2009 Gunns Woodlot Scheme), cl 4.4.*

(iv) do not admit the allegation in sub-paragraph (d); and

(e) otherwise deny the allegations in paragraph 18.

19 In answer to paragraph 19, the Tenth and Eleventh Defendants:

- (a) admit that a Prospectus or Product Disclosure Statement was issued for each of the Gunns Woodlot Schemes; and

(b) otherwise do not admit the allegations in paragraph 19.

20 The Tenth and Eleventh Defendants admit the allegations in paragraph 20.

21 The Tenth and Eleventh Defendants admit the allegations in paragraph 21.

22 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 22.

23 In answer to paragraph 23, the Tenth and Eleventh Defendants:

(a) admit that the landowners who were parties to Forestry Right Deeds granted the "Forestry Rights" in clause 3 of those Deeds;

(b) rely on the Forestry Right Deeds for their full terms, meaning and effect; and

(c) otherwise deny the allegations in paragraph 23.

24 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 24.

25 In answer to paragraph 25, the Tenth and Eleventh Defendants:

(a) admit that, in relation to the 2002, 2003 and 2005 Gunns Woodlot Schemes, it was a term of the Forestry Right Deed that GPL may licence or lease some or all of the rights granted to it under the Forestry Right Deed to a third party;

(b) say that, in relation to the 2006, 2008 and 2009 Gunns Woodlot Schemes, it was a term of the Forestry Right Deed that GPL may licence or grant some or all of the rights granted to it under the Forestry Right Deed to a third party; and

(c) otherwise do not admit the allegations in paragraph 25.

26 In answer to paragraph 26, the Tenth and Eleventh Defendants:

(a) admit that, for the 2002, 2003 and 2005 Gunns Woodlot Schemes, GPL leased the Forestry Rights granted to it under Forestry Right Deeds to Growers under Forestry Right Lease Deeds for the "Term" as defined therein;

(b) say that, for the 2006, 2008 and 2009 Gunns Woodlot Schemes, GPL granted Forestry Rights granted to it under Forestry Right Deeds to Growers under Sub-Forestry Right Deeds for the "Term" as defined therein; and

(c) otherwise deny the allegations in paragraph 26.

27 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 27.

### **Establishment and Management of the Woodlots**

28 In answer to paragraph 28, the Tenth and Eleventh Defendants:

(a) admit that GPL had obligations to carry out:

- (i) in respect of the 2002 and 2003 Gunns Woodlot Schemes, the "Establishment Services", "Planting Services", "Maintenance Services" and "Pruning Services" pursuant to the Management Agreements for those Schemes (as those services are described therein); and
  - (ii) in respect of the 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes, the "Establishment Services", "Maintenance Services" and "Pruning Services" pursuant to the Management Agreements for those Schemes (as those services are described therein); and
- (b) otherwise deny the allegations in paragraph 28.

29 In answer to paragraph 29, the Tenth and Eleventh Defendants:

- (a) repeat their response at paragraph 28 above;
- (b) rely on the Management Agreements for their full terms, meaning and effect; and
- (c) otherwise do not admit the allegations in paragraph 29.

30 In answer to paragraph 30, the Tenth and Eleventh Defendants:

- (a) say that, under the Management Agreement for the 2002 Gunns Woodlot Scheme, GPL:
  - (i) was to use its best endeavours to complete the "Establishment Services" before 30 June in the year the "Application" (as defined therein) was made; and
  - (ii) was to use its best endeavours to complete the "Planting Services" before 30 June of the financial year immediately following the financial year in which the "Application" (as defined therein) was made; but
  - (iii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services or the Planting Services before the dates set out at (i) and (ii) above, respectively;
- (b) say that, under the Management Agreement for the 2002 Gunns Woodlot Scheme as modified by the Supplemental Constitution for that Scheme dated 10 May 2002, GPL:
  - (i) was to use its best endeavours to complete the "Establishment Services" before the earlier of:

- (1) 12 months following the date on which the Establishment Fee (as defined therein) was paid or GPL was first permitted under the Forestry Right Deed to access the land for the purpose of commencing to carry out those services, whichever was the later; and
  - (2) 30 June of the financial year immediately following the year in which the Establishment Fee was paid;
- (ii) was to use its best endeavours to complete the "Planting Services" before 30 June of the financial year immediately following the financial year in which the "Application" (as defined therein) was made; but
- (iii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services or the Planting Services before the dates set out at (i) and (ii) above, respectively;
- (c) say that, under the Management Agreement for the 2003 Gunns Woodlot Scheme, GPL:
- (i) was to use its best endeavours to complete the "Establishment Services" before the earlier of:
    - (1) 12 months following the date on which the Establishment Fee (as defined therein) was paid or GPL was first permitted under the Forestry Right Deed to access the land for the purpose of commencing to carry out those services, whichever was the later; and
    - (2) 30 June of the financial year immediately following the year in which the Establishment Fee was paid;
  - (ii) was to use its best endeavours to complete the "Planting Services" before the earlier of:
    - (1) 12 months following the date on which the Application Fee (as defined therein) was paid or GPL was first permitted under the Forestry Right Deed to access the land for the purpose of commencing to carry out those services, whichever was the later; and
    - (2) 30 June of the financial year immediately following the year in which the Application Fee was paid; but

- (iii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services or the Planting Services before the dates set out at (i) and (ii) above, respectively;
- (d) say that, under the Management Agreements for the 2005 and 2006 Gunns Woodlot Schemes, GPL:
  - (i) was to use its best endeavours to complete the "Establishment Services" before the earlier of:
    - (1) 12 months following the date on which the Establishment Fee (as defined therein) was paid or GPL was first permitted under the Forestry Right Deed to access the land for the purpose of commencing to carry out those services, whichever was the later; and
    - (2) 30 June of the financial year immediately following the financial year in which the Establishment Fee was paid; but
  - (ii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services before that date;
- (e) say that, under the Management Agreement for the 2008 Gunns Woodlot Scheme, GPL:
  - (i) was to use its best endeavours to complete the "Establishment Services" before the earlier of:
    - (1) 12 months following the date on which the Establishment Fee (as defined therein) was paid or GPL was first permitted under the Sub-Forestry Right Deed to access the land for the purpose of commencing to carry out those services, whichever was the later; and
    - (2) 30 June of the financial year immediately following the financial year in which the Establishment Fee was paid; but
  - (ii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services before that date;
- (f) say that, under the Management Agreement for the 2009 Gunns Woodlot Scheme, GPL:

- (i) was to use its best endeavours to complete the "Establishment Services" within 18 months of the end of the financial year in which the Establishment Fee (as defined therein) was paid; but
- (ii) was not liable to the Grower for any loss or damage caused to the Grower for any failure to complete the Establishment Services before that date; and

(g) otherwise deny the allegations in paragraph 30.

31 In answer to paragraph 31, the Tenth and Eleventh Defendants:

- (a) repeat their response in paragraph 30 above; and
- (b) otherwise deny the allegations in paragraph 31.

32 In answer to paragraph 32, the Tenth and Eleventh Defendants:

- (a) in relation to paragraph 32.1, say that GPL was required under the standard form Forestry Right Deeds to keep current with a reputable insurer a public risk insurance policy covering GPL's liability in respect of its interest in the "Land" (as defined therein) in which the limit of public risk will be not less than \$10,000,000 and which policy will contain all provisions as are normally contained in public risk insurance policies;

**Particulars**

*Forestry Right Deeds, cl 7(f).*

- (b) rely on the terms of the Forestry Right Deeds and the other documents listed in paragraph 17 above for their full terms, meaning and effect; and
- (c) otherwise do not admit the allegations in paragraph 32.

33 In answer to paragraph 33, the Tenth and Eleventh Defendants:

- (a) say that, in respect of the 2002-2003 Gunns Woodlot Schemes, GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services and Planting Services under each of the Management Agreements on the terms contained in the Maintenance and Planting Services Sub-contracting Agreements referred to in paragraph 17(b)(iv) above;
- (b) say that, in respect of the 2005, 2006 and 2008 Gunns Woodlot Schemes, GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services under each of the Management Agreements on the terms contained in the Maintenance Services Sub-contracting Agreements referred to in paragraph 17(b)(iv) above;

- (c) say that, in respect of the 2009 Gunns Woodlot Scheme, GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services and Pruning Services under each of the Management Agreements on the terms contained in the Maintenance and Pruning Services Sub-contracting Agreement referred to in paragraph 17(b)(iv) above; and
- (d) otherwise do not admit the allegations in paragraph 33.

34 The Tenth and Eleventh Defendants admit the allegations in paragraph 34.

35 In answer to paragraph 35, the Tenth and Eleventh Defendants:

- (a) admit the allegations in paragraph 35; and
- (b) say that the bank guarantees issued by ANZ Bank on 11 July 2011 were not in respect of the Gunns Woodlot Schemes.

36 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 36.

#### **RE Remuneration under the Gunns Woodlot Schemes**

37 In answer to paragraph 37, the Tenth and Eleventh Defendants:

- (a) repeat their response at paragraph 18(c)(vi) above;
- (b) rely on the Management Agreements for their full terms, meaning and effect; and
- (c) otherwise do not admit the allegations in paragraph 37.

38 In answer to paragraph 38, the Tenth and Eleventh Defendants:

- (a) in relation to paragraph 38.1:
  - (i) say that, upon being satisfied of the matters specified in clause 7 of each Constitution and being in possession of a duly completed and executed Lease Agreement or Sub-Forestry Right Deed (as relevant) and Management Agreement, GPL was entitled, in relation to each "Contract" (as defined in the Constitutions) which was either expressed to be not subject to finance or (if subject to finance) was unconditional because finance had been approved, to payment of the entirety of an Applicant's "Application Fee" in consideration for GPL (as Manager) providing the Establishment Services pursuant to the terms of the applicable Management Agreement; and
  - (ii) say further that payment of the "Application Fee" constituted full payment of the "Establishment Fee" (as those terms are defined in the Constitutions);

**Particulars**

*Constitutions, cll 1.1 "Application Fee", 4.1, 7-8.*

*Management Agreements, cll 4, 10.1.*

- (b) in relation to paragraph 38.2, admit that, subject to the "Law" (as defined in each Constitution), GPL, as responsible entity, was entitled to the income earned from the "Application Portion" of the "Fund";
- (c) in relation to paragraph 38.3, admit that GPL, as responsible entity, was entitled to reimbursement for payment of the Baseline Pruning Expenses by Growers who chose "Planting Option 2" (including, in respect of the 2009 Gunns Woodlot Scheme, Growers who chose the "Blended Option") in accordance with the terms of clause 11.1 of each Constitution;
- (d) in relation to paragraph 38.4:
- (i) admit that GPL, as responsible entity, was to be paid a "Fee" out of the "Wood Sale Proceeds" (as each of those terms was defined in the Constitutions and Management Agreements) for the proper performance of its duties;
- (ii) admit that the Fee comprised the Maintenance Fee, Sales Commission and Rental Fee for each of the Gunns Woodlot Schemes and also the Planting Fee for the 2002 and 2003 Gunns Woodlot Schemes; and
- (iii) say that the Fee amounted to between 9% and 15% of the Wood Sale Proceeds, depending on the Gunns Woodlot Scheme;

**Particulars**

	<b>2002</b>	<b>2003</b>	<b>2005</b>	<b>2006</b>	<b>2008</b>	<b>2009</b>
<b>Planting Fee</b>	1.25%	1.25%	n/a	n/a	n/a	n/a
<b>Maintenance Fee</b>	2.25%	2.25%	2.0%	2.0%	2.0%	8.0%
<b>Rental Fee</b>	6.5%	6.5%	5.0%	5.0%	5.0%	5.0%
<b>Sales Commission</b>	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%
<b>Total</b>	12.0%	12.0%	9.0%	9.0%	9.0%	15.0%



- (e) in relation to paragraph 38.5, admit that GPL, as responsible entity, was entitled to payment of 50% of the "Carbon Rights Proceeds" (as defined in the Management Agreements) for the proper performance of its duties;
- (f) in relation to paragraph 38.6, admit that GPL, as responsible entity, was to be reimbursed out of the relevant "Section" of the "Wood Proceeds Portion" (as each of those terms was defined in the Constitutions) for the costs, taxes and other expenses specified in clause 28.2 of the Constitutions in relation to the proper performance of its duties; and
- (g) otherwise deny the allegations in paragraph 38.

39

In answer to paragraph 39, the Tenth and Eleventh Defendants:

- (a) repeat their response in paragraph 38(a) above;
- (b) say that the "Application Fee" was an amount payable by an Applicant, on a per Woodlot basis, seeking participation in one of the Gunns Woodlot Schemes;
- (c) say that the Application Fee was to be held on trust by GPL for the relevant Applicant until GPL became reasonably satisfied that the relevant pre-conditions to an Applicant becoming a "Grower" had been met, at which point the Application Fee was no longer held on trust but, pursuant to clause 8 of the Constitutions, was to be released in its entirety in payment of the Woodlot Establishment Expenses;
- (d) say that only Applicants, and not Growers, had an interest in the "Application Portion", and the Growers only had interests in the "Wood Proceeds Portion" and "Carbon Rights Proceeds Portion" (as each of those terms was defined in the Constitutions);
- (e) say that there was no provision for return of any part of the Application Fee to Growers in the event that the whole of the Application Fee was not expended to carry out the Establishment Services;
- (f) say that the Growers were not obliged to contribute any other monies to the maintenance of their Woodlots (apart from those Growers who chose "Planting Option 2", who were obliged to reimburse GPL for the Baseline Pruning Expenses), which meant GPL was obliged to run the Gunns Woodlot Schemes and maintain and tend to the Woodlots without any other financial contribution from the Growers until:

- (i) "Commercial Thinning" occurred (at approximately 9 years of age for trees the subject of Planting Options 1 and 2, and approximately 13 years and 18 years of age for trees the subject of Planting Option 3), after which point GPL was entitled to:
  - (1) deduct the applicable fees and other amounts from the "Wood Sale Proceeds" resulting from that harvest; and
  - (2) payment of 50% of any "Carbon Rights Proceeds" received for the relevant Planting Option; and
- (ii) "Final Harvest" occurred (at the times set out in paragraphs 15(d) and 15(e) above), after which point GPL was entitled to make the same deductions described at (i) above;
- (g) say that, in the premises, on the proper construction of the Constitutions and Management Agreements:
  - (i) the cost of the Establishment Services (being the Establishment Fee) was the entirety and not just some part of the Application Fee; and
  - (ii) no part of the Application Fee was held on trust for Growers (as opposed to being held on trust for Applicants prior to the release of the Application Fee from trust as described at sub-paragraph (c) above); and
- (h) otherwise deny the allegations in paragraph 39.

**Particulars**

*Constitutions, cll 1.1 "Applicant", "Application Fee" and "Woodlot Establishment Expenses", 3.4(b), 3.6-3.8, 4.1, 7-8, 11, 29.*

*Management Agreements, cll 4, 7, 10.1, 18.2-18.3.*

40 In answer to paragraph 40, the Tenth and Eleventh Defendants:

- (a) admit the allegations insofar as they relate to the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes; and
- (b) deny the allegations insofar as they relate to 2009 Gunns Woodlot Scheme and say that, in respect of that Scheme, the per Woodlot amount of the Application Fee was specified in the Constitution and differed depending on the planting option selected.

41 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 41.

42 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 42.

43 In answer to paragraph 43, the Tenth and Eleventh Defendants:

- (a) repeat their responses at paragraphs 38(a) and 39 above;
- (b) admit that GPL was trustee for the Applicants in respect of their Application Fees until those fees were released in accordance with clause 8 of the applicable Constitution;
- (c) admit that, pursuant to clause 3.2 of the Constitution for each of the 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes, the "Assets" (as defined) were vested in, and to be held by, GPL on trust for the "Members" (as defined);
- (d) say that, pursuant to clause 3.2 of the Constitution for the 2002 Gunns Woodlot Scheme, the "Assets" (as defined) were vested in, and to be held by, GPL on trust for the Applicants and Growers;
- (e) admit that the Application Fees, while held on trust for the Applicants, were to be held in a "trust Bank account" and (together with other amounts) constituted the "Application Portion"; and
- (f) otherwise deny the allegations in paragraph 43.

44 In answer to paragraph 44, the Tenth and Eleventh Defendants:

- (a) admit the allegations insofar as they relate to the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes; and
- (b) deny the allegations insofar as they relate to 2009 Gunns Woodlot Scheme and say that, in relation to that Scheme, GPL was to place, or ensure that the "Custodian" (as defined) placed, the Application Fees in the "Application Portion" until GPL released, or instructed the Custodian to release, the Application Fees in accordance with clause 8 of the Constitution.

45 In answer to paragraph 45, the Tenth and Eleventh Defendants:

- (a) repeat their responses in paragraphs 18(a), 18(b), 38(a), 39 and 43 above;
- (b) say that, if the Plaintiffs entered into a Lease Agreement or Sub-Forestry Right Deed (as the case may be) and Management Agreement in respect of which Application Fees had been fully paid and allocated pursuant to clause 8 of the relevant Constitution, then they were, from that time, Growers and were no longer Applicants, and therefore had no "Proportional Interest" in the "Application Portion"; and
- (c) otherwise deny the allegations in paragraph 45.

- 46 In answer to paragraph 46, the Tenth and Eleventh Defendants:
- (a) repeat their responses in paragraphs 38(a), 39, 43 and 45 above; and
  - (b) otherwise deny the allegations in paragraph 46.
- 47 In answer to paragraph 47, the Tenth and Eleventh Defendants:
- (a) repeat their responses in paragraphs 38(a), 39, 43 and 45 above;
  - (b) say the "Woodlot Establishment Expenses", as defined in each Constitution, were the costs and expenses of performing the duties and obligations of the Responsible Entity under clause 4 of the applicable Management Agreement; and
  - (c) otherwise deny the allegations in paragraph 47.
- 48 In answer to paragraph 48, the Tenth and Eleventh Defendants:
- (a) admit that the Establishment Fee was the fee payable by Growers to GPL in consideration of the Establishment Services;
  - (b) say that payment of the Application Fee constituted full payment of the Establishment Fee; and
  - (c) otherwise do not admit the allegations in paragraph 48.

**Particulars**

*Management Agreements, cl 10.1(b).*

- 49 In answer to paragraph 49, the Tenth and Eleventh Defendants:
- (a) repeat their responses in paragraphs 38(a), 39, 43, 45 and 47 above;
  - (b) deny the existence of the "Growers' Trust Funds"; and
  - (c) otherwise deny the allegations in paragraph 49.
- 50 In answer to paragraph 50, the Tenth and Eleventh Defendants:
- (a) repeat their responses in paragraph 38(a), 39, 43, 45, 47 and 49 above;
  - (b) admit that, prior to the Application Fees being released in accordance with clause 8 of the Constitutions, GPL was permitted to arrange for all or part of the "Application Portion" (as defined in the Constitutions) to be invested in an interest bearing account with a "Bank" nominated by GPL, but not in any other form of investment; and
  - (c) otherwise deny the allegations in paragraph 50.
- 51 The Tenth and Eleventh Defendants deny the allegations in paragraph 51.

52 In answer to paragraph 52, the Tenth and Eleventh Defendants:

- (a) admit that, subject to the terms of clause 29.1 of each Constitution, Growers were entitled to:
  - (i) receive distributions out of each "Section" of the "Wood Proceeds Portion" by reference to their "Proportional Interest" in that Section (as each of those terms was defined in the Constitutions); and
  - (ii) receive payment of their "Proportional Interest" in relation to each "Section" of the "Carbon Rights Proceeds Portion" (as defined);
- (b) admit that GPL was entitled to deduct, from amounts payable to Members (or, in the case of the 2002 Gunns Woodlot Scheme, Applicants or Growers) pursuant to clause 29.1 of the Constitutions, the costs, fees and other amounts specified in clauses 28.2, 29.4, and 30.1 of each Constitution; and
- (c) otherwise do not admit the allegations in paragraph 52.

**Auditor oversight and the Compliance Plans**

53 In answer to paragraph 53, the Tenth and Eleventh Defendants:

- (a) admit that KPMG (A Firm) carried out the actions described in paragraphs 53.1 and 53.2; and
- (b) otherwise deny the allegations in paragraph 53.

54 In answer to paragraph 54, the Tenth and Eleventh Defendants:

- (a) admit that in all relevant periods up to about 12 October 2010, each of the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes had a Compliance Plan containing substantially the same compliance rules;
- (b) say that the Compliance Plan for the 2009 Gunns Woodlot Scheme contained substantially different rules;
- (c) say that, pursuant to the Replacement Compliance Plans, the rules in the Compliance Plan for the 2009 Gunns Woodlot Scheme were subsequently incorporated into the Compliance Plan for each of the other Gunns Woodlot Schemes;
- (d) rely on each of the Original Compliance Plans, the Replacement Compliance Plans, and the Compliance Plan for the 2009 Gunns Woodlot Scheme for their full terms, meaning and effect; and
- (e) otherwise deny the allegations in paragraph 54.

55 In answer to paragraph 55, the Tenth and Eleventh Defendants:

- (a) admit that between about 12 October 2010 and 30 November 2010, pursuant to section 601HB of the Act various provisions of the Compliance Plan for the 2009 Gunns Woodlot Scheme (as those provisions were amended from time to time) were incorporated into the Compliance Plan for each of the other Gunns Woodlot Schemes;
- (b) rely on the Replacement Compliance Plans and the Compliance Plan for the 2009 Gunns Woodlot Scheme for their full terms, meaning and effect; and
- (c) otherwise deny the allegations in paragraph 55.

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

56 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 56.

57 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 57.

58 In answer to paragraph 58, the Tenth and Eleventh Defendants:

- (a) say that:
  - (i) not all companies forming part of the Gunns Group had the Receivers or the Administrators appointed to them; and
  - (ii) the Receivers were not appointed to GPL in its capacity as responsible entity for the Gunns Woodlot Schemes; and
- (b) otherwise admit the allegations in paragraph 58.

59 The Tenth and Eleventh Defendants admit the allegations in paragraph 59.

60 In answer to paragraph 60, the Tenth and Eleventh Defendants:

- (a) repeat paragraph 58 above; and
- (b) otherwise admit the allegations in paragraph 60.

61 In answer to paragraph 61, the Tenth and Eleventh Defendants:

- (a) admit that the Liquidators obtained directions from the Supreme Court of Victoria that they were justified in procuring GPL to amend the Constitutions of the Gunns Woodlot Schemes on 31 May 2013 and 6 June 2013;
- (b) rely on the terms of the orders and the Constitutions (including as amended) for their full terms, meaning and effect; and
- (c) otherwise do not admit the allegations in paragraph 61.

62 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 62.

63 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 63.

64 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 64.

### C3. THE DEFENDANTS' ALLEGED DUTIES

#### Other Defendants

65 In answer to paragraph 65, the Tenth and Eleventh Defendants:

- (a) do not plead to paragraphs 65.1-65.4 which do not allege any matters against them, but they do not thereby admit the allegations in those paragraphs;
- (b) in relation to paragraph 65.5:
  - (i) as to sub-paragraph (a), admit that Rule 1 of the Original Compliance Plans required GPL to comply with, *inter alia*:
    - (1) the scheme-related cash needs; and
    - (2) insurance requirements;
  - (ii) admit the allegations in sub-paragraph (b);
  - (iii) as to sub-paragraph (c), admit that Rule 10 of the Original Compliance Plans required GPL to ensure that all of the conditions for the release of the application money out of the application portion to pay for the plantation establishment expenses were satisfied;
  - (iv) admit the allegations in sub-paragraph (d);
  - (v) admit the allegations in sub-paragraph (e), except that in the case of the Original Compliance Plan for the 2002 Gunns Woodlot Scheme, Rule 15 referred to "applicants and growers" instead of "scheme members";
  - (vi) admit the allegations in sub-paragraphs (f)-(i);
  - (vii) as to sub-paragraph (j), say that Rule 27 of the Original Compliance Plans required GPL to report to ASIC any breach of the law that related to a Gunns Woodlot Scheme and that had had or was likely to have a materially adverse effect on the interests of "members" (or, in the case of the Original Compliance Plan for the 2002 Gunns Woodlot Scheme, "applicants" or "growers"), as soon as practicable after it became aware of the breach; and
  - (viii) otherwise deny the allegations in paragraph 65.5; and

- (c) in relation to paragraph 65.6, and on the basis that the reference to "Amended Compliance Plans" in that paragraph is read as a reference to the "Replacement Compliance Plans" (as defined above herein) and the Compliance Plan for the 2009 Gunns Woodlot Scheme, admit the allegations in sub-paragraphs (a) to (i).

66 The Tenth and Eleventh Defendants do not plead to paragraph 66 which does not allege any matters against them, but they do not thereby admit the allegations in that paragraph.

67 In answer to paragraph 67, the Tenth and Eleventh Defendants:

- (a) do not plead to paragraphs 67.1-67.9 which do not allege any matters against them, but they do not thereby admit the allegations in those paragraphs;
- (b) in relation to paragraph 67.10:
- (i) as to sub-paragraph (a), admit that Rule 10 of the Original Compliance Plans required GPL to ensure that all of the conditions for the release of the application money out of the application portion to pay for the plantation establishment expenses were satisfied;
  - (ii) admit the allegations in sub-paragraph (b);
  - (iii) admit the allegations in sub-paragraph (c), except that in the case of the Original Compliance Plan for the 2002 Gunns Woodlot Scheme, Rule 15 referred to "applicants and growers" instead of "scheme members";
  - (iv) admit the allegations in sub-paragraphs (d)-(f);
  - (v) as to sub-paragraph (g), say that Rule 27 of the Original Compliance Plans required GPL to report to ASIC any breach of the law that related to a Gunns Woodlot Scheme and that had had or was likely to have a materially adverse effect on the interests of "members" (or, in the case of the Original Compliance Plan for the 2002 Gunns Woodlot Scheme, "applicants" or "growers"), as soon as practicable after it became aware of the breach; and
  - (vi) otherwise deny the allegations in paragraph 67.10; and
- (c) in relation to paragraph 67.11, and on the basis that the reference to "Amended Compliance Plans" in that paragraph is read as a reference to the "Replacement Compliance Plans" (as defined above herein) and the Compliance Plan for the 2009 Gunns Woodlot Scheme, admit the allegations in sub-paragraphs (a)-(g).



68 The Tenth and Eleventh Defendants do not plead to paragraphs 68 to 69 which do not allege any matters against them, but they do not thereby admit the allegations in those paragraphs.

### **The Tenth and Eleventh Defendants**

70 In answer to paragraph 70, the Tenth and Eleventh Defendants repeat their responses to paragraphs 53 to 55, 65.5 to 65.6 and 67.10 to 67.11 of the ACLS above.

71 In answer to paragraph 71, the Tenth and Eleventh Defendants:

- (a) in relation to sub-paragraph 71.1, admit that, by reason of s 601HG(3) of the Act, the auditor of the Compliance Plans (as in force from time to time) was required, within 3 months after the end of a financial year of the Gunns Woodlot Schemes, to examine the Compliance Plans, carry out an audit of GPL's compliance with the Compliance Plans during the preceding financial year and give to GPL a report that stated whether, in the opinion of the auditor, GPL complied with the Compliance Plans during the preceding financial year and the Compliance Plans continued to meet the requirements of Part 5C.4 of the Act;
- (b) deny the allegations in sub-paragraph 71.2;
- (c) in relation to sub-paragraph 71.3, admit that an audit company conducting an audit of a compliance plan contravenes s 601HG(4A) of the Act if the lead auditor is aware of circumstances that the lead auditor has reasonable grounds to suspect amount to a significant contravention of the Act and does not notify ASIC in writing of those circumstances as soon as practicable and in any case within 28 days after the lead auditor becomes aware of those circumstances;
- (d) deny that s 601HG(3) of the Act imposed any duties on the Tenth and Eleventh Defendants that were owed to the Plaintiffs;
- (e) deny that s 601HG(4A) of the Act imposed any duties on the Tenth and Eleventh Defendants at all, as KPMG (A Firm) is not an audit company within the meaning of that section; and
- (f) otherwise deny the allegations in paragraph 71.

72 In answer to paragraph 72, the Tenth and Eleventh Defendants:

- (a) deny that they or KPMG (A Firm) had the duty alleged in paragraph 72;
- (b) in answer to paragraph 72.1, admit that they had the necessary knowledge, skills and experience to carry out the compliance plan audits of which they were the lead auditors but otherwise deny the allegations in paragraph 72.1;
- (c) in answer to paragraph 72.2, admit that KPMG (A Firm) voluntarily agreed to perform the compliance plan audits of the Gunns Woodlot Schemes, which it did perform, but otherwise deny the allegations in paragraph 72.2;
- (d) in answer to paragraph 72.3, admit that KPMG (A Firm) performed the compliance plan audits of the Gunns Woodlot Schemes in return for payment, but otherwise deny the allegations in paragraph 72.3;
- (e) in answer to paragraph 72.4:
  - (i) admit that, pursuant to s 601HG(5) and (6) of the Act, the auditor of the compliance plan:
    - (1) has a right of access at all reasonable times to the books of the scheme; and
    - (2) may require an officer of the responsible entity to give the auditor information and explanations for the purposes of the audit; and
  - (ii) otherwise deny the allegations in paragraph 72.4;
- (f) in answer to paragraph 72.5, admit that KPMG (A Firm) was required to comply with applicable professional auditing principles and practices to the extent that they applied to KPMG (A Firm) during the course of the compliance plan audits, but otherwise deny the allegations in paragraph 72.5;
- (g) in answer to paragraph 72.6:
  - (i) admit the allegations in paragraph 72.6 in relation to the compliance plan audit reports for the 2003-2007 financial years;
  - (ii) say that the compliance plan audit reports for the 2008-2011 financial years referred to the specific auditing or assurance standards applied; and
  - (iii) otherwise deny the allegations in paragraph 72.6;
- (h) in answer to paragraph 72.7, admit that KPMG (A Firm) knew that the compliance plan audit reports that it gave to GPL would be lodged with ASIC and that members of the public, including members or potential members of

the Gunns Woodlot Schemes, could obtain copies from ASIC if they paid the requisite fee, but otherwise deny the allegations in paragraph 72.7;

- (i) in answer to paragraph 72.8:
  - (i) admit that members and potential members of the Gunns Woodlot Schemes were not in a position to undertake or cause to be undertaken a compliance plan audit; and
  - (ii) otherwise do not admit the allegations in paragraph 72.8;
- (j) say that, in performing the compliance plan audits of the Gunns Woodlot Schemes, which it did perform, KPMG (A Firm) relied upon:
  - (i) the provision of accurate and complete information and documentation by GPL and its directors and officers; and
  - (ii) representations and certifications given by GPL and the directors and officers of GPL;

#### **Particulars**

*The representations and certifications include the representation letters given in connection with the compliance plan audits as follows:*

<b>Year</b>	<b>Date of letter</b>	<b>Issued by</b>
2003	30 September 2003	Third and Fourth Defendants
2004	September 2004	Third and Fourth Defendants
2005	27 September 2005	Third and Fourth Defendants
2006	28 September 2006	Third and Fourth Defendants
2007	27 September 2007	Fourth Defendant
2008	30 September 2008	Fourth Defendant
2009	30 September 2009	Fourth Defendant
2010	30 September 2010	Ninth Defendant
2011	Undated	Fifth Defendant and Robert Wood (company secretary)

*Further particulars may be provided after discovery and evidence.*

- (k) say that each of the compliance plan audit reports for the Gunns Woodlot Schemes for the 2003 to 2009 financial years contained statements to the effect that:
- (i) the report was prepared for GPL as the responsible entity of the relevant scheme and that KPMG (A Firm) disclaimed any assumption of responsibility for any reliance on the report, or the compliance plan to which it related, to any person other than the responsible entity, or for any purpose other than for which it was prepared;
  - (ii) because of the inherent limitations of any internal control structure, as documented in the compliance plan, it was possible that errors or irregularities may occur and not be detected, and that the audit was not designed to detect all weaknesses in the compliance plan and the measures in the plan as the audit had not been performed continuously throughout the period and the procedures performed on the compliance plan and measures were undertaken on a test basis; and
  - (iii) any projection of the evaluation of the operation of the compliance plan to future periods was subject to the risk that the procedures may become inadequate because of changes in conditions, or that the degree of compliance with them may deteriorate; and
- (l) say that each of the compliance plan audit reports for the Gunns Woodlot Schemes for the 2010 and 2011 financial years contained statements to the effect that:
- (i) the report was prepared for GPL as the responsible entity of the relevant scheme and that KPMG (A Firm) disclaimed any assumption of responsibility for any reliance on the report, or the compliance plan to which it related, to any person other than the directors of the responsible entity, or for any purpose other than that for which it was prepared;
  - (ii) because of the inherent limitations of any compliance measures it was possible that fraud, error or non-compliance with laws and regulations may occur and not be detected, and that the audit was not designed to detect all weaknesses in the compliance plan and the measures in the plan as the audit had not been performed continuously throughout the period and the procedures performed on the compliance plan and measures were undertaken on a test basis; and

- (iii) any projection of the evaluation of the compliance plan to future periods was subject to the risk that the compliance measures in the plan may become inadequate because of changes in conditions or circumstances, or that the degree of compliance with them may deteriorate.

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

##### **Payments of Alleged Growers' Trust Funds to Gunns Ltd**

73 In answer to paragraph 73, the Tenth and Eleventh Defendants:

- (a) repeat their response at paragraph 49 above; and
- (b) otherwise deny the allegations in paragraph 73.

74 In answer to paragraph 74, the Tenth and Eleventh Defendants:

- (a) repeat their responses in paragraphs 38(a), 39, 43, 45, 47 and 49 above;
- (b) say that the Plaintiffs have failed or refused to provide further particulars of the alleged payments, loans and dividends referred to in paragraph 74 and the particulars to paragraph 74 in paragraphs 19-21 of the letter dated 1 June 2018 from Piper Alderman to Allens; and
- (c) otherwise deny the allegations in paragraph 74.

##### **Forestry Right Fees and Insurances**

75 In answer to paragraph 75, the Tenth and Eleventh Defendants:

- (a) repeat paragraph 57 above; and
- (b) otherwise do not admit the allegations in paragraph 75.

76 The Tenth and Eleventh Defendants do not admit the allegations in paragraph 76.

##### **KPMG Compliance Plan Audit Reports**

77 In answer to paragraph 77, the Tenth and Eleventh Defendants:

- (a) subject to sub-paragraphs ~~(b)~~ and (c) below, admit that, in respect of each of the 2003 to 2011 financial years~~“each relevant financial year”~~, KPMG (A Firm) issued a compliance plan audit report for each of the Gunns Woodlot Schemes which stated that, in its opinion, GPL had complied with the relevant Compliance Plan (except for the matter referred to in the qualification paragraph contained in the compliance plan audit reports for the 2003 financial year);

- (b) ~~say that, by reason of the particulars to paragraph 77, "each relevant financial year" means only the 2011 financial year and no other year;~~
- (c) say ~~further~~ that, by letter dated 25 June 2018 from Piper Alderman to Allens and subsequently by the ACLS, the Plaintiffs have limited the Gunns Woodlot Schemes the subject of paragraph 77 to the 2002, 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes;
- (d) repeat their responses to paragraphs 74-76 and sub-paragraphs 80.10-80.11 of the ACLS; and
- (e) otherwise deny the allegations in paragraph 77.

78 In answer to paragraph 78, the Tenth and Eleventh Defendants:

- (a) repeat their response in paragraph 77 above;
- (b) say that paragraph 78 is embarrassing because it does not identify the circumstances of which the lead auditor is alleged to have been aware, and is thus liable to be struck out;
- (c) deny the allegations in paragraph 78 to the extent it is asserted that any contravention under s 601HG of the Act occurred in relation to any financial year between 2003 and 2011 (inclusive) ~~"each relevant financial year" (which by reason of the particulars to paragraph 77 is only the 2011 financial year)~~; and
- (d) otherwise deny the allegations in paragraph 78.

## **C5. ALLEGED BREACHES OF DUTY BY THE DEFENDANTS**

### **Other Defendants**

79 The Tenth and Eleventh Defendants do not plead to paragraph 79 which does not allege any matters against them, but they do not thereby admit the allegations in that paragraph.

80 In answer to paragraph 80, the Tenth and Eleventh Defendants:

- (a) do not plead to sub-paragraphs 80.1-80.9 which do not allege any matters against them, but they do not thereby admit the allegations in those sub-paragraphs; and
- (b) deny the allegations in sub-paragraphs 80.10-80.11.

81 The Tenth and Eleventh Defendants do not plead to paragraphs 81-85 which do not allege any matters against them, but they do not thereby admit the allegations in those paragraphs.

**KPMG (A Firm)**

86 In answer to paragraph 86, the Tenth and Eleventh Defendants:

- (a) repeat their responses to paragraphs 71, 72 and 78 of the ACLS above;
- (b) to the extent that a duty arises from the provision of professional services by the Tenth and/or Eleventh Defendant or otherwise (such a duty being denied), will rely on s 50 of the *Civil Liability Act 2002* (NSW) (**NSW CLA**) or s 22 of the *Civil Liability Act 2002* (Tas) (**Tas CLA**) or any similar or equivalent provision of any other applicable State or Territory legislation; and
- (c) otherwise deny the allegations in paragraph 86.

**C6. CAUSATION AND LOSS****Other Defendants**

87 The Tenth and Eleventh Defendants do not plead to paragraphs 87-96 which do not allege any matters against them, but they do not thereby admit the allegations in those paragraphs.

**KPMG (A Firm)**

97 In answer to paragraph 97, the Tenth and Eleventh Defendants:

- (a) repeat their responses at paragraphs 71-72, 77-78 and 86 above;
- (b) say they will rely on:
  - (i) ss 5D and 5E of the NSW CLA;
  - (ii) ss 13 and 14 of the Tas CLA; and/or
  - (iii) any similar provision of any applicable State or Territory legislation; and
- (c) otherwise deny the allegations in paragraph 97.

98 In answer to paragraph 98, the Tenth and Eleventh Defendants:

- (a) repeat their response to paragraph 97 of the ACLS above; and
- (b) otherwise deny the allegations in paragraph 98.

99 In answer to paragraph 99, the Tenth and Eleventh Defendants:

- (a) repeat their responses to paragraphs 97 and 98 of the ACLS above;
- (b) say that:
  - (i) the investments by the Plaintiffs and the Group Members in the Gunns Woodlot Schemes were risky and speculative, including by reason of

the general risks associated with forestry plantations including fire, wind, disease, pests, drought and fluctuations in wood prices;

- (ii) the investments by the Plaintiffs and the Group Members in the Gunns Woodlot Schemes were always exposed to the risk of the insolvency of Gunns Ltd because the Gunns Woodlot Schemes were dependent on the continued existence of Gunns Ltd for their viability;
- (iii) even if, contrary to the denials and non-admissions set out above, the Plaintiffs prove the allegations they have made against the Tenth and Eleventh Defendants, then the Plaintiffs and the Group Members would have suffered the losses they claim to have suffered in paragraph 103 of the ACLS in any event because of the nature of the investments and the insolvency of Gunns Ltd; and

(c) otherwise deny the allegations in paragraph 99.

100 In answer to paragraph 100, the Tenth and Eleventh Defendants:

- (a) repeat their responses to paragraphs 97, 98 and 99 of the ACLS above; and
- (b) otherwise deny the allegations in paragraph 100.

#### **The Plaintiffs' Alleged Losses**

101 The Tenth and Eleventh Defendants deny the allegations in paragraph 101.

102 In answer to paragraph 102, the Tenth and Eleventh Defendants:

- (a) repeat their responses at paragraphs 49, 97, 98 and 99 above; and
- (b) otherwise deny the allegations in paragraph 102.

103 In answer to paragraph 103, the Tenth and Eleventh Defendants:

- (a) repeat their responses at paragraphs 49, 97, 98, ~~and 99~~ and 100 above;
- (b) say that the Plaintiffs and Group Members have not lost the whole amount of their respective initial investments to the extent that they obtained tax deductions by reason of those investments pursuant to applicable product rulings of the Australian Taxation Office and the benefit of these deductions must be brought to account when assessing this alleged head of loss;
- (c) say further that if, which is denied, the Tenth and Eleventh Defendants' acts or omissions caused the loss and damage pleaded in paragraphs 103.1 to 103.3 of the ACLS, then:



- (i) the loss and damage pleaded in paragraphs 103.1 to 103.3 was suffered by the Gunns Woodlot Schemes;
  - (ii) the loss and damage pleaded in paragraphs 103.1 to 103.3 was not suffered by the Plaintiffs;
  - (iii) the loss and damage pleaded in paragraphs 103.1 to 103.3 is not a category of loss which is actionable by the Plaintiffs because it is not a personal loss and is merely a reflection of the loss and damage which was suffered by the Gunns Woodlot Schemes;
  - (iv) as the responsible entity of the Gunns Woodlot Schemes, GPL (or its liquidators), is the proper plaintiff to recover the loss and damage pleaded in paragraphs 103.1 to 103.3; and
  - (v) the Plaintiffs' claim in relation to the loss and damage pleaded in paragraphs 103.1 to 103.3 is liable to be dismissed for the reason that the loss and damage alleged by the Plaintiffs is not actionable by them; and
- (d) otherwise deny the allegations in paragraph 103.

#### **PROPORTIONATE LIABILITY**

104 In answer to the whole of the Plaintiffs' claims, and on the basis of the matters pleaded in paragraph 105 below, the Tenth and Eleventh Defendants say that if, contrary to the denials and non-admissions set out above, the Plaintiffs prove the allegations they have made against the Tenth and Eleventh Defendants and the Tenth and Eleventh Defendants are liable to the Plaintiffs, then the Tenth and Eleventh Defendants plead that:

- (a) the following provisions apply in this proceeding:
  - (i) Part 4 of the NSW CLA;
  - (ii) Part 9A of the Tas CLA; and/or
  - (iii) any similar or equivalent provision of any applicable State or Territory legislation

(together, the **Proportionate Liability Legislation**);
- (b) it presently appears to the Tenth and Eleventh Defendants that the First to Ninth Defendants are or are likely to be concurrent wrongdoers within the meaning of the Proportionate Liability Legislation, to the extent and on the basis of the facts set out in paragraph 105 below;

- (c) by this pleading, written notice is hereby given to the Plaintiffs of the existence and relevant circumstances of the concurrent wrongdoers referred to in the above sub-paragraph, as required by s 35A of the NSW CLA, s 43D of the Tas CLA or any other provision of the Proportionate Liability Legislation;
- (d) the Tenth and Eleventh Defendants may become aware and provide notice of other concurrent wrongdoers after the Plaintiffs and other Defendants have provided their discovery;
- (e) the Plaintiffs' claims against the Tenth and Eleventh Defendants are all apportionable claims for the purposes of s 34 of the NSW CLA, s 43A of the Tas CLA or any other provision of the Proportionate Liability Legislation; and
- (f) by reason of s 35 of the NSW CLA, s 43B of the Tas CLA or any other provision of the Proportionate Liability Legislation, any liability of the Tenth and Eleventh Defendants is limited to an amount reflecting that proportion of the damage or loss claimed that the Court considers just, having regard to the extent of the responsibility of the Tenth and Eleventh Defendants for the damage or loss, and the Court may not give judgment against the Tenth and Eleventh Defendants for more than that amount.

105 For the purposes only of paragraph 104 above, if, which is denied, the allegations against the Tenth and Eleventh Defendants in the ACLS are proved by the Plaintiffs, then the Tenth and Eleventh Defendants:

- (a) repeat as against each of the First to Ninth Defendants the allegations in paragraphs 65-69, 79-85 and 87-96 of the ACLS; and
- (b) say that the First to Ninth Defendants have primary responsibility for the loss and damage alleged in paragraph 103 of the ACLS.

#### **DISCRETION UNDER S 1325(2) OF THE ACT**

106 Further or alternatively to paragraphs 104 and 105 above, if, contrary to the denials and non-admissions set out above, the Plaintiffs prove the allegations they have made against the Tenth and Eleventh Defendants and the Tenth and Eleventh Defendants are liable to the Plaintiffs, then the Court should decline in its discretion under s 1325(2) of the Act to order the Tenth and Eleventh Defendants to pay the Plaintiffs any amount that exceeds the proportion of the Plaintiffs' loss or damage for which they are properly liable, having regard to the responsibility of the other concurrent wrongdoers as pleaded in paragraphs 104 and 105 above.

## SECTION 1318 OF THE ACT

107 In answer to the whole of the Plaintiffs' claims, the Tenth and Eleventh Defendants say that if, contrary to the denials and non-admissions set out above, the Plaintiffs prove the allegations made against the Tenth and Eleventh Defendants and the Tenth and Eleventh Defendants are liable to the Plaintiffs, then the Tenth and Eleventh Defendants acted honestly and, having regard to all the circumstances of the case, ought fairly to be excused from any such liability, in whole or in part, pursuant to section 1318 of the Act.

## LIMITATION DEFENCE

108 The claims of the Plaintiffs and the Group Members against the Tenth and Eleventh Defendants each have a six year limitation period (from the date on which the cause of action accrued) by reason of:

- (a) s 14(1)(b) of the *Limitation Act 1969* (NSW);
- (b) s 4(1)(a) of the *Limitation Act 1974* (Tas);
- (c) s 1325(4) of the Act; and / or
- (d) any similar or equivalent provisions of any applicable legislation in any other State or Territory.

109 In answer to the whole of the claims of the Plaintiffs and the Group Members, the Tenth and Eleventh Defendants say that, to the extent the alleged causes of action accrued at some time more than six years before the date of the commencement of this action, or such other date as applies to the Plaintiffs' claims only by reason of any agreement between the Plaintiffs and KPMG (A Firm), they are time-barred.

## DENIAL OF RELIEF

110 The Tenth and Eleventh Defendants:

- (a) say that the Plaintiffs in the ACLS do not plead any claim against the Tenth or Eleventh Defendant which could give rise to an order for relief in the form of equitable compensation as claimed in paragraph 7 of the Amended Summons filed on 20 March 2018 and the Plaintiffs have now confirmed by correspondence and by the Further Amended Summons filed on 6 August 2018 that this claim for relief is abandoned; and
- (b) otherwise deny that the Plaintiffs are entitled to the relief sought from the Tenth and Eleventh Defendants set out in the Further Amended Summons.

**D QUESTIONS APPROPRIATE FOR REFERRAL TO A REFERREE**

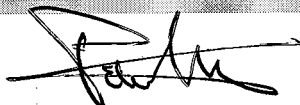
None

**E MEDIATION STATEMENT**

To date, the parties have not attempted to mediate. The Tenth and Eleventh Defendants would be willing to proceed to mediation at an appropriate time.

**SIGNATURE OF LEGAL REPRESENTATIVE**

Signature



Capacity

Solicitor for the Tenth and Eleventh Defendants

Date of signature

29 ~~July~~ August 2018