Supreme Court of Victoria

Woodcroft-Brown v Timbercorp Securities Limited (in liq) & Ors [2011] VSC 427 (1 September 2011)

Last Updated: 17 October 2011

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL AND EQUITY DIVISION

COMMERCIAL COURT

No. S C1 2009 9807

BETWEEN:

ALLEN RODNEY WOODCROFT-BROWN — Plaintiff

v

TIMBERCORP SECURITIES LIMITED (ACN 092 311 469) (IN LIQUIDATION) & ORS — Defendants

Third Parties

- and –

TIMBERCORP LIMITED (ACN 055 185 067) (IN LIQUIDATION) & ORS

JUDGE:	JUDD J
WHERE HELD:	Melbourne
DATES OF HEARING:	23-26, 30 May, 1, 2, 6-9, 14-16, 20, 22, 23, 27, 28, 29 June, 5-7 July
DATE OF JUDGMENT:	1 September 2011
CASE MAY BE CITED AS:	Woodcroft-Brown v Timbercorp Securities Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2011] VSC 427 1st Revision 17/10/2011

Corporations – Managed investment scheme – Product disclosure statement – Disclosure of prescribed information by Responsible Entity – Significant risk – Performance risk – Continuing disclosure obligations – ss 1013C, 1013D, 1013E, 1013F, 1017B and Part 6CA of the *Corporations Act 2001* (Cth)

Practice and procedure – Group proceeding under Part4A of the Supreme Court Act 1986 (Vic)

Misleading and deceptive conduct – Availability of claims under s 1041H(1) of the *Corporations Act 2001* (Cth); s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth); and s 9 of the *Fair Trading Act 1999* (Vic)

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J W K Burnside QC with Mr P G Crennan and Mr C H Truong	Macpherson + Kelley

For Timbercorp Securities Ltd	Mr P D Crutchfield SC with Dr O Bigos	Arnold Bloch Leibler
For the Second, Third and Fourth Defendants	Mr J Delany SC with Mr A J McClelland	Brian Ward & Partners
For Timbercorp Finance Pty Ltd	Mr J B R Beach QC with Mr H N G Austin and Dr C O Parkinson	Freehills
For the Second and Third Third Parties	Mr C M Caleo SC with Mr R A Heath	Norton Rose

HIS HONOUR:

INTRODUCTION AND SUMMARY

1 The Timbercorp Group was established in 1992 by Robert James Hance, the third defendant, and David Muir. They incorporated Timbercorp Eucalypts Ltd, an unlisted public company, which later became known as Timbercorp Ltd. At the same time, the fifth defendant, Timbercorp Finance Pty Ltd, was incorporated as a subsidiary, for the purpose of providing finance to investor growers. Between 1992 and its collapse in 2009, the Group had invested more than $2 billion in agribusiness projects on behalf of about 18,500 investors. The projects were horticultural and forestry managed investment schemes. One investor was the plaintiff, Alan Rodney Woodcroft-Brown, who invested in the 2007 Almond project, the 2008 Olive project and the 2007/2008 Timberlot Project. Francis Jeremy Van Hoff invested in the 2005 (Single Payment) Timberlot Project, the 2006 Almond project, the 2006 Avocado project, the 2007 Almond project and the 2008 Olive project.

2 The first defendant, Timbercorp Securities Ltd, was incorporated on 4 April 2000. It replaced Timbercorp as the operator of the existing schemes, and became the Responsible Entity of each new scheme. At the time the Group collapsed, Timbercorp Securities managed 33 registered managed investment schemes, and three unregistered private offer schemes.

3 On 23 April 2009, Mark Anthony Korda, Mark Francis Xavier Mentha, Leanne Kylie Chesser, Craig Peter Sheppard and Clifford Stewart Rocke, all partners of the firm Korda Mentha, were appointed administrators of the Group companies. At a meeting on 29 June 2009, the creditors resolved to wind up the companies, and the administrators became joint and several liquidators. At the time the Group collapsed, the Timbercorp Finance loan book had outstanding loans to over 14,500 investors totalling $477.8 million. The liquidators have commenced or threatened proceedings against borrowers to recover the loans. One purpose of this proceeding is an attempt by borrowers to avoid their loan obligations.

4 This proceeding, commenced by Mr Woodcroft-Brown as the lead plaintiff, is a group proceeding pursuant to Part 4A of the Supreme Court Act 1986 (Vic). It was commenced by the plaintiff on his own behalf and on behalf of persons who, at any time during the period between 6 February 2007 and 23 April 2009, defined in the plaintiff's statement of claim as the Relevant Period, acquired or held an interest in a managed investment scheme of which Timbercorp Securities was the Responsible Entity. There are two categories of schemes with which the proceeding is concerned. The Recent Schemes are those to which the plaintiff, Mr Van Hoff and other Recent Investors, subscribed during the Relevant Period. The Early Schemes are those in which investments pre-dated the Relevant Period. Mr Van Hoff was a Recent Investor and an Early Investor, having invested in three Early Schemes and two Recent Schemes.

5 The background to the proceeding is arresting for a number of reasons. Foremost, is the apparently healthy position presented by Timbercorp in its 2008 Annual Report, published a little over three months before the appointment of the administrators.

6 On 30 December 2008, Timbercorp lodged with the Australian Securities and Investments Commission (ASIC) its annual audited full year accounts, annual audit review, and annual directors' statement. Its Annual Report was published at about the same time. Timbercorp described itself as a leading Australian Agribusiness Company, managing high quality large-scale forestry and horticulture assets. It claimed to be a major participant in domestic and export markets for almonds, olive oil, citrus, table grapes, mangoes, avocadoes and glasshouse tomatoes, as well as Australia's wood fibre export industry, through its eucalypt plantation projects.

7 Timbercorp reported an increase in total Group revenues, to a record $494.4 million, led by sustained growth in annuity income. New sales of agribusiness managed investment schemes had made a significant contribution to profit. Annuity income comprised fees and rental income generated from payments made by investors in managed investment schemes, and entitlements from maturing schemes.

8 Timbercorp reported that annuity income had increased 32.1% over the previous year to $321.5 million, and that the contribution to EBIT had increased to $72.6 million. While some one-off negative provisions were mentioned, net assets had increased from $75.8 million to $595.6 million, while net overall debt had increased $71.9 million.

9 Timbercorp announced a net profit for the financial year ended 30 September 2008 of $44.6 million. The Group had 22,000 hectares of horticultural land, and 98,000 hectares of forestry plantations, under management.

10 The 2008 Annual Report announced that annuity income was expected to increase to more than $360 million in the following year, and then to more than $400 million in 2010. New business sales were claimed to have been strong in 2008, with three project offerings attracting $119 million in new investment. Timbercorp's almond project had sold out, the forestry project was over subscribed, and Timbercorp had achieved its highest ever sales for an olive project. The report noted, however, that the total new business revenues, and related EBIT contribution, was down 16.3% and 12.7% respectively, due mainly to reduced horticultural project offerings in 2008.

11 The Annual Report noted that net debt had increased in order to finance further increases in the growing loan book and meet increased borrowing and finance charges, which had increased from $63.6 million to $81.9 million. Timbercorp attributed the current level of debt to the capital intensity of developing managed investment scheme projects over the past decade. Its total current borrowings exceeded $567 million and non-current borrowings exceeded $367 million.

12 Timbercorp reported that it had an active plan to reduce debt in 2009. It proposed to sell and lease back its forestry land portfolio to substantially repay debt and fund its capital commitments for 2009 and 2010.

13 Timbercorp also announced a new strategic direction. It advised that its board directors was well advanced in a major strategic review of the company, which was designed to build on a strong base. An objective was to reduce capital intensity and debt, while maximising annuity income. Timbercorp advised that it had appointed Goldman Sachs JBWere (Goldman Sachs) to assist in the implementation of a strategy plan to facilitate asset sales and to assess how best to fund its growth options. It stated that while the global economic environment remained difficult, the agribusiness sector was characterised by sound fundamentals and a generally positive outlook. There was demand for food and fibre, and the supply of land and water used to produce it remained strong and should continue to grow.

14 At the time the 2008 Annual Report was prepared and published, Sholom Charles (Sol) Rabinowicz was a director and the Chief Executive Officer of Timbercorp. He is the fourth defendant. Mr Hance, also a director, held the position of Chief Executive Officer prior to Mr Rabinowicz. The second defendant, Gary William Liddell, was a director and chairman of the Audit, Risk and Compliance Committee. (ARCC)

15 The 2008 Annual Report contained a declaration by the directors, over the signature of Mr Rabinowicz, to the effect that there were reasonable grounds to believe that the company would be able to pay its debts as and when they became due and payable, and that in the directors' opinion, the financial statements and notes complied with accounting standards, and gave a true and fair view of the financial position and performance of the company and of the consolidated entity.

16 The financial reports had been prepared on the basis that and the Group was a going concern, which assumed continuity of normal business activities and the realisation of assets in the settlement of liabilities in the ordinary course of business. The auditors had expressed some reservation about the business as a going concern in a report to the ARCC in November 2008, identifying a working capital deficiency of $82.8 million. By that time Lehman Brothers had collapsed in the United States and there had been an effective closure of global capital markets. Significant and substantial asset sales, planned by Timbercorp to take place in late 2008, had fallen through as a consequence. Those sales were an underlying assumption for continuing bank support. The Group depended on support from its bankers.

17 In their report the directors noted that, but for waivers by its bankers of certain covenants, Timbercorp would have been in breach. Timbercorp had restructured its borrowing arrangements so as to obtain waivers of the covenants as at 30 September 2008, and to vary future covenants and terms.

18 The directors also expressed a belief that the going concern basis for the preparation of the accounts was appropriate after consideration of a number of factors, including the appointment of an investment bank to assist in the sale and lease back of forestry land and selected horticultural assets. They noted that cash flow forecasts indicated that the Group was able to pay its debts as and when they fell due, although an asset sales and a debt reduction program was assumed. The directors noted that should the proposed asset sales not proceed as planned, or only proceeded in part, they were confident of the continued support of Timbercorp's bankers, subject to agreement on alternative acceptable plans.

19 The Annual Report contained an independent audit report from the Group's external auditors, Deloitte Touche Tohmatsu, Chartered Accountants, dated 24 December 2008. The report contained a paragraph entitled Material uncertainty regarding continuation as a going concern. The auditors, none the less, expressed the following opinion:

> (a) the financial report of Timbercorp Limited is in accordance with the *Corporations Act,* including:
> (i) giving a true and fair view of the company and consolidated entity's financial position as at 30 September 2008 and of their performance for the year ended on that date; and
>
> (ii) complying with Australia Accounting Standards (including the Australian Accounting Interpretations) and the *Corporations Regulations 2001*; and
>
> (b) the financial report also complies with International Financial Reporting Standards as disclosed in Note 1.

But they went on to add:

> *Without qualifying our opinion*, we draw your attention to Note 1 in the financial report which indicates that the consolidated entity, in the absence of waivers, would have breached certain bank covenants at balance date. The consolidated entity has, subsequent to year end, obtained waivers for the breach of covenants as at 30 September 2008 and varied future covenants and terms. This includes an undertaking to sell selected assets and apply a portion of the proceeds to reduce debt. These factors, along with other mitigating factors being relied on by management to address these issues, are as set forth in Note 1 'Going Concern'. In the event that the mitigating factors as disclosed in Note 1 do not eventuate as management anticipate, there exists a material uncertainty about the company's and consolidated entity's ability to continue as going concerns and whether they will realise assets and extinguish their liabilities in the normal course of business and at the amounts stated in the financial report.[1]

20 Another unusual feature of the case was the fact that the plaintiff did not allege that the directors were dishonest, or incompetent. He did, of course, allege and rely upon their involvement in alleged breaches by Timbercorp Securities of its duty to inform potential and existing investors about risks associated with the operation of the

schemes. The plaintiff did not overtly contend that the business had been mismanaged, that the accounts were inaccurate or that the directors' declarations in the Group financial reports were false. The plaintiff did, however, allege that declarations made by the directors in March and September 2008, in scheme financial reports, were false or misleading because of certain events that had occurred in and after February 2007, described as the adverse matters.

21 Importantly, the plaintiff did not contend that the auditor's declaration was false or misleading or that the directors knew or believed that it was false or misleading. With one faintly pressed exception, the plaintiff did not contend that the directors had mislead Timbercorp bankers or the auditors.

22 A further unusual feature of the case was the way in which the plaintiff's case developed. In his attempt to cover every possible combination or permutation of fact and law, attributing principal liability to Timbercorp Securities and accessorial liability to Timbercorp Finance and the directors, the plaintiff constructed an elaborate and sometimes illusive web of allegations. The complexity was compounded by the failure of the statement of claim to record a coherent narrative and the extensive and often confusing use of cross referencing.

23 By reference to his statement of claim, the plaintiff advanced more than a dozen principal claims, before accessorial liability was brought to account. Having regard to the way in which the plaintiff advanced his case at trial, it had the potential to be made relatively straightforward, although with a material change to which the defendants took exception. Unfortunately, any potential for simplification was not realised, because the plaintiff expressly refused to abandon any element of his pleaded case. The change to his case, explained below, did not result in an application to amend the statement of claim. The plaintiff maintained that his case at trial fell within his existing pleading.

24 Put simply, the plaintiff's case as pleaded was that the Responsible Entity, Timbercorp Securities, had failed to disclose information about risks it was required to disclose in compliance with its statutory obligations. The plaintiff argued that the Group business model involved risks associated with its financial structure that should have been disclosed to existing and potential scheme investors, because the risks were significant or might have had a material influence on a decision to invest in a scheme. This was described as a structural risk; a risk that the Group might fail because of insufficient cash, with a consequential risk to the viability of the schemes managed by Timbercorp Securities.

25 The plaintiff argued at trial that on and after 6 February 2007, events occurred that put the business of the Group at further or heightened risk of failure. Those events included an announcement by a Commonwealth government Minister on 6 February 2007, of a proposal by the Australian Taxation Office to change its position on the deductibility of up-front fees paid by investors. This event became known as the tax announcement. It was the first so-called adverse matter. The second such matter was the tightening of global credit markets, which the plaintiff said commenced in the second half of 2007. This was sometimes referred to as the Global Financial Crisis. There were other events, although the two mentioned are by far the most important.

26 The plaintiff argued that had he been informed of the structural risk or any of the adverse matters he would not have invested in the schemes and would not have borrowed from Timbercorp Finance to do so. The relief claimed by the plaintiff includes an order that he and Group members are not liable for repayment of their loans from Timbercorp Finance.

27 At trial, the plaintiff formulated 10 Key Propositions. These were:

> (1) The Timbercorp Group operated as a single interdependent and interconnected business of marketing, financing and management of forestry and horticulture projects in which the different legal entities were involved in a common pursuit.
> (2) Before and throughout the relevant period [6 February 2007 to 23 April 2009] the Timbercorp Group promoted itself to potential investors in Timbercorp schemes as a leading agribusiness manager, and as financially strong and reliable, with a sound

> business model enabling it to manage each of the schemes throughout their project terms.[2]
>
> (3) At all times during the relevant period, the Timbercorp Group knew that scheme investors were exposed to risks associated with the Timbercorp Group failing during the currency of project terms and in particular, that the Timbercorp Group was critically dependent on its ability to maintain and increase its borrowings, its ability to continue to raise equity and to sell assets in a timely manner and that if capital or debt markets tighten there was a real prospect that the Timbercorp Group would be at risk, and the grower investments with it.

28 Proposition (3) encapsulated what the plaintiff described as the financing risk or the fragile business model risk. He submitted that Key Proposition (3) was a reflection of the allegations made in paragraph 75A to 75H of his statement of claim. It was not. The structural risk articulated in those paragraphs was more aptly described as a cash flow risk. While the description is unimportant, the nature and components of the risk were completely different. The pleaded structural risk was concerned with the exposure of scheme members to the ability of the Timbercorp Group to maintain its cash flow, should members of other schemes fail to make scheme contributions, or because the Group might not be able to obtain or service external debt, or because it could not access funds by securitising investor loans. The financing risk, advanced at trial, was no longer concerned with cash flow from the identified sources. The structural risk had been converted into one concerning anterior matters - the Group's dependency on new capital, in the form of debt and equity. That dependency, the plaintiff argued, made the Group susceptible to adverse changes in the capital markets, such as occurred with the Global Financial Crisis. That was a business model risk which the plaintiff argued made the Group so vulnerable to market forces that it required disclosure in every Product Disclosure Statement. The Key Propositions continued:

> (4) During the relevant period the Timbercorp Group knew that each of the *adverse matters* occurred and that they further increased the possibility that the Timbercorp Group would fail during the currency of the project terms and thus the possibility of grower investments failing during the project terms.

Proposition (4) relied on the *adverse matters* which the plaintiff submitted were pleaded in paragraphs 12D, 12E and 13 to 15A of his statement of claim.

29 As mentioned, the first adverse matter was the tax announcement by the Australian government on 6 February 2007, to the effect that the Australian Taxation Office would no longer allow the deduction of upfront fees paid by investors in non-forestry managed investment schemes. The second adverse matter was a substantial deterioration in credit and financial markets worldwide that commenced in late 2007. A third adverse matter was said to be the near insolvency of the Group in early 2008.

30 The adverse matters, or events, had played a prominent part in the plaintiff's initial formulation of his case. It will be observed from the subsequent analysis that the status of the adverse matters changed with the passage of time. The adverse matters were transformed from the status of isolated events, that the plaintiff alleged ought to have been disclosed, into freestanding risks and then back to events that exacerbated or heightened the financing risk, increasing the possibility of the Group's failure. It was that increased risk of failure, according to the plaintiff, that required disclosure of the impact of the adverse events on the Timbercorp Group. The Key Propositions continued:

> (5) The defendants did not disclose to the investors in any product disclosure document or otherwise during the relevant period:
> (a) the existence of the *financing risk*; and
>
> (b) the occurrence of the *adverse matters*.[3]
>
> (6) The *financing risk* and the occurrence of each of the *adverse matters*:

(a) was *material* to any decision by a person, including the plaintiff and Mr Van Hoff, to invest in a recent scheme; and

(b) constituted a *significant risk*, *characteristic or feature* associated with holding an interest in a recent scheme, and the Timbercorp Group had legal obligations to disclose them.[4]

31 Key Proposition (6), as formulated, invoked disclosure obligations in s 1013D(1)(c) and (f), s 1013E, and the continuing disclosure obligations in s 1017B or Chapter 6CA of the Act. The Key Propositions continued:

(7) The failure to disclose was a breach by each of the defendants of the legal obligations to investors including the plaintiff and Mr Van Hoff, and was misleading and deceptive conduct by each of them in contravention of statute. In particular, the defendants' failure to disclose:
(a) rendered each PDS *defective* within the meaning of the *Corporations Act*;

(b) meant that each of the defendants is a *liable person* in respect of the defective PDS under the *Corporations Act*; and

(c) was in all the relevant circumstances misleading or deceptive.[5]

32 The plaintiff's case for misleading or deceptive conduct, as formulated in Key Proposition (7), confined the conduct to a failure to disclose the financing risk and adverse matters in Product Disclosure Statements required to be given to each person to whom an offer to invest is made. The Key Propositions continued:

(8) The extent that the failure of TSL to disclose:
(a) the existence of the *financing risk*; or

(b) the occurrence of an *adverse matter*

was a breach by TSL of its legal obligations to investors, or constituted misleading and deceptive conduct by TSL in contravention of statute, each of the directors and TFL was a person involved in the breach or contravention.[6]

(9) By their conduct in promoting the schemes in the relevant period, the defendants misrepresented:

(a) The financial circumstances of the Timbercorp Group and its principal risks associated with each scheme;[7]

(b) The sufficiency of the scheme contributions paid by scheme members and how they would be applied;[8] and

(c) The state of affairs of operations of the schemes.[9]

(10) The failure to disclose the financing risk and the adverse matters, and the making of the financial misrepresentations caused Woodcroft-Brown and Van Hoff some loss or damage.

33 The plaintiff's reformulation of his case may be explicable, although no explanation was given. Perhaps none was considered necessary, because the plaintiff maintained the position that no material change in his case had occurred.

34 The evidence prepared for trial by the defendants, and even the evidence of the plaintiff's expert forensic accountant, Mr Dicks, could not have been lost on the plaintiff. The plaintiff's cash flow risk case, grafted into his pleading in February 2011, was confronted by evidence that the banks had continued to support the Group until well after the last Product Disclosure Statement was issued, and all adverse matters had occurred.

35 The plaintiff's overall case thesis, evident in his pleading, involved the concept that the fortunes of the schemes were necessarily linked to the viability of the Timbercorp Group. If the Group failed, Timbercorp Securities could no longer perform its obligations in relation to scheme management. Factors that might be prejudicial to the survival of the Group were, therefore, prejudicial to the survival of the schemes. It is in that sense, as Timbercorp Finance submitted, that the risk to the schemes of the failure of the Group was binary, in that Timbercorp Securities either could or could not perform its obligations. It also submitted that a reasonable investor would only be concerned about the financial capacity to manage the scheme until such time as the scheme's survival did not depend on the existence of the Group.

36 At the commencement of the trial, the plaintiff's structural risk case, as pleaded, was firmly rooted in the cash flow risk. The evidence given by the financial experts engaged by the plaintiff, the directors and Timbercorp Finance on this topic was crucial. Joe Dicks, a partner in PPB Advisory, was a forensic accounting expert engaged on behalf of the plaintiff. Michael Hill of McGrathNicol Forensic, gave evidence on behalf of the directors and Barry Honey, chartered accountant, gave evidence on behalf of Timbercorp Finance. Having prepared independent reports, the experts were directed to prepare a joint report identifying matters of agreement and disagreement. One matter of agreement was stated thus:

> All the experts agree that as long as the group's bankers continued to support the group's operations there was no significant risk that the group would not have had the financial capacity to manage any of the schemes through to their contemplated completion.

37 The joint opinion was a complete answer to the structural risk case as pleaded. In my view, the plaintiff's new financing risk sought to sidestep this conclusion, and much of the lay and expert evidence prepared on both sides, and in particular the case prepared by the defendants to meet the plaintiff's pleaded case. Instead of identifying risks associated with the Group's ability to maintain its cash flow, the plaintiff identified a new theoretical risk, that the fragile business model made the Group's capital management particularly sensitive to market conditions.

38 The difficulty for the plaintiff in changing course was that the defendants, and in particular the directors, had fashioned and presented their evidence to establish that they were not aware of any structural risk or other risks as formulated by the plaintiff until late December 2008, when continuing bank support became uncertain. Actual knowledge was an important issue in the case. The disclosure obligation was predicated on actual knowledge of particular risks and information about them. Much of the lay-evidence was directed to establishing that the board had successfully managed risks as they arose, including the events described as adverse matters, and had successfully negotiated banking facilities, and managed cash flow. The evidence was not directed to an analysis of the business model, and the resulting risk enunciated by the plaintiff in Key Proposition (3).

39 The plaintiff should, in my opinion, be confined to his case as pleaded, augmented by particulars delivered in April 2011. The evidence, including the plaintiffs own evidence, was not directed to establish or meet a case based on Timbercorp's critical dependency on capital and debt markets and its particular susceptibility to the occurrence of adverse conditions in those markets. But even if the plaintiff were permitted to advance such a case, it was not supported by the evidence.

40 Business models vary. Some will be more robust than others. Such evidence as there was concerning the nature of Timbercorp's business model did not reveal any unique or particular fragility. The experts were not asked to express a view as to whether the business model was fragile, unusual or inherently risky. While Mr Hance and Mr Rabinowicz were asked questions in cross-examination about the business model, their evidence did not analyse, explain or set out to justify the model in a context where the allegation made by the plaintiff was that it was particularly susceptibility to a downturn in capital markets.

41 In his pleaded case, the plaintiff alleged that the Product Disclosure Statements that were prepared by Timbercorp Securities, in purported compliance with its statutory obligations, were defective within the meaning of s 1022A(1) of the Act, because they did not disclose the structural risk and the adverse matters. In my view,

Timbercorp Securities was not required to provide that information to potential or existing investors, and the adverse matters did not make the information contained in the Product Disclosure Statements misleading or deceptive.

42 The plaintiff also alleged that the Product Disclosure Statements prepared for schemes sold during the Relevant Period, were misleading or deceptive because they contained financial representations to the effect that the Timbercorp Group was sufficiently strong that investors could reasonably expect that Timbercorp Securities would continue to manage each scheme throughout its term, and that the principal risks associated with each relevant scheme were fully disclosed. The alleged representation, to the effect that Timbercorp was strong, lacked content. The coupling of the expectation of investors was an attempt to qualify the representation by reference to durability – its ability to survive for the duration of the schemes. It was pleaded as a representation about how things would be in the future. That called upon the defendants to justify their expressions of strength and durability. In my opinion they established reasonable grounds for their expressions of confidence and the Group's viability and strength.

43 As for the alleged representation, to the effect that the principal risks associated with the schemes were fully disclosed, an investor was entitled to assume that the Responsible Entity had complied with its disclosure obligations.

44 The plaintiff alleged that the financial representations were false or misleading in that from around February 2007 the financial circumstances of the Group were not such that investors could reasonably expect that Timbercorp Securities would be able to manage each relevant scheme throughout its intended term, and that Timbercorp Securities failed to disclose the adverse matters after they occurred, as a substantial risk in connection with each relevant scheme. The first part of the allegation was not supported by the evidence; and I have found that Timbercorp Securities was not required to disclose the information about the adverse matters as formulated by the plaintiff.

45 The misleading or deceptive conduct case also relied on scheme contributions representations, alleged to have been made by Timbercorp Securities and Timbercorp Finance, to the effect that fees paid by investors equalled or exceeded the true cost of establishment and ongoing management of each scheme, and that their contributions would only be applied to fund the costs of the particular scheme in respect of which they were paid. These allegations were intended to reflect a contention that, as the plaintiff understood the operation of the schemes, payments made by investors would be quarantined from exposure to the fortunes of other schemes, or more particularly, the Group as a whole. The plaintiff complained that his payments were pooled with payments made by investors in other schemes and treated by Timbercorp Securities as its own funds. This allegation was inconsistent with the information contained in the relevant Product Disclosure Statements. It was also inconsistent with an important limb of the plaintiffs case – his claimed reliance on the strength of the Group.

46 The plaintiff further alleged that the failure of Timbercorp Securities to disclose to existing and potential investors the adverse matters when they occurred was misleading or deceptive conduct by silence. He claimed to have a reasonable expectation that such matters would have been disclosed because of the statutory obligations of disclosure and the content of each Product Disclosure Statement. In much the same way, the plaintiff alleged that declarations made by the directors of Timbercorp Securities, in financial reports for the half years ended 31 December 2007 and 30 June 2008, to the effect that there was no significant change in the state of affairs of the schemes, were misleading or deceptive because the adverse matters had not been disclosed. The plaintiff claimed that he relied on the financial representations, the scheme cost representations, Timbercorp's silence and the director's declarations, and was induced thereby, to invest in the schemes and borrow from Timbercorp Finance. He also claimed that had he been properly informed, he would have stopped making loan repayments.

47 Unlike the earlier causation chain based upon the breach of statutory duty of disclosure, and defective Product Disclosure Statements, the plaintiff alleged that one consequence of the misleading or deceptive conduct by silence was that, as a member of the schemes, he refrained from seeking to pass a resolution to terminate any of them, or to pursue the appointment of a replacement Responsible Entity. These proposed remedial actions were not advanced at trial.

48 Assuming an equivalence between the concept of significance risk employed by the experts, and the statutory requirement for the disclosure of significant risks in Product Disclosure Statements, the opinion expressed by the experts provided a complete answer to the plaintiff's structural risk case as pleaded. Furthermore, the evidence did not support the proposition that there was actual knowledge on the part of the relevant entities or their directors, of that structural risk. It was not until the last quarter of the 2008 calendar year, following the collapse of Lehman Brothers and after the proposed sale of forestry assets to Harvard Management Company failed to proceed, that banker support wavered. Even then, banker support continued into the new year, with the banks providing Timbercorp with an opportunity to dispose of assets.

49 All experts agreed that the collapse of Lehman Brothers, in the United States, on 15 September 2008 was a significant event in that it affected asset sales and credit markets. In its Financial Stability Review for March 2009, the Reserve Bank of Australia stated:

> The collapse of Lehman Brothers in September precipitated a period of extreme uncertainty about the health of the global financial system, and the increase in risk aversion led to the virtual closure of global capital markets. Despite their ongoing good performance, the Australian banks were not immune from these developments, with investors becoming reluctant to buy long-term bank debt and some depositors also showing signs of nervousness. In response to this extraordinary environment, and following moves by the Irish Government in late September, many governments announced that they would strengthen their deposit protection arrangements and provide guarantees of banks' wholesale debt. In line with these developments, the Australian Government also moved to reassure depositors and investors in October by announcing guarantee arrangements for deposits and wholesale funding. These arrangements have been successful in sustaining depositor confidence and in ensuring that Australian banks have continued access to capital market funding.

50 The feature of the structural risk, upon which the plaintiff relied to impose an obligation of disclosure, was the threat to scheme members because Timbercorp Securities might be unable to discharge its management obligations. That risk may be properly characterised as a performance risk – a risk that Timbercorp Securities would be unable to perform its contractual obligations to manage the projects. The identification of, and the provision of information about, such a risk should be distinguished from the happening of events that, if unchecked or unmanaged, might convert the risk into reality. It was only at trial that the plaintiff drew any such distinction, by alleging that the adverse matters heightened the risk of collapse. Nonetheless, in his pleaded case and at trial, the plaintiff persisted in his characterisation of the adverse matters as having the status of significant risks requiring disclosure by Timbercorp Securities.

51 According to the plaintiff's case as pleaded, the structural risk existed because of the dependency of the Group on cash flow and particularised threats to the cash flow. For so long as the banks supported the Group, there was no real threat to its cash flow. The banks continued to support the Group until its collapse. I am not satisfied by the evidence that the directors knew that there was a real risk that bank support might be withdrawn until after the collapse of Lehman Brothers, and the consequential failure of the anticipated asset sale transactions.

52 The structural risk, whether as defined in the statement of claim or at trial, is in the nature of the institution risk, mentioned in Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd.[10] That risk was recognised and dealt with by the legislative regime, introduced in 1998, to regulate managed investment schemes. It is one reason why the Responsible Entity and scheme manager must now be a public company and hold an Australian Financial Services Licence (AFSL). The reporting obligations imposed on public companies, and the conditions attaching to the licence held by Timbercorp Securities, reflect a regulatory attempt to mitigate the institution risk.

53 In my view, the performance risk, or the institution risk, is a significant risk and information about it is required to be disclosed in a Product Disclosure Statement. It might be argued that it would not be reasonable for a person

considering whether to acquire an interest in a scheme to expect to find information about that risk in the Statement. [11] That is because the nature of the risk – being a risk that a contracting party might fail to discharge all of its contractual obligations due to financial incapacity – might be regarded as a risk that goes without saying. It is an everyday risk of commercial transactions. It is well-understood and accepted by business people. A question is, however, whether it ought to be disclosed to a retail client.

54 The attention given to the disclosure of risks by the regulatory regime is intended to protect investors, including a retail client. Notwithstanding the commonly understood nature of the performance risk, its recognition by the regulatory regime and the consequential requirement for the preparation and publication of accounts by a Responsible Entity as a public company, I am persuaded that information about the performance risk was required to be disclosed in Product Disclosure Statements as a significant risk under s 1013D(1)(c). Put another way, information about that risk is required to be included in a Product Disclosure Statement even though it would not be reasonable for a commercially sophisticated investor, considering whether to acquire the product, to expect to find the information in the Statement. The regulatory regime was designed to protect retail clients who may include relatively unsophisticated investors. Even though the plaintiff and Mr Van Hoff were commercially experienced and sophisticated investors, they are properly characterised as retail clients.

55 The case proceeded, however, on the basis that the risks as formulated by the plaintiff were required to be disclosed. While inextricably linked to the performance risk, the formulations by the plaintiff incorporated events or circumstances that, if left unmanaged, might have caused that risk to materialise. It was to those risk formulations that the defendants directed their evidence and submissions, including their contention that those risks were not significant risks requiring disclosure in the Product Disclosure Statements.

56 In my opinion, the Product Disclosure Statements issued or employed during the Relevant Period included information about the performance risk. The reference to the ability of Timbercorp Securities, to meet its obligations under the various agreements, seems to have first emerged as a separate note in the Risk Analysis part of each Product Disclosure Statement in 2006.

57 The relevant Product Disclosure Statements specifically identified the performance risk, generally in the following terms:

> Anything that affects our ability to meet our obligations under the Almond Lot Management Agreement and the Sub-leases, and the ability of the Land Owner to meet its obligations under the Sub-lease, could also constitute a risk to Growers.

58 The formulation by the plaintiff of the structural risk, whether identified as the cash flow risk or fragile business model risk or financing risk, and the adverse matters, all depended upon the effect of events and circumstances on the ability of Timbercorp Securities to perform its obligations under the various agreements. While the performance risk was disclosed, the Statements did not contain the substance of the information which the plaintiff contended ought to have been disclosed. Even though the tax announcement, for example, was expressly disclosed in Product Disclosure Statements issued after February 2007, its impact, according to the plaintiff's thesis, was not.

59 The Product Disclosure Statements also contained information about the financial position of the Group. There was a statement in the 2007 Almond project Product Disclosure Statement, to the effect that Timbercorp Securities was a subsidiary of a publicly listed company with net assets of $440 million. That statement drew a direct link between the financial strength of the Group and the capacity of Timbercorp Securities to discharge its obligations.

60 At trial, the adverse matters only really achieved a status as events that heightened the financing risk. Even with the advent of the cash flow risk in February 2011, the significance of the adverse matters, as standalone events or consequences requiring disclosure, had diminished. They were elevated into risks by the plaintiffs particulars delivered in April. Whether analysed as standalone events, or as risks, or as events which escalated a structural risk, they did not require disclosure in the form alleged by the plaintiff, whether in a Product Disclosure Statement or otherwise, to potential or existing investors in managed investment schemes promoted and operated by Timbercorp Securities.

61 There are a number of reasons why that is so. First, the adverse matters, as pleaded, were events that, if left unchecked or unmanaged, might crystallise the performance risk into a reality. They had no independent status as risks. Second, information about the performance risk was disclosed. Third, the adverse matters, as events requiring management, were in fact managed. To require disclosure of each such event, as the plaintiff would have it, without regard to the capacity of the board to manage the event, and without regard to the fact that it was successfully managed, is to divorce reality and common sense from the disclosure obligation. If, for example, an event occurred which threatened the very existence of the business, but the board had the opportunity and ability to manage the risk, and successfully did so, the threat to the Group would be averted. The performance risk would, of course, remain unchanged. But its crystallisation into a catastrophe for the schemes had been avoided. It is, after all, a fundamental role of corporate management to manage events which may impact adversely on the business.

62 Fourth, the evidence revealed that the board of Timbercorp Securities, and of the Group, successfully managed such of the adverse matters as occurred, so as to avoid crystallisation of the performance risk, until after the collapse of Lehman Brothers. With the failure of the anticipated asset sales, the board could no longer count on continuing bank support. Asset sales were an assumption underlying bank funding, even if they were not a condition imposed by the banks. That realisation took hold, at the very latest, after it became apparent that there were no satisfactory offers for the assets in early 2009. An appreciation by the board that a fundamental assumption of bank support had failed would, in my view, be a material change in circumstances that might affect scheme investments. That obligation arose as part of a continuing disclosure obligation. It is a separate question as to whether such disclosure, if made, would have had any material impact on the plaintiff's position.

63 The plaintiff submitted that the fact that a risk may be capable of being managed, or had been successfully managed, so as to avoid a potentially catastrophic consequence, was beside the point. If the risk existed and was significant, or was material to a decision to invest, it must be disclosed, the plaintiff submitted. It must be kept firmly in mind that the scope of the analysis of the disclosure obligations in this proceeding is confined to the obligations of Timbercorp Securities, as the Responsible Entity of managed investment schemes, to inform investors of prescribed information. This case does not concern the continuing disclosure obligations of Timbercorp, although the defendants relied upon the disclosure of information in Annual Reports on its website and to the ASX.

64 The Act prescribes what must be included within a Product Disclosure Statement and what need not. It also establishes a complex regime for continuing disclosure. The mere fact that there emerges a risk to the viability of the Group will not necessarily translate into an obligation imposed on a Responsible Entity to inform scheme investors of that risk, or of information about it, or convert a failure to disclose such information into misleading or deceptive conduct.

65 The information concerned with the tax announcement event, the Global Financial Crisis and the near insolvency event, as formulated by the plaintiff in his particulars, was not in the nature of a risk capable of isolation from the performance risk. But was the tax announcement a material change to a matter or a significant event that affects a matter? For the word matter, one might read, performance risk. There is no doubt that events might occur in the course of running the business of the Group which might make a material change to the performance risk or be properly characterised as a significant event that affected the performance risk.

66 In my view the inability of the Group to sell assets following the collapse of Lehman Brothers was an event that made a material change to the performance risk. There was a point at which the board could no longer be reasonably confident of maintaining bank support. The question is, however, were the adverse matters or events of such a character? Alternatively, if the interests held by the investors were ED securities, was the information about those events such that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the interest; and was the information generally available?

67 Putting to one side the questions as to whether the events were disclosed or whether the information about them was generally available, I am of the opinion that the adverse matters, as events, and their impact on the Group, did not require disclosure. That is because they were events of the kind that management is required to grapple with on a day-to-day basis. The range of such events confronting businesses is difficult to define. It will depend on the nature of the business, the business model and many other factors. Such events might include the loss of key

employees, customers or suppliers; currency and interest rate changes; product and raw material price changes; for primary production industries, drought and flood; the risks of fire, regulatory change, industrial accident and patent challenges. The list could go on.

68 Having identified a risk that such an event might occur, and that it would adversely affect a business if left unchecked, directors typically plan management strategies to address such risks. That is what the Timbercorp directors in fact did. Such events may be managed through conventional well understood avenues, or lesser well understood mechanisms. For example, they may decide to effect insurance, hedge currencies, reduce debt, raise capital, sell assets, or formulate new marketing or production strategies. Not surprisingly, this approach was recognised in the Timbercorp risk management process, implemented in early 2005, and apparently applied on a regular basis by management.

69 In my opinion, it was not until management realised that an event may not be capable of successful management to avoid the crystallisation of the performance risk, that Timbercorp Securities was under an obligation to inform investors in the schemes pursuant to its continuing disclosure obligation. I am satisfied, insofar as it is relevant, that the plaintiff and Mr Van Hoff were either aware of the adverse matters as events, or that the information about them was generally available.

70 The plaintiff's reliance on Timbercorp's risk management plan, and the SWOT analysis undertaken periodically, misunderstood the significance of the process as a management tool. He pointed to the risk but ignored the purpose of the process, which was to enable management to anticipate risks and plan to manage them if they arose.

71 The fifth reason why the information about the structural risk and adverse matters did not require disclosure, assuming for present purposes that each adverse matters was properly characterised as a risk, characteristic or feature for the purpose of s 1013D(1) (and in my opinion they are not), are the prefatory words. They make it clear that only such of the information about significant risks or significant characteristics and features as a person would reasonably require for the purpose of making a decision to acquire the product must be provided in the Product Disclosure Statement. In my opinion, it cannot be said that the information as formulated by the plaintiff about the structural risk and the adverse matters, insofar as the event occurred, was information that a retail client would reasonably require.

72 Sixth, the limiting effect of s 1013F leads to the same conclusion. Information about the existence and impact of an event, that can be reasonably managed, even if it might cause a catastrophic consequence if left unmanaged would, I think, be of such a kind that it would not be reasonable for a person considering whether to acquire the product to expect to find the information in the Statement.

73 There is no doubt that the capacity of the manager to deliver on its obligation might have a material influence on a decision to invest. This was recognised by Timbercorp Securities and no doubt the reason why it disclosed the performance risk, and presented the Group as financially strong and experienced. It is worth remembering that there was no suggestion that the financial information provided was inaccurate or misleading, until the happening of the adverse matters or events. The plaintiff argued that the representations of strength and experience became misleading or deceptive following the adverse matters. But once it is accepted that the adverse matters should not be divorced from the capacity of the Group to successfully manage their impact, the happening of the events did not make any such representations misleading or deceptive.

74 Seventh, the plaintiff's formulation of the information incorporating the adverse matters, and linking them to the performance risk, was vague and incomplete. If it was necessary to identify an event that, if left unchecked, might have a material adverse impact on the business, it would also be necessary to explain what, if anything was being done to manage the event. To impose such an obligation on a Responsible Entity concerned with its disclosure obligations to potential and existing scheme investors, would be unrealistic and oppressive. Such an obligation is not imposed by the Act. Such information would not reasonably be required, even by retail investors, to inform them about an investment decision. It would not constitute a significant risk to their investment or information that might reasonably be expected to have a material influence on the decision making process of a reasonable retail client considering whether to invest in a scheme managed by a member of the Group. The plaintiff's formulation of the

information required to be disclosed confused and conflated an event that might occur in the course of managing a business, albeit important and even threatening, with the performance risk.

75 I have also found that the cases advanced by the plaintiff and Mr Van Hoff, to the effect that had they been properly informed they would not have invested at all; or if properly informed after having invested, they would have taken certain steps to reduce their loss, lacked credibility.

76 The witness statements of the plaintiff and Mr Van Hoff on this topic contained formulaic incantations reminiscent of the pleadings. Their evidence strained to diminish the importance of the tax benefit derived by them in favour of more laudable long term investment objectives. Their evidence in that regard was implausible.

77 I am not persuaded that they relied upon the content of a Product Disclosure Statement or the absence of information in such a Statement as is alleged when making their investments and continuing to repay their loans and when paying fees to Timbercorp. In my view, the information contained in the Product Disclosure Statements was quite incidental to their investment decisions.

PLAINTIFF'S CASE

78 At the trial the defendants complained of a substantial shift in the plaintiff's case. They argued that the plaintiff had departed from his pleaded case in material respects, and that they had prepared their case based upon the pleadings. The defendants submitted that the evidence on both sides had been directed to the pleaded case, which was a materially different case to that ultimately advanced by the plaintiff. Timbercorp Finance described the plaintiff's case as elusive. The directors argued that the plaintiff was advancing an unpleaded case that was vague and embarrassing.

79 The directors went so far as to argue that the plaintiff's case, as pleaded, did not disclose a cause of action. All defendants submitted that the plaintiff should not be permitted to advance a new case at trial. The plaintiff made no application to amend, but submitted that while his case had been refined, it fell within the scope of his pleading.

80 The contest between the parties concerning the extent to which, if at all, the plaintiff's case had undergone a material change, and whether that case could now be advanced, requires close analysis for at least four reasons. First, to decide whether the plaintiff was in fact advancing a new case or whether it fell within the existing pleading. The plaintiff's case as pleaded had undergone significant amendment prior to trial. In February 2011 the plaintiff had introduced a new structural risk that he said should have been disclosed to potential and existing scheme investors from 2000 onward. The structural risk articulated by the plaintiff had the potential to explain the significance of the adverse matters, and give them a material consequence.

81 Second, the plaintiff pleaded that the financial structure of the Group meant that it was dependent on cash flow that was susceptible to certain specified adverse influences. At trial, the plaintiff submitted that the Group employed a fragile business model which meant that when each adverse matter occurred, its impact was more significant than might otherwise have been the case. The new structural risk was called the financing risk. The character and components of the structural risk had changed.

82 Third, the case was pleaded in a scatter gun approach to litigation. It was complex, involving numerous separate claims for primary and accessorial liability. Every conceivable combination or permutation of statutory duty and remedy was explored. The plaintiff's case was not concisely stated until trial. That is often the case, and in some circumstances may be justified. In this case, the complexity tended to mask a mercurial case. Had the plaintiff been required to narrow and confine his case at a much earlier stage, much of the complexity could have been avoided. While the case became capable of refinement and simplification, the plaintiff refused to abandon any aspect of his pleaded case. Fourth, an analysis of the development of the plaintiff's case provides a useful vehicle to outline the statutory framework on which the plaintiff relied, and to identify the issues.

83 The plaintiff's case changed substantially in February 2011. Some of the changes were understandable attempts by the plaintiff to grapple with factual and conceptual challenges. Prior to February 2011, the plaintiff's case was relatively straightforward, although his attempts to give meaning to the adverse matters were elusive. He sought to attribute to each of them a character of a risk when in truth they were events.

84 The early case centred around events and circumstances described as adverse matters which, the plaintiff alleged, constituted or created significant risks that were required to be disclosed. The initial cause of action pleaded by the plaintiff involved an allegation that Product Disclosure Statements prepared by Timbercorp Securities were defective within the meaning of s 1022A(1) of the Act, because the adverse matters had not been disclosed in the documents. The plaintiff alleged that each of the adverse matters was information about a significant risk associated with an investment within the meaning of s 1013B(1)(c) of the Act, and that it might reasonably have been expected to have a material influence on the decision of a reasonable person, as a retail client, to acquire the product within the meaning of s 1013E of the Act. The plaintiff further alleged that there was an ongoing disclosure obligation of any material change to a matter or significant event that affects a matter, being a matter that would have been required to be specified in a Product Disclosure Statement for the financial product prepared on the day before the change or event occurs.[12]

85 The defendants argued that the ongoing disclosure obligation under s 1017B did not apply because at the time of the investments made by the plaintiff and Mr Van Hoff, each of the interests offered by Timbercorp Securities was characterised as an ED security, as defined in s 111AFA of the Act. Accordingly, the continuing disclosure obligation was regulated under the provisions in Chapter 6CA of the Act, and in particular ss 674-677. In order to meet that case, the plaintiff eventually advanced an alternative claim, alleging that each adverse matter was known to the defendants, not generally available as that expression is explained in s 676 of the Act, and was information required to be lodged with ASIC under s 675 of the Act.

Disclosure obligations - overview

86 It is convenient at this stage to refer in more detail to some of the statutory requirements for disclosure in a Product Disclosure Statement. It was common ground that Timbercorp Securities was obliged to give a Product Disclosure Statement with any invitation to invest in a scheme.

87 There were very few issues between the parties concerning the components of the statutory regime regulating the disclosure obligations of a Responsible Entity and questions of statutory construction. It was common ground that a Product Disclosure Statement must disclose information about any significant risks associated with holding a product.[13] Unfortunately, the concept of significant risk dominated much of the argument and to some extent became a distraction. The plaintiff and defendants devoted a good deal of their submissions to an analysis of the expression, significant risk.

88 It was the plaintiff's case after the February amendments, that the structural risk and each of the adverse matters constituted significant risks that Timbercorp Securities was legally obliged to disclose. The plaintiff submitted that a significant risk requiring disclosure was a risk to which a reasonable investor would be likely to attach significance. He argued that the relevant question should be framed as to whether an investor's decision might reasonably be influenced by the information.

89 The difference between the parties on this issue did not so much concern the characterisation of what were significant risks, as a theoretical concept, but the practical application of the disclosure obligation in the present case. Other issues of statutory construction concerned the application of s 1013E; which the plaintiff submitted provided a separate obligation of disclosure; and the extent to which the financial product offered for sale in conjunction with each Product Disclosure Statement was an ED security.

90 When the plaintiff and Mr Van Hoff were offered the opportunity to invest in a Timbercorp managed investment scheme, Timbercorp Securities, as the issuer of the financial product, and any financial advisor (such as Mr Larkin in the case of the plaintiff, and Mr Weaver in the case of Mr Van Hoff) were required to give their potential customer or client, at or before making the offer, a Product Disclosure Statement.[14] A person could not be bound by a legal obligation to acquire a product before receiving a Product Disclosure Statement.[15]

91 A Product Disclosure Statement must contain up to date information at the time it is given.[16] In the present case, supplementary Statements were prepared in respect of a number of schemes, although not so as to make disclosure of the particular matters which the plaintiff alleged ought to have been disclosed.

92 The plaintiff argued that the structural risk ought to have been included in each Product Disclosure Statement after April 2000. The plaintiff also argued that each of the adverse matters ought to have been disclosed as and when they occurred, although the form of disclosure was less clear. There was a point at which the plaintiff submitted that the disclosure ought to have been included in a Product Disclosure Statement, or a supplementary Statement. He did not, however, abandon the proposition that some other form of communication might have been required if, for example, the disclosure obligation arose under the continuing obligation in s 1017B of the Act.

93 Section 1013C prescribes the information and statements that must be included in a compliant Product Disclosure Statement. There are two important qualifications. Section 1013C(2) only requires information to be included to the extent to which it is actually known to the person who is required to prepare a Product Disclosure Statement (Timbercorp Securities) and the other persons described, including directors of a body corporate. Thus, the question of what was known to the directors of Timbercorp Securities from time to time was an important issue. Another qualification was that the information included in a Product Disclosure Statement must be worded and presented in a clear, concise and effective manner.[17] There were other qualifications.

94 The main requirements of a Product Disclosure Statement are set out in s 1013D, in which the prefatory words import the actual knowledge qualification from s 1013C(2), and make reference to s 1013F, which is a general limitation on the extent to which information is required to be included. Section 1013D(1) provides:

> (1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement 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 the financial product*:[18]

95 The prefatory words bookend the requirements by the use of the words, 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 the financial product, and by reference to the limiting provision in s 1013F, which excludes information if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the statement.

96 Section 1013F(2) provides a list of matters to be taken into account in considering whether or not particular information should be included. The list is not exhaustive. The sub-section provides:

> (2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:
> (a) the nature of the product (including its risk profile); and
>
> (b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and
>
> (c) the kinds of things such persons may reasonably be expected to know; and
>
> (d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions:
>
> (i) Chapter 2M as it applies to disclosing entities;
>
> (ii) sections 674 and 675; and
>
> (e) the way in which the product is promoted, sold or distributed; and
>
> (f) any other matters specified in the regulations.

97 Of the main requirements for a Product Disclosure Statement, set out in s 1013D(1), particular attention was directed to the following:

> (c) information about any significant risks associated with holding the product; and
> (f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and
>
> (j) if the product issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) makes other information relating to the product available to holders or prospective holders of the product, or to people more generally—a statement of how that information may be accessed; and

98 The Act does not contain a definition of significant risk. That is understandable because the identification and nature of risks as significant will vary from product to product. The plaintiff's characterisation of significant risk was a risk to which a reasonable investor would be likely to attach significance. The plaintiff submitted that the question should be framed as to whether an investor's decision might reasonably influenced by the information. He submitted that such an approach was consistent with Timbercorp's own definition of materiality in its due diligence planning documents. As a generalisation, I am inclined to agree with the plaintiff's formulation, so far as it goes, because of the relationship between what an investor would reasonably require, or not reasonably expect as the case may be, and the particular categories of information required to be included in the Product Disclosure Statements. The plaintiff's definition was not, however, very helpful, when it came to identifying what particular information was required to be disclosed in a given case, and in relation to what risks. The legislative framework is a little more complex, requiring a multifaceted analysis.

99 Timbercorp Finance submitted that in order to define a risk, it was necessary to put an event in context in terms of its potential consequences associated with holding the product. If it be accepted that a risk, for the purpose of the disclosure obligation, was more than an event, and was necessarily focussed upon a potential consequence of the event, the evaluation of a risk was to be assessed by the probability of occurrence multiplied by the magnitude of consequence. Framed in this way, the analysis resembled the risk assessment process undertaken by Timbercorp's management using the risk matrix.

100 Timbercorp Finance submitted that the term risk, as used in s 1013D(1)(c), necessarily implied something other than a theoretical or fanciful risk. It argued that the probability of occurrence and the magnitude of consequence must have a commercial reality. It also argued that merely to demonstrate the existence of a real risk was not enough. Section 1013D(1)(c) required a significant risk. In other words, what must be shown was that the risk had a sizeable probability of occurring and consequence. Timbercorp Finance argued that these elements took the risk out of the realm of the theoretical or fanciful, or normal or ordinary.

101 There is much to be said for the approaches adopted by the plaintiff and the defendants. Plainly, the risks required to be disclosed must be real in the sense that there is a probability of occurrence and a consequence that is measurably significant. On the other hand, the bookends to the disclosure obligation, found in the prefatory words of s 1013D(1), require a consideration of the decision-making process by a retail client to acquire the financial product. Thus, the degree of probability of occurrence and the level of possible consequence are to be adjusted by reference to what a person would reasonably require to make a decision, and what would not be reasonable for such a person to expect to find in the Product Disclosure Statement.

102 The plaintiff submitted that s 1013E imposed an additional obligation of disclosure. Section 1013E provides:

> **1013E General obligation to include other information that might influence a decision to acquire**
> Subject to subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

103 The defendants submitted that s 1013E had no work to do in relation to the disclosure of risks. That was dealt with specifically under s 1013D(1).

104 The plaintiff also invoked the ongoing disclosure obligation in s 1017B. He alleged that the adverse matters involved a material change to a matter or a significant event that affected a matter which involved a changed significant risk. The pleading did not explain what a changed significant risk was in the circumstances, but, by reference to his particulars dated 8 April 2011, the plaintiff defined what he alleged was required to be disclosed.

105 The defendants submitted that s 1017B had no operation because, by the time of the investments by the plaintiff and Mr Van Hoff, each product was an ED security. The perceived utility of that submission to the defendants was their ability to rely upon the generally available information exception in s 675(2), to argue that even if Timbercorp Securities was aware of the information alleged by the plaintiff to require disclosure, it was generally available.

106 The plaintiff argued that the ED security provisions had no application to exclude the operation of s 1017B, because at the time the Product Disclosure Statements were prepared the product was not an ED security, even though it may have changed character once the required number of investors had joined in the scheme. While the concept of a change of character at some point after a product is first issued, may be arresting, s 111AFA(1) seems to contemplate that very circumstance. If the defendants are correct in their analysis, a transformation occurred when the hundredth investor acquired an interest. By way of contrast, s 111AF(1)(c) and (d) seem to contemplate an issue of securities resulting in 100 or more holders who have held the securities at all times since the issue of the securities. Thus, a single issue to 100 or more persons.

107 While the plaintiff's case was primarily directed at establishing a failure to disclose information in Product Disclosure Statements, he did not confine himself to that form of disclosure. The ongoing disclosure obligation under s 1017B required notification as soon as practicable after the occurrence of an adverse event following his acquisition of an interest in one of the schemes. The obligation, according to the plaintiff, was to provide information when the event occurred.

Disclosure obligations - detailed analysis

108 I am satisfied, that, on any view of the disclosure obligation imposed upon Timbercorp Securities in its preparation of Product Disclosure Statements, it was required to disclose information about the institution risk or the performance risk. That is, the risk to the schemes occasioned by the possible failure of Timbercorp Securities to perform its contractual obligations. In my view information about the institution risk or performance risk was disclosed. A question arises, however, whether more information was required about that risk, and whether the events, described by the plaintiff as adverse matters were required to be disclosed in a Product Disclosure Statement or by some other means because of a continuing disclosure obligation. Helpfully, the plaintiff formulated what he said ought to have been disclosed. I am not persuaded that Timbercorp Securities was required to disclose that information in a Product Disclosure Statement, a supplementary Product Disclosure Statement or by any other means to potential or existing investors in the managed investment schemes it operated.

109 The plaintiff and the defendants devoted a good deal of attention to the statutory regime requiring disclosure, and in particular the requirement in s 1013D(1)(c) to include within a Product Disclosure Statement, information about any significant risks associated with the holding of the product. Ultimately, the differences between the parties as to the meaning of significant risk were immaterial to the outcome. Even accepting the meaning of those words advanced by the plaintiff, the requirement did not extend to providing the information which the plaintiff alleged should have been provided.

110 A Product Disclosure Statement is defective, pursuant to s 1022A(1), if it contains a misleading or deceptive statement or if it omits material required by s 1013C. In his pleaded case, the plaintiff alleged a breach by Timbercorp Securities of its obligation to give priority to member's interests as required by s 601FC(1)(c), and a breach by the directors of an alleged duty under s 601FD to inform members of matters known to them that would reasonably be expected to materially affect the Group. These matters included Timbercorp's cash flow revenue and profits, the solvency of the Group, its capacity to operate the schemes and its ability to continue to do so to completion. These are, of course, matters that might have a bearing upon the realisation of the performance risk, if left unmanaged. The plaintiff also alleged a breach by the directors of a duty to avoid a conflict of interest of the kind alleged against Timbercorp Securities.

111 The obligations that the plaintiff sought to impose upon Timbercorp Securities and the directors by reference to ss 601FC and 601FD are to be construed in a context where the Responsible Entity is required to be a public company with an AFSL, and is also to act as scheme manager. That regime, for better or worse, creates the institution risk or the performance risk, and inherent conflicts, which the regulatory regime then sets about to manage.

112 One important element of the regulatory regime is a detailed scheme requiring disclosure of prescribed information to be included within a Product Disclosure Statement and on a continuing basis. There are exclusions and exemptions from disclosure. In my opinion it would be wholly inappropriate to graft onto the obligation to give priority to the interests of members or the duties of officers of the Responsible Entity, obligations of disclosure not required by the specific provisions of the Act. Dealing with that topic. In any event, the plaintiff did not seem to rely upon those causes of action in his final submissions.

113 Section 1013C(1)(a) provides that a Product Disclosure Statement must include the statements and information required by s 1013D and the information required by s 1013E, as well as other information required by the other provisions of the Subdivision. A Product Disclosure Statement may also include other information or refer to other information set out in another document.

114 Section 1013D provides that, subject to ss 1013D, 1013C(2), 1013F and 1013FA, a Product Disclosure Statement must include such of the specified categories of information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product. Specific categories of information are listed in paragraphs (a) to (l). The important categories are those mentioned above – s 1013D(1)(c), (f) and (j)

115 Section 1013E provides that, subject to ss 1013C(2), 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable retail client whether to acquire the product.

116 The plaintiff submitted that s 1013E created an alternative obligation under which Timbercorp Securities was obliged to disclose the risks identified by him. The defendants submitted that s 1013D(1)(b) and (c) complement each other, making reference to the benefits and risks of holding the product, and that s 1013E was a general obligation to include any other information that might influence a decision to acquire the product. They submitted that the spheres of operation of each of s 1013D(1)(c) and s 1013E were mutually exclusive, because s 1013E provides that a Product Disclosure Statement must also contain any other information. The defendants argued that the structure of Div 2 of Part 7.9 was such that risk disclosure was the exclusive territory of s 1013D which, in that sense, covered the field.

117 The defendants submitted that s 1013E must, as a matter of interpretation, be concerned with the types of information other than those the subject of directed disclosure under s 1013D and not specifically required by s 1013D. Alternatively, they argued that, if the sections were not mutually exclusive, the focus must be on whether a risk was a material risk, which in context was not likely to make a meaningful difference to the analysis. Thus, both s 1013D(1)(c) and s 1013E provide for a standard that is objective and based upon what a reasonable retail client would require for the purpose of making a decision to acquire the product.

118 Because the adverse matters are properly characterised as events, rather than risks, these submissions by the defendants might have no application. The submission depended upon the argument that s 1013D(1)(c) covered the field in terms of any obligation to disclose risks. While it is true that the plaintiff had unambiguously characterised the information requiring disclosure as information about significant risks, evident from his formulation of the adverse matters in his particulars delivered in April 2011, the important adverse matters were in truth events, not risks.

119 In my view, ss 1013D(1) and 1013E are complimentary in that 1013E is designed to enhance the disclosure obligation by approaching disclosure from a different perspective. The prefatory words in s 1013D(1) limit the information required to be given to such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to require the financial product. It seems tolerably clear that the requirement to include information about any significant risks associated with holding product, is intended to describe a category of information whose character and conduct is qualified by the prefatory words. Plainly, the information must be about any significant risks, but the description of a category of information should not be

confused with the qualitative requirement. In my view, it is not appropriate to examine the concept of significant risks in a theoretical vacuum, divorced from the prefatory words.

120 The prefatory words in s 1013D commenced by making the operation of the section subject to ss 1013C(2) and 1013F. These provisions further qualify or limit the information to be provided, and may inform the question of what is a significant risk. These qualifying provisions are replicated in s 1013E, which invites a different analysis to be undertaken when examining the scope of a disclosure obligation, in the absence of categories. Section 1013E directs attention to information that might reasonably be expected to have a material influence on the decision. The absence of categories and the refocus on material influence, reveals a legislative intention to inform the decision-making process. The identification of categories in s 1013D(1) should not be analysed as if a self-contained expression of any obligation to disclose risks. It is possible that information about a risk may not be properly characterised as significant, according to the defendants' criteria, but nevertheless be information that might reasonably be expected to have a material influence on a decision. Thus, even where the issue is whether particular information about a risk should be disclosed, both provisions have scope to operate. They have different work to ensure that investors are given sufficient information. Just because it is unlikely that, where disclosure of risks are concerned, s 1013E will not add anything to the requirements of s 1013D(1)(c), does not in my view limit the scope of its potential operation.

121 Section 1013F introduces a general limitation by reference to an opposite standard of expectation. It is an important limitation that applies to the obligations expressed in s 1013D(1) and s 1013E.

122 Prior to the Financial Services Reform Act 2002 (Cth), which introduced ss 1013D and 1013E, the type of disclosure document applicable to an interest in a managed investment scheme was, as with corporate securities, a prospectus. Following the Financial Services Reform Act, the traditional prospectus requirements continue to apply to corporate securities under Chapter 6 of the Corporations Act, but disclosure in respect of financial products, such as interests in managed investments schemes, became subject to the Product Disclosure Statement regime in Chapter 7.

123 The content requirements of a prospectus set out in Chapter 6 of the Corporations Law (until 15 July 2001) and Corporations Act (from 15 July 2001 to 11 March 2002) do not contain any express requirement concerning risk disclosure. In s 710(1), a general disclosure test is set out, which provides:

> A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below. The prospectus must contain this information:
>
> (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and
> (b) only if a person whose knowledge is relevant (see subsection (3)):
>
> (i) actually knows the information; or
> (ii) in the circumstances ought reasonably to have obtained the information by making enquiries.

124 Before the Financial Services Reform Act amended this section, it required, in the case of an offer to issue (or transfer) shares, debentures or interests in a managed investment scheme, that the disclosures include the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests. Section 711 required certain specific disclosure. Those are a range of basic matters which are not presently relevant. But there is no express requirement that risks be disclosed. The only provisions that directed risk disclosure were those referable to Profile Statements and Offer Information Statements, which applied to specific types of offers, not presently relevant.

125 Until the Financial Services Reform Act, those general and specific requirements applied to interests in managed investments schemes. The Revised Explanatory Memorandum to the Financial Services Reform Bill 2001 set out an extensive explanation of the intentions and policy considerations guiding the new regime for disclosure in relation to financial products including interests in managed investment schemes:

> ***Content of Product Disclosure Statement***
> 14.71 As noted above, a directed disclosure approach to point of sale disclosure is outlined in the provisions. That approach seeks to balance the need for the purchaser to have sufficient information to make an informed decision and compare products against the concern that they may be provided with more information than they can comprehend. In doing so, it takes a middle ground between the full due diligence approach in the fundraising provisions of the Corporations Law and the Key Features Statement approach taken in relation to superannuation. That is, the provisions take a directed disclosure approach supplemented by other information known to the issuer or seller that might materially influence a retail client's decision to acquire the product.
>
> 14.72 The other key feature of the approach taken is that it has been drafted in such a way that it is *capable of applying flexibly across the full range of financial products that are subject to the regime*. It is envisaged that a Product Disclosure Statement for a banking product will be very different from a Product Disclosure Statement for a managed investment product in terms of the detail provided. However, there will, through the directed disclosure approach, be sufficient similarity between the documents to enable a consumer to compare them if they so wish.
>
> 14.73 This flexibility is achieved in a number of ways:

the level of information required to be included under a particular topic varies according to the particular product in question. *Only the level of information that a retail person would reasonably require for the purpose of making a decision whether to acquire that product needs to be included* (see proposed subsection 1013D(1)). *This requirement should be read as limiting, not expanding, the disclosure obligation*;
if a particular topic is not relevant to a particular product it need not be included. For example, if there are no significant risks associated with the holding of a particular product, which might be the case in relation to a capital guaranteed banking product, then nothing needs to be included in relation to risks (proposed subsection 1013D(3));
information only needs to be included in the Product Disclosure Statement to the extent that it is reasonable for a person considering whether to acquire the product to expect to find the information in the Product Disclosure Statement (proposed section 1013F). Therefore things that are general knowledge and that a reasonable person would not expect to find in a Product Disclosure Statement would not have to be included in the Product Disclosure Statement. Again, *the requirement to provide information that a person would expect to find in the Product Disclosure Statement is intended to limit, not expand, the disclosure obligation*;
the list itself is cast in fairly general terms, with the capacity for the information that must be included under particular heads in relation to particular products to be fleshed out in a number of ways:
− through a regulation making power (see proposed subsection 1013C(4));

− under an industry code of conduct which may be approved by ASIC (proposed section 1101A);

− Through ASIC guidance in the form of policy statements.

> ***Directed disclosure***
> 14.74 Proposed section 1013D contains the list of topics that must be included in all Product Disclosure Statements, to the extent that they are relevant to the particular product. It distinguishes between statements and information. In relation to statements all relevant information must be included, for example, the name and contact details of the product issuer. In relation to information, however, only such information under the particular item as a retail person would reasonably require for the purpose of making a

decision whether to acquire the financial product needs to be included in the Product Disclosure Statement. *This will vary from product to product and allow for flexibility in the detail that is to be included under each topic*. In addition information need only be included to the extent that it is within the actual knowledge of the persons described in proposed subsection 1013C(2). *Unlike the current fundraising provisions of the Corporations Law a full 'due diligence' inquiry is not required by these provisions*.

14.75 The topics under which statements or information must be included in the Product Disclosure Statement are as follows:

...

Benefits

14.77 Proposed paragraph 1013D(1)(b) requires disclosure of any significant benefits to which the holder of the product will or may become entitled and the circumstances in which or the time at which those benefits will or might be provided. This would mean, for example, the disclosure of:

the interest rate on a bank account;
the payment of a claim under an insurance contract; or
the payment of an entitlement by a superannuation fund and the circumstances in which that entitlement is to be paid. It would encompass the kinds of information required to be disclosed under clauses 37-39 of the determination made under section 153 of the SIS Act.

Risks

14.78 The Product Disclosure Statement must include information about any significant risks associated with the holding of the product. If there are no significant risks, nothing needs to be disclosed under this head. In other cases, the level of detail of disclosure of risks will depend on what a retail person would reasonably require to make a decision to invest in the product. However, information does not need to be included if it would not be reasonable for a person to expect to find that information in the Product Disclosure Statement, for example, because it is common knowledge (proposed section 1013F).

...

Other information that might influence a decision to acquire

14.94 As noted above, *in addition to the list of items that must be disclosed under proposed section 1013D, disclosure is also required of any other information that is actually known to the product issuer or seller and that might reasonably be expected to have a material influence on the decision of a reasonable retail person to acquire the product* (proposed section 1013E). This differs from the approach taken in the current fundraising provisions of the Corporations Law in two respects:

it only requires disclosure of information actually known to the product issuer or seller. Section 710 of the Corporations Law also requires disclosure of information that in all the circumstances the issuer ought reasonably to have obtained by making inquiries. It is this element of section 710 that gives rise to the due diligence obligation; and only the information requirements of retail persons, and not also their professional advisers, need to be taken into account.

14.95 Proposed subsection 1013C(2) outlines whose knowledge is relevant in terms of the additional information that must be included in the Product Disclosure Statement. It is modelled on subsection 710(3) of the Corporations Law (as inserted by the CLERP Act) and, in addition to the product issuer and seller and their directors, includes:

an underwriter of the issue or sale of the product;
financial service licensees who participated in the preparation of the Product Disclosure Statement;
persons who have consented to the inclusion of a statement in the Product Disclosure Statement; and
persons who are named in the statement as having performed a particular professional or advisory function in relation to the issue of the product.

> 14.96 The limitation on the extent to which information is required to be included in a Product Disclosure Statement under proposed section 1013F will ensure that the field of knowledge of such persons is not unduly broad. If it would not be reasonable for a retail client to expect to find the information in the Product Disclosure Statement it need not be included.
> 14.97 However, a person will only be civilly liable for a defective Product Disclosure Statement if they are involved in the preparation of the Product Disclosure Statement and have caused it to be defective (proposed subsection 1022B(3)).
>
> ***Need not include if would not expect to find in Product Disclosure Statement***
>
> 14.98 As noted above, information need not be included in the Product Disclosure Statement if it would not be reasonable for a retail person considering whether to acquire the product to find the information in the statement (see proposed section 1013F). For example, it may not be reasonable to expect to find a statement in a Product Disclosure Statement that ADIs are prudentially regulated. This is based on paragraph 710(1)(a) of the Corporations Law (as inserted by the CLERP Act). Proposed subsection 1013F(2) sets out a range of factors that may be taken into account in assessing whether it would be reasonable for a person to expect to find information in the Product Disclosure Statement.[19]

126 The Explanatory Memorandum did not specifically elucidate the meaning of the expression, significant risks, but did provide some guidance on the intended breadth of the requirement. It was intended to be a flexible requirement, tailored to the type of product involved and its particular circumstances. Therefore, s 1013D does not require disclosure of information concerning any and all possible risks. Had that been so, the section would have so stated. Instead, only risks which are relevant to the product, significant and which one would reasonably expect to see disclosed in the Product Disclosure Statement need be included.

127 The Oxford Dictionary defines significant, relevantly, as sufficiently great or important to be worthy of attention; noteworthy. The defendants submitted that the word significant is not intended to mean relevant or material, but must mean something more.

128 The expression significant risk appears in numerous other statutory provisions. Cases concerning the construction of statutes dealing with different subject matter and objects are of limited assistance, although there are some instances in which helpful observations have been made.

129 The Civil Liability Act 2002 (NSW) used the expression significant risk in the context of its statutory modification of the tortious defence of volenti non fit injuria. Sections 5L of that Act essentially provided that there is no liability in negligence where the injury results from the materialisation of an obvious risk of a dangerous recreational activity. Section 5K defined dangerous recreational activity as meaning a recreational activity that involves a significant risk of physical harm. The expression significant risk of physical harm has been considered in various authorities.

130 In Falvo v Australian Oztag Sports Association,[20] Ipp JA discussed the definition of dangerous recreational activity[21] as follows:

> [28] In my view, the definition of “dangerous recreational activity” in s 5K has to be read as a whole. This requires due weight to be given to the word “dangerous”. It also requires “significant” to be construed as bearing not only on “risk” but on the phrase

> "physical harm" as well. The expression "significant risk of physical harm" is coloured by the word "dangerous" and the phrase "significant risk" cannot properly be understood without regard being had to the nature and degree of harm that might be suffered, as well as to the likelihood of the risk materialising.
> [29] The view that a risk is "significant" when it is dependent on the materiality of the consequences to the person harmed is consistent with the views expressed by the High Court in *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 490.
>
> [30] Thus, in my opinion, the expression should not be construed, for example, as capable of applying to an activity involving a significant risk of sustaining insignificant physical harm (such as, say, a sprained ankle or a minor scratch to the leg). It is difficult to see how a recreational activity could fairly be regarded as dangerous where there is no more than a significant risk of an insignificant injury.
>
> [31] In substance, it seems to me, that the expression constitutes one concept with the risk and the harm mutually informing each other. On this basis the "risk of physical harm" may be "significant" if the risk is low but the potential harm is catastrophic. The "risk of physical harm" may also be "significant" if the likelihood of both the occurrence and the harm is more than trivial. On the other hand, the "risk of physical harm" may not be "significant" if, despite the potentially catastrophic nature of the harm the risk is very slight. It will be a matter of judgment in each individual case whether a particular recreational activity is "dangerous".

131 In Fallas v Mourlas,[22] the defendant had accidentally shot the plaintiff in the leg while hunting kangaroos in company of two other men. At the time of the accident, they were, spotlighting, or shooting kangaroos at night with the aid of a spotlight. The plaintiff sat in the vehicle, holding the spotlight for the shooters. At various times one or more shooter might leave or enter the vehicle with a gun that might or might not be loaded.

132 Ipp JA, in concluding that the activity in which the plaintiff was engaged carried a significant risk of physical harm, held the word significant, in the expression significant risk of physical harm, to impose a standard somewhere between a trivial risk and a risk likely to materialise.

133 His Honour held:[23]

> [14] But what does 'significant' mean in s 5K? I think it is plain that it means more than trivial and does not import an 'undemanding' test of foreseeability as laid down in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40.
> [15] The epithet 'real' was suggested during the course of argument. But 'real' can mean a risk that is not far-fetched or fanciful (*Wyong Shire Council v Shirt* (at 48)) and 'significant' means more than that.
>
> [16] On the other hand, it seems to me, a 'significant risk' does not mean a risk that is likely to occur; that would assign to it too high a degree of probability. Had it been the legislature's intention to lay down an element for the application of s 5L involving the probability of harm occurring, different words would have been used.
>
> [17] In the present context, the word 'significant' — coloured or informed as it is by the elements of both risk (which it expressly qualifies) and physical harm (which is indivisibly part of the expression under consideration) — is not susceptible to more precise definition.
>
> [18] Thus, I do not think it practicable or desirable to attempt to impose further definition on 'significant', other than saying that the term lays down a standard lying somewhere between a trivial risk and a risk likely to materialise. Where the particular standard lies between these two extremes cannot be prescribed by any rule of thumb. Each individual

> case will have to depend on its particular circumstances and by having regard to the ordinary meaning of the term.

134 Basten JA held that in considering whether a risk of physical harm is significant, the seriousness of the harm must be considered - if the harm is potentially catastrophic, a very low level of risk may be treated as significant, but on the other hand, where the harm is not serious at all, the risk may not be considered significant until it reaches a much higher level.[24]

135 Tobias JA held, in general terms, that for a risk to qualify as significant, it must have a real chance of materialising and that for a risk to have a real chance of materialising it must lie somewhere between a trivial risk and a risk likely to materialise, although it is probably closer to the second than the first.

136 In his judgment, Tobias JA discussed the differing approaches of Ipp and Basten JJA as follows:[25]

> [90] ... If, as I believe to be the case, the word "significant" in the context of the subject definition means a risk which is not merely trivial but, generally speaking, one which has a real chance of materialising, then the subject activity was clearly capable of involving a significant risk of physical harm. This is consistent with the third approach referred to by Basten JA (at 443 [144] infra) and which I would respectfully adopt as the correct approach to a case of the present kind. On this approach, given the factors referred to below, there can be no relevant difference in terms of each having a significant risk of materialising between the first and second elements referred to at [88] supra.
> [91] I am conscious of the observations of Ipp JA (at 422 [18] supra) that "significant" means a standard somewhere between a trivial risk and a risk likely to materialise. A real chance of the risk materialising lies somewhere between these two standards although probably closer to the second than the first. I accept that there is merit in not seeking to define the term with precision, as its application requires a normative judgment in light of the particular facts and circumstances of each case. However, I see no danger in adopting as no more than a general guide that the risk should have a real chance of materialising for it to qualify as significant. But I emphasise that such a standard, which as I have said lies between the extremes articulated by Ipp JA, is to be regarded as what it is — no more than a general guide.

137 Subsequently, in Jaber v Rockdale City Council,[26] the Court of Appeal dealt with an appeal by the plaintiff who had been seriously injured in a diving accident. One issue which arose was whether the plaintiff's activity was a dangerous recreational activity, being one that involved a significant risk of physical harm.

138 Tobias JA said:[27]

> [52] The relevant standard lies somewhere between a trivial risk and one that is likely to occur. Importantly, "significance" is to be informed by the elements of both risk and physical harm. The context in which the appellant found himself was that he was diving into water from the top of a bollard that was two to three metres above the surface of the water. True it is that he had observed other persons diving from the wharf but there was no evidence that he had observed them diving from the particular bollard from which he himself dived or in the direction that he dived.
> [53] In the present case, it could not be said that the risk of physical harm was in the circumstances trivial; nor was it one which would inevitably eventuate although in my view there was a real chance of the risk materialising if, as was the case, the appellant was to misjudge the depth of the water. Furthermore, the nature of the physical harm that could be sustained if the risk materialised was acknowledged by the appellant to be extremely serious: in fact, catastrophic.

> [54] The factors to which I have referred in [28] above and relied upon by the appellant do not lead to any different conclusion, leaving aside those factors which are, by their nature subjective, all of them point to the risk of the appellant sustaining physical harm by diving from an enhanced height into water of unknown depth as being significant. The chance of the risk of physical harm materialising was real.

139 Tobias JA seemed prepared to adopt a more specific test, being whether there is a real chance of the risk materialising. While there may be little difference between the two approaches in any given case, both require much more than a potential for the risk to materialise.

140 A similar compound expression, significant risk of serious bodily harm, was considered and received a similar exposition in R v Mabior.[28] In that case, the Court of Appeal of Manitoba considered the application of the legal test for the invalidation of consent to sexual activity, where it was alleged that the appellant had not disclosed his HIV status to various sexual partners. The court considered the test established by previous authority that the failure to disclose one's HIV-positive status, where this creates a significant risk of serious bodily harm to the complainant, invalidates any consent to the sexual activity. Steel JA, giving the judgment of the court, considered the issues in the context of scientific evidence concerning the probability of transmission and the extent to which preventative measures could:

> reduce the risk of transmission, not to zero but below the level of significance. The word 'significant' is not necessarily to be equated with quantity, but it does imply importance.

141 Her Honour went on to observe that:

> 'Significant' means something other than an ordinary risk. It means an important, serious, substantial risk. ...

142 The Criminal Justice Act 2003 (UK) also uses the expression significant risk in the context of the regime applicable to the imposition of sentences of imprisonment for public protection and other indeterminate sentences. Sections 225, 226 and 227 provide, in essence, that such sentences may be imposed where, among other things, the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

143 In R v Lang,[29] Rose LJ gave the judgment of the court of Appeal, stating at 2518-9 [17] relevantly as follows:

> (i) The risk identified must be significant. This is a higher threshold than mere possibility of occurrence and in our view can be taken to mean (as in the Concise Oxford Dictionary) "noteworthy, of considerable amount ... or importance".

144 In R v Pedley,[30] Hughes LJ said:[31]

> [17] All the parties before us agreed that in addressing the question whether the risk of serious harm is significant the judge is entitled to balance the probability of harm against the nature of it if it occurs. The harm under consideration must of course be serious harm before the question even arises. But we agree that within the concept of significant risk there is built in a degree of flexibility which enables a judge to conclude that a somewhat lower probability of particularly grave harm may be significant and conversely that a somewhat greater probability of less grave harm may not be.
> [18] We do not, however, agree that it follows that there is any justification for attempting a redefinition of the plain English expression "significant risk... of serious harm". There is no occasion to rewrite the statute as Mr Fitzgerald invites us to do. In R v Lang [2005] EWHC 2342; [2006] 1 WLR 2509, para 17(i), this court noted that the dictionary definition of "significant" is "noteworthy, of considerable amount ... or importance". That was not to

> substitute a different expression for the statute, but was and remains a helpful indication of what kind of risk is in issue.
>
> [19] In particular, it is wholly unhelpful to attempt to redefine "significant risk" in terms of numerical probability, whether as "more probable than not" or by any other percentage of likelihood. We doubt very much that the probability of future harm is capable of numerical evaluation. No attempt should be made by sentencers to attach arithmetical values to the qualitative assessment which the statute requires of them. Such would, moreover, be inconsistent with the degree of flexibility inherent in the word "significant" to which we have adverted in para 17 above. At one stage in his submissions Mr Fitzgerald contended that "significant risk" was being found in cases where there was no more than a 20% probability of serious harm. We are unaware of any sentencer expressing a sentence in any arithmetical terms, never mind those, and very much doubt that it has ever occurred.

145 Hughes LJ concluded his discussion of the relevant matters of principles,[32] as follows:

> ... In *R v Lang* [2005] EWHC 2342; [2006] 1 WLR 2509, para 17(i), this court had explicitly said that a "significant risk" presented a higher threshold than a mere possibility of occurrence. If there had been, in *R v Johnson*, any intention to modify that statement, this court would have said so plainly. It is abundantly clear that *R v Johnson* provides no support for any contention that the "significant risk" test is met whenever the risk of serious harm is anything more than negligible. Some risk is not enough; it must be a significant risk.

146 Ultimately, these decisions do no more than provide limited guidance as to what may be a significant risk. Timbercorp Finance submitted that the expression, significant risk in the Act was not to be construed in isolation. The structure of s 1013D was such that the express requirement to include information about any significant risks associated with holding the product was preceded by the introductory words 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 the financial product. It submitted that, reading the section as a whole, a Product Disclosure Statement must, subject to s 1013C(2) include:

> such information about any significant risks associated with holding the product as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product.

147 Timbercorp Finance submitted that this position was fortified by the statement in the Revised Explanatory Memorandum to the Financial Services Reform Bill that the level of detail of disclosure of risks will depend on what a retail person would reasonably require to make a decision to invest in the product. It submitted that to understand the expression in this way, and noting that s 1013D was concerned with risk disclosure antecedent to the making of an investment decision by the recipient of the Product Disclosure Statement, s 1013D was best construed by analogy with Rogers v Whitaker,[33] which seems to have been the approach adopted by Ipp JA in Falvo in construing the expression significant risk in a different legislative context. Timbercorp Finance submitted that such a construction, if accepted, would mean that a risk would be objectively significant, if, in the circumstances of the particular product in question, a reasonable person in the recipient's position, if warned of the risk, would be likely to attach significance to it or if the financial product issuer is or should reasonably be aware that the particular recipient, if warned of the risk, would be likely to attach significance to it.

148 Timbercorp Finance submitted that in order to be significant to the hypothetical reasonable prospective investor posited by the provision, the risk in question must be more than theoretical – it cannot be merely trivial or real – but must be a risk which is sufficiently great or important to be worthy of attention [or] noteworthy, has a real chance of materialising or an important, serious, substantial risk. It submitted that the effect of preventative measures in

reducing a risk, not to zero but below the level of significance (or materiality), should also be factored in. It argued that such an approach acknowledged the flexibility inherent in the application of the test, such that the degree of possible harm and the likelihood of its occurring may be balanced.

149 Timbercorp Finance seemed to confuse, in much the same way as did the plaintiff, the concept of risk and remedial action following the happening of an event. They conflate risk and event in order to assess the vulnerability of the Group to the happening of the event. In my view, the identification of a risk and the action taken by the board, following an event, to avoid crystallisation of the risk, are quite separate concepts. The plaintiff, of course, seized on this difference to require the event to be disclosed, as a risk, without regard to proposed or actual remedial action.

150 The risk will not cease to exist because an event is managed, avoiding a materialisation of the risk. Events that occur, which might, if they remain unchecked, cause the performance risk to crystallise into catastrophe, are not risks as such. That is a fundamental misconception in the plaintiff's case. They are events which may be capable of management to avoid the possible consequences. The plaintiff's own formulation of the adverse matters as risks, reveals his fundamental misconception. What the plaintiff would have Timbercorp Securities disclose to investors was information about how the event might elevate the possibility that Timbercorp Finance may not be able to perform its obligations to investors, but without any mention of the likelihood, because there was no place in the plaintiff's formulation for remedial action by the board to manage the event and risk.

Actual knowledge

151 Section 1013C(2) provides that information required by ss 1013D and 1013E need only be included in the Product Disclosure Statement to the extent to which it is actually known to the Responsible Entity, including its directors or other persons involved in the preparation of the Product Disclosure Statement.

152 The Revised Explanatory Memorandum relevantly provides:

> ***Directed disclosure***
> 14.83 Proposed section 1013D contains the list of topics that must be included in all Product Disclosure Statements, to the extent that they are relevant to the particular product. It distinguishes between statements and information. In relation to statements all relevant information must be included, for example, the name and contact details of the product issuer. In relation to information, however, only such information under the particular item as a retail person would reasonably require for the purpose of making a decision whether to acquire the financial product needs to be included in the Product Disclosure Statement. This will vary from product to product and allow for flexibility in the detail that is to be included under each topic. *In addition information need only be included to the extent that it is within the actual knowledge of the persons described in proposed subsection 1013C(2). Unlike the current fundraising provisions of the Corporations Law a full 'due diligence' inquiry is not required by these provisions.*[34]

153 Thus, the current legislative provisions applicable to Product Disclosure Statements do not impose a due diligence requirement. By way of contrast, the provisions applicable to prospectuses require the inclusion of information which a person whose knowledge is relevant in the circumstances ought reasonably to have obtained ... by making enquiries. Only information that is actually known, that is, of which the relevant persons have actual knowledge, must be included in a Product Disclosure Statement.

154 Relevantly, the actual knowledge which must be shown for disclosure under s 1013D is knowledge of the information about any significant risks associated with holding the product. Timbercorp Finance submitted that it is necessary to show that there was actual knowledge that the risk was significant within the statutory meaning.

155 Timbercorp Finance submitted that if s 1013D did not cover the field on risk disclosure, and s 1013E had a role in relation to disclosure of the risks identified, the actual knowledge which must be shown is that the information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client,

whether to acquire the product. Thus, if s 1013E were to apply so as to require the disclosure of risks, only those risks of which Timbercorp Securities knew to be material risks, would require disclosure.

156 I have already found that s 1013E is not limited in its operation by the categories requiring information under s 1013D. Where, however, a piece of information is not required to be disclosed under s 1013D, such as information identified by the plaintiff, it is difficult to imagine such information having the materiality requiring disclosure under s 1013E.

ED securities

157 The question whether a product is an ED security arises in two quite different ways – to define matters that may be taken into account under s 1013F(2) and to define the continuing disclosure obligation.

158 Section 1013F provides that information is not required in a Product Disclosure Statement if it would not be reasonable for a retail client considering whether to acquire the product to expect to find such information in the Product Disclosure Statement, and the matters that may be taken into account include:

> (2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:
> (d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions:
>
> (i) Chapter 2M as it applies to disclosing entities;
>
> (ii) sections 674 and 675; and
>
> (e) the way in which the product is promoted, sold or distributed...

159 Timbercorp Finance submitted that the focus of the legislative regime, in the context of an issue situation, is upon the obligation to give the client a Product Disclosure Statement. In the same way, the primary criterion for liability for provision of a defective Product Disclosure Statement which is given arises upon the giving of the Product Disclosure Statement to the client. This has the consequence that the adequacy of the Product Disclosure Statement by reference to the statutory requirements is to be adjudged at the point in time at which it is given. From the point in time at which interests in a managed investment scheme become an ED security, in each issue situation which then arises (and each giving of the Product Disclosure Statement for that scheme), s 1013F(2)(d) may be applied when assessing the adequacy of the Product Disclosure Statement content.

160 Section 1013F(2)(d) refers to the effect of both ss 674 and 675, as opposed to the effect of s 674 or s 675. Thus, the effect of both sections may be considered in relation to the appropriate level of Product Disclosure Statement disclosure. In such circumstances, depending on whether the scheme investments are continuously quoted, the issuer will be either a listed disclosing entity or an unlisted disclosing entity.

161 Section 674 concerns continuous disclosure obligations for a listed disclosing entity. Relevantly, s 674(2)(c) provides that the entity must notify the market operator of information that:

> (a) is not generally available; and
> (b) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price of the entity's securities.

162 Section 675 concerns continuous disclosure obligations for an unlisted disclosing entity. Relevantly, s 675(2) provides that if the disclosing entity becomes aware of information:

> (a) that is *not generally available*; and
> (b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity's securities,

the entity must notify ASIC of the information.

163 The expression generally available is defined in s 676 of the Corporations Act, which provides as follows:

> **Sections 674 and 675—when information is generally available**
> (1) This section has effect for the purposes of sections 674 and 675.
>
> (2) Information is generally available if:
>
> (a) it consists of *readily observable matter*; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention *of persons who commonly invest in securities of a kind* whose price or value might be affected by the information; and

(ii) since it was so made known, *a reasonable period* for it to be disseminated among such persons has elapsed.

> (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
>
> (a) information referred to in paragraph (2)(a);
> (b) information made known as mentioned in subparagraph (2)(b)(i).

164 Timbercorp Finance submitted that the concepts of what information persons who commonly acquire products of the relevant kind as retail clients, may reasonably be expected to know,[35] and what information was generally available[36] are closely analogous. It submitted that the following types of information are generally available:

> (a) ASX releases;
> (b) information on the company's website;
>
> (c) financial reports; and
>
> (d) research or analyst reports.

165 The two limbs of s 676(2) are to be read disjunctively. The first limb of the test in s 676(2)(a) stands as an independent basis upon which information may be found to be generally available. It does not appear to involve a consideration of whether the market has had a reasonable time to absorb the information.

166 The term readily observable matter is not defined in the Act. Extrinsic material relating to the enactment of the cognate provisions proscribing insider trading explained the expression readily observable matter in the first limb of the test as facts directly observable in the public arena.

167 Whether information is readily observable matter is a question of fact to be determined objectively and hypothetically. It does not matter how many people actually observe the relevant information; information may be readily observable even if no one observed it. It is not a question whether the particular matter was in fact observed, but whether it could have been.[37] Ready observability is also not limited to perceptibility by the unaided human senses. In considering the factual question involved, modern means of communication such as telephone, telex, facsimile, television and the internet should be taken into account.[38]

168 The section does not define the class of persons by whom the matter is to be readily observable, and it is not confined to existing shareholders in the relevant entity or even existing traders of shares on the ASX.

169 Ready perceptibility by those in Australia is not an explicit or implicit part of the statutory definition; such a limitation would wrongly suggest or infer that the readiness of the perceptibility is to be judged from the viewpoint of

individuals located in Australia using their natural senses and would fail to recognise that television, the internet (including e-mail) and other means of telecommunication such as the phone and fax are part and parcel of how Australians generally and investors in particular readily perceive events.[39]

170 By contrast, it has been held that information on an ASIC register that might, on payment of a fee, enable a complex series of filings by a private company that had changed its name on a number of occasions to be searched, which might reveal relevant information if the searcher was sufficiently astute to consider name changes and conducted a search for the ABN of the private company, was not readily observable matter.[40]

171 The term persons who commonly invest is not defined in the Act. The section does not provide any guidance on the manner in which information must be disseminated. However, it has been held that the section is not restricted to the bringing to the attention of the class of persons identified by a report or release.

172 The Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth), relating to the enactment of the cognate provisions proscribing insider trading explained this element of the second limb of the test as requiring that the information:

> be made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information. This provision is intended to define the term 'generally available' in terms appropriate to closely held and unlisted companies as well as listed companies with dispersed shareholdings. It would not be sufficient for information to be released to a small sector of the investors who commonly invest in the securities. The information must be made known to a cross section of the investors who commonly invest in the securities; ...

173 The extrinsic material implies that disclosure to a group of institutional investors would not be sufficient to meet the test, but it is unclear whether the situation would change if that group of institutional investors represented a large proportion of the shareholder population of the particular issuer.

174 The term reasonable period is also not defined in the Act. The Explanatory Memorandum mentioned above explained this element of the second limb of the test as follows:

> a reasonable period of time has elapsed for the information to be disseminated. This provision is designed to prevent an insider, who is aware of information prior to its release, getting an unfair head start on other market participants, not to require an embargo on trading of such duration that it constitutes an impediment to the efficient operation of the market (subparagraph (b)).

175 Policy-makers and legislators have generally declined to provide specific guidance on the required period of time. The means of dissemination, the complexity of the information, trading volumes, investor interest in the relevant security, and market conditions all impact on the speed and accuracy of the absorption of information into security prices. Further, when information is not released through the ASX, investors may not know that particular information is available or where it is available.

176 The Explanatory Memorandum explained that it was not intended that the provisions would regard, as inside information, such things as deductions and conclusions which investors, brokers or other market participants may make based on independent research of generally available information. Hence, the third means by which information may become generally available is if the information consists of deductions, conclusions or inferences based upon information that is either readily observable or publicly disseminated.

177 A party seeking to prove the lack of general availability of information must negative the existence of relevant deductions, conclusions or inferences. The plaintiff has alleged, on an alternative basis, liability for breach of continuing disclosure obligations under Chapter 6CA, because the information required to be disclosed was not generally available.

178 The relevance of the foregoing short excursion into the concept of ED security and its significance to the issues in this proceeding, is in the limiting effect of s 1013F and the application of s 1017B. In relation to its limiting effect upon what must be included within a Product Disclosure Statement, Chapter 2M, a factor that may be taken into account, is a more direct pathway than the elaborate arguments advanced by the defendants concerning the operation of ss 675 and 676. That is because the most relevant information that may be said to be generally available is found in the Annual Reports of Timbercorp, its consolidated accounts, the directors report and the auditors report. That material, published to the ASX, ASIC and the world, described and contained information about the Group business model, cash flows, debt levels, debt and finance instruments, assets, asset sales, strategic changes, adverse events including the tax announcement, the emerging credit crisis, the going concern issues, the operating income and working capital positions and other information that would inform an investor about the performance risk, should the investor be interested.

179 The very existence of that material, which was not said to be inaccurate, is a by-product of the regulatory regime designed to mitigate the institution risk. In my view, the mitigating statutory regime, coupled with the publication of the financial and other information, including publication on the Timbercorp website, is yet another reason why the information about the structural risk and adverse matters was not required to be included in a Product Disclosure Statement. It would not be reasonable for a person, considering whether to acquire the product, having been informed of the institution risk or the performance risk, to expect to find the detailed financial data and other information, normally included in the Annual Report of the institution, to also be found in the Product Disclosure Statement.

180 The relevance to the continuing disclosure obligation, of the fact that a product is characterised as an ED security, is that one can look to such material as the Annual Reports in the present case in order to satisfy the requirement. Even in the absence of such a characterisation, Timbercorp Securities was not required to disclose the information about the structural risk and the adverse matters as formulated by the plaintiff, pursuant to a disclosure obligation under s 1017B.

181 What was required to be disclosed, as a matter, in the Product Disclosure Statement on the day before the change or event occurred, was the performance risk. That was in fact disclosed.

182 Did any of the adverse matters constitute a material change to the performance risk? The answer must be no; because the risk remained the same, even though the event may have elevated the likelihood that the risk might materialise. Even if it might be argued that the tax announcement or the credit crisis was an event that, if unchecked or unmanaged, might affect the viability of the Timbercorp Group, it was not, in my view, a significant event unless it had a real potential to bring about the failure of Timbercorp Securities. For so long as the board had the capacity to manage the event, so as to mitigate its impact, it did not pose such a threat. The ability to manage events cannot be divorced from the potential impact of the event and thus its significance as a discloseable event.

183 The evidence disclosed that by 14 June 2006, 100 or more persons held an interest in the 2006 Mango project; by 20 March 2007 in the 2007 Almond project; by 21 May 2007 in the 2007 Olive project; by 15 June 2007 in the 2007 Avocado and other fruits project; by 30 June 2007 in the 2007/2008 Timberlot project; and by 26 May 2008 in the 2008 Olive project. Thus, insofar as it is relevant, from those dates the continuing disclosure obligation was regulated by Part 6CA of the Act.

The plaintiff's pleaded case – continued

184 Returning to the plaintiff's pleaded case, it was initially confined to a complaint that the adverse matters had not been disclosed. These were identified in paragraphs 13 to 16 and 20 of his statement of claim. They were not placed into a chronological context in the pleading because the plaintiff relied on the adverse matters in his breach of statutory duty case in paragraphs 9 to 12Q, to arrive at the concluding allegation that each relevant Product Disclosure Statement was defective within the meaning of s 1022A(1) of the Act. When introducing the statutory obligations in relation to the preparation of Product Disclosure Statements, the plaintiff alleged:

> 12D Each of the PDS documents purported to:

(a) contain information as to the financial circumstances of TSL and the Timbercorp Group (PDS Financial Information); and

(b) identify the significant risks to the relevant recent scheme.

12E In each of the PDS documents:

(a) The PDS financial information was to the effect that TSL and the Timbercorp Group were financially strong and, by necessary implication, that TSL would continue to provide services as responsible entity to the relevant recent scheme for its intended duration; and

(b) The risks of the relevant recent scheme identified in the PDS did not include any risk associated with the financial circumstances, financial strength or financial arrangements of TSL or the Timbercorp Group and/or the continuing ability of TSL to provide services as responsible entity of the relevant recent scheme for its intended duration.

185 The plaintiff alleged that acting in reliance on the matters alleged in paragraphs 12D and 12E, he and other group members subscribed for interest in schemes, paid fees and entered into loan agreements. The plaintiff alleged that each Product Disclosure Statement must contain up-to-date information concerning the financial circumstances of the Timbercorp Group, including the ability of Timbercorp Securities to continue to provide services as Responsible Entity of each scheme for their duration. That information was defined by what might reasonably be expected to have a material effect on the decision of a person as a retail client to acquire an interest in a scheme.[41] It is difficult to know quite what to make of the generality of the allegation that the Product Disclosure Statements should have, but did not, contain information concerning the ability of Timbercorp Securities to discharge its obligations as Responsible Entity, unless specifically required under one or other of the statutory provisions.

186 The adverse matters may be conveniently described in the following terms:

(a) The tax announcement: On February 2007 the Australian Taxation Office announced that from 1 July 2007 it would no longer allow upfront deductions to be claimed in respect of investments in non-forestry managed investment schemes.

(b) Global Financial Crisis: The plaintiff alleged that in late 2007 there was a substantial deterioration in credit and financial markets worldwide which materially limited the ability of Timbercorp to raise capital, restricted the availability of credit, and prevented the Group from either refinancing or extending its existing loan facilities. He alleged that the same event depressed the value of group assets and restricted its ability to sell assets.[42]

(c) Near insolvency: The plaintiff alleged that in early 2008 the Group was *nearing insolvency*, and consequently there was a significant risk that it did not have the financial capacity to manage any of the schemes through to their contemplated completion. Alternatively, he alleged that financial circumstances of the Group had deteriorated such that there was a significant risk that Timbercorp Securities would be incapable of continuing to provide services as responsible entity for the duration of each scheme then in existence or for further schemes.[43]

(d) Breach of loan covenants: The plaintiff alleged that by no later than around September 2008, the Group was in breach of certain loan covenants in respect of its bank facilities totalling approximately $360 million.[44]

(e) Going concern doubts: In the 2008 Annual Report for Timbercorp Limited, its auditors expressed uncertainty about the company's ability to continue as a going concern.[45]

187 The last three adverse matters lost much of their relevance as the case advanced. The plaintiff's case at trial gave prominence and significance to the tax announcement and the Global Financial Crisis, as the key factors affecting the financing risk as formulated. The near insolvency event was elusive and ill-defined, while the breach of covenant and going concern events were, even if accurately formulated, too late to have had any influence on group

members in acquiring interest in the schemes because no new Product Disclosure Statement was issued and no new schemes sold after 30 June 2008.

188 The breach of duty alleged against Timbercorp Securities was a contravention of s 601FC(5) of the Act, predicated on a conflict between the commercial interest of Timbercorp Securities in the receipt of initial and ongoing fees and expenses from scheme members and the interests of members in full and timely disclosure of the adverse matters.[46] The plaintiff alleged that by reason of everything pleaded in paragraphs 8A to 26, Timbercorp Securities had a duty to inform scheme members in a timely manner of any matter known to Timbercorp Securities which would reasonably be expected to materially affect the Timbercorp Group's cash flow, revenue and profits; the solvency of the Timbercorp Group or any of its material subsidiaries, including Timbercorp Securities or Timbercorp Finance; its financial capacity to operate the schemes; whether the schemes would continue to operate for their contemplated duration; and Timbercorp Securities' ability to discharge its duties as Responsible Entity for the schemes.

189 As mentioned above, that particular allegation was not advanced at trial as a separate claim. The difficulty with the plaintiff's formulation of the statutory claims under ss 601FC and 601FD was the existence of a specific statutory regime prescribing what was required to be disclosed in Statements and what was not. A like difficulty confronted the plaintiff's case for misleading or deceptive conduct by the failure of Timbercorp Securities to have disclosed the adverse matters.

190 The plaintiff's case for breach of statutory duties extended beyond a breach of ss 601FC (in relation to Timbercorp Securities) and 601FD (in relation to the directors). He alleged that Timbercorp Securities failed to disclose risks, events and information pursuant to ongoing disclosure obligations. Disclosure was required in subsequent Product Disclosure Statements, or by other means. The disclosure required in each Product Disclosure Statement was confined to the events that had occurred by the date of publication. For the 2007 Almond project, the plaintiff alleged that the tax announcement had been made and the Global Financial Crisis had allegedly commenced. While the initial Product Disclosure Statement was dated 27 November 2006, there was a Supplementary Statement, dated 12 December 2007, issued after the plaintiff alleged the financial crisis had started. For the 2007 Olive project, the Product Disclosure Statement was dated 7 February 2007, the day following the tax announcement. In relation to the 2007 Avocado and Fruit projects, the Product Disclosure Statement was dated 7 June 2007, by which time the tax announcement had been made and, according to the plaintiff, the Global Financial Crisis had allegedly commenced. In relation to the 2008 Olive project, the Product Disclosure Statement was dated 26 February 2008. By that time the tax announcement had been made, the Global Financial Crisis had commenced and the near insolvency event had occurred. In relation to the 2007/2008 Timberlots project, the Product Disclosure Statement was dated 5 December 2006, but there were Supplementary Statements dated 23 April 2007 (by which time the tax announcement had been made) and 12 December 2007 (by which time the Global Financial Crisis had allegedly commenced).

Misleading and deceptive conduct case

191 Following his pleaded breach of statutory duties case, the plaintiff alleged a series of representations and other conduct said to be misleading or deceptive contrary to s 1041H of the Act, s 12DA of the Australian Securities and Investments Commission Act 2001 and s 9 of the Fair Trading Act 1999 (Vic). Section 1041H of the Act provides:

> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

192 Section 12DA of the ASIC Act provides:

> (1) A corporation must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

193 Section 9 of the Fair Trading Act provides:

9. **Application of Australian Consumer Law**

> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

194 The part of the pleading under the heading Misleading or Deceptive Conduct commenced with a range of statements alleged to have been made in various Product Disclosure Statements, concerning the financial position of the Timbercorp Group, and some aspects of the schemes. The material statements alleged have been made as follows:[47]

> 38A. In the relevant period, each of the PDS documents materially stated:
> (a) that TSL was a wholly-owned subsidiary of TL, an ASX/S&P200 public listed company with substantial assets and would be able to benefit from TL's recognised management expertise and agribusiness credentials;
>
> (b) the consolidated financial position of the Timbercorp Group and the financial position of TSL;
>
> (c) that TSL was the responsible entity for the relevant scheme and would be responsible for all aspects of the scheme throughout its term;
>
> (d) that the scheme was a long term project;
>
> (e) that TSL was a leading investment manager and market leader in agribusiness investment, with a proven track record in managing successful horticultural and forestry projects;
>
> (f) that a well-managed agribusiness venture is a specialised activity unlike traditional investment classes;
>
> (g) that TSL had considered and set out the principal risks associated with the relevant scheme and had developed strategies to reduce the impact of these risks;
>
> (h) that there was no minimum amount of subscriptions necessary for the scheme to proceed; and
>
> (i) that the applicant needed to pay an initial application fee and ongoing fees in connection with the operation of the schemes.

195 The misleading or deceptive conduct case had five separate components. These were generally described in the pleading under the following headings:

> (a) Financial representations;
> (b) Scheme contributions representations;
>
> (c) Conduct by silence;
>
> (d) March 2008 representations; and
>
> (e) September 2008 representations.

Financial representations

196 By reference to the material statements alleged in paragraph 38A of his statement of claim, and earlier allegations to the effect that the adverse matters had not been disclosed in the Product Disclosure Statements, the plaintiff alleged that Timbercorp Securities represented to scheme members and prospective scheme members that:

> (a) The financial circumstances of the Timbercorp Group were sufficiently strong that investors could reasonably expect that TSL would continue to manage each relevant

recent scheme throughout its term;
(b) The principal risks associated with each relevant recent scheme were fully disclosed in the relevant PDS document.[48]

197 The representations by Timbercorp Securities were then converted into representations by Timbercorp Finance by reason of the structure and operation of the Timbercorp Group in which TSL and TFL operated in tandem, the fact of common directors, and the manner in which Timbercorp Finance promoted its financial services and made loans to scheme members. The Timbercorp Finance financial representations were as follows:

> That the recent schemes were viable in the long term and that TSL and the Timbercorp Group generally were financially strong and reliable for the foreseeable future and that the principal risks associated with the relevant recent scheme were fully disclosed in the relevant PDS document.[49]

198 Insofar as the representations were as to future matters, the plaintiff relied upon s 769C(1) of the Act; s 12BB of the ASIC Act; and s 4 of the Fair Trading Act, all of which provide that a representation with respect to a future matter, made by a person without reasonable grounds, is taken to be misleading.

199 The plaintiff alleged that the financial representations were false or misleading in that at all relevant times from around February 2007:

> (a) The financial circumstances of the Timbercorp Group were not sufficiently strong that investors could reasonably expect that TSL would be able to manage each relevant scheme throughout its intended term; and
> (b) Each of TSL and TFL failed to disclose the *adverse matters* after they occurred as a substantial risk in connection with the relevant recent scheme.[50]

There followed allegations to the effect that the *financial representations* constituted misleading or deceptive statements in the Product Disclosure Statements; that the Product Disclosure Statements were *defective*; and that Timbercorp Securities, Timbercorp Finance and the directors were each a *liable person* under s 1022B(3)(b) of the Act.

200 These allegations invited the defendants to respond, as they did, by directing detailed evidence to management of the business risks, the state of mind of the board about the well-being of the Group and its future prospects, and in particular, their ability to respond to and manage the events that occurred in and after 2007, such as the tax announcements and the credit crisis.

Scheme contributions representations

201 The plaintiff further alleged that Timbercorp Securities and Timbercorp Finance made representations in the Product Disclosure Statements, and by reason of their relationship and common undertaking, that:

> (a) The scheme contributions equalled or exceeded the true cost of the establishment and ongoing management of that recent scheme;
> (b) The scheme members' payment of the scheme contributions would be applied to fund the relevant recent scheme;
>
> (c) The scheme contributions would be sufficient to fund the relevant recent scheme.[51]

202 The second of these representations was later transformed into a belief, expressed by the plaintiff, to the effect that all funds contributed by him would be ring fenced for his scheme, and would not be pooled with other funds of the Group. The plaintiff alleged that each of the representations was false or misleading in that:

> (a) At the time they were made, there was no reasonable basis for making them; and
> (b) The scheme contributions were not sufficient to fund the relevant recent scheme.[52]

203 The basis for these allegations seemed to involve the assumption that each scheme would be economically isolated from the fortunes of other schemes and the Timbercorp Group as a whole. The plaintiff's assumption seemed to imply that contributions would not form part of the income revenue stream of the Timbercorp Group, but would be retained, perhaps earmarked or even held upon trust, to be devoted only to the support and maintenance of his scheme objectives. The particulars relied upon yield of no other conclusion.

204 The plaintiff relied on the fact that the administrators of the Timbercorp Group had no funds with which to continue management of the schemes; that funds paid by scheme members to Timbercorp Securities were not set aside or paid directly to Select Harvests Limited, the entity responsible for maintaining, marketing and selling harvesting [sic] almonds; that the Group operated all scheme cash flows through a central bank account; and that expenses paid in respect of one scheme were used to fund the operations of another or other expenses of the Timbercorp Group.

205 The difficulty for the plaintiff in this part of his case was three-fold. First, his assumption was inconsistent with the content of the Product Disclosure Statement and the financial information that was generally available about the Group. Second, it was inconsistent with his claim to have read the Product Disclosure Statements; and third, it was inconsistent with his reliance case based on the financial strength of Timbercorp.

Conduct by silence

206 The conduct by silence, on which the plaintiff relied, was the failure of Timbercorp Securities, Timbercorp Finance and the directors to inform scheme members of the impact of the tax announcement, the Global Financial Crisis, the near insolvency event in early 2008, and its breach of loan covenants in September 2008.[53] These matters were, with the exception of the going concern warning, the adverse matters relied upon as the foundation for the allegations of breach of statutory duty. Thus, the plaintiff's case for misleading or deceptive conduct by silence depended upon the same factual matrix as the allegations of breach of statutory duty.

March 2008 representations

207 The March 2008 representations give life to an allegation found within a chronology of events which included the adverse matters. It was alleged that on 5 March 2008 the directors passed resolutions, in their capacities of directors of Timbercorp Securities, declaring that, during the financial half year ended 31 December 2007, there was no significant change in the state of affairs of the schemes; and that there had not been any matter or circumstance other than referred to in the financial statements or notes, that had arisen since the end of the financial year, that had significantly affected, or may have significantly affected the operations of the schemes. These statements were alleged to be false or misleading. The plaintiff alleged:

> The March 2008 representations were false and/or misleading in that:
> (a) by reason of the *adverse matters* alleged in paragraphs 14 and 15 above, during the financial half-year ending 31 December 2007, there was a significant change in the state of affairs of the schemes because each of the *adverse matters* constituted a significant adverse change in TSL's capacity to continue to operate the schemes; and
>
> (b) by reason of the matters alleged in paragraphs 14 to 15A above, there were matters that had arisen since of the end of the financial half-year that had significantly affected, or may have significantly affected, the operations of the schemes, the results of those operations or the state of affairs of the schemes in future financial years in that each of the matters alleged in paragraphs 14 to 15A significantly and adversely affected TSL's capacity to continue to operate the schemes. [54]

Paragraphs 14, 15 and 15A, mentioned in paragraph 65 of the statement of claim are the *tax announcement*, the *Global Financial Crisis* and the *near insolvency* events.

September 2008 representations

208 A similar allegation, found in chronological order amongst the adverse matters, was that on or about 12 September 2008 the directors made declarations to the same effect as those made on 5 March 2008. The plaintiff alleged that the declarations were false or misleading. He alleged that:

> The September 2008 representations were false and/or misleading in that:
> (a) by reason of the matters alleged in paragraphs 14 to 16 above, during the financial year ending 30 June 2008, there was a significant change in the state of affairs of the schemes in that each of the matters in paragraphs 14 to 16 constituted a significant adverse change in TSL's capacity to continue to operate the schemes; and
>
> (b) by reason of the matters alleged in paragraphs 14 to 16, there were matters that had arisen since of the end of the financial year that had significantly affected, or may have significantly affected, the operations of the schemes, the results of those operations or the state of affairs of the schemes in future financial years in that each of the matters in paragraphs 14 to 16 significantly and adversely affected TSL's capacity to continue to operate the schemes. [55]

Paragraphs 14 to 16, mentioned in paragraph 69 of the statement of claim are the *tax announcement*, the *Global Financial Crisis*, *near insolvency* and *breach of loan covenant* events.

February 2011 amendments

209 In February 2011 the plaintiff applied for leave to further amend his statement of claim, by incorporating a series of allegations under the heading Non-Disclosure in Relation to Financial Structure and Operations of Timbercorp Group. One consequence of the amendments was to extend the period of factual analysis so as to commence on 4 April 2000. The initial period (the Relevant Period) commenced with the tax announcement, on 6 February 2007. The new period was referred to as the longer period.

210 The general structure of the new pleading, found at paragraphs 75A to 75R, was to link the viability of the schemes to the economic wellbeing of the Group. While the financial structure allegations made in paragraph 75A were expressed too generally or were incomplete they were not strongly challenged by the defendants. Some of the allegations summarised information derived from Annual Reports and scheme documents.

211 The plaintiff alleged that the continued operation of each scheme depended on the ability of the Group to meet scheme costs and expenses from a its cash flow, and that dependency made the schemes vulnerable to the cash flow of the Timbercorp Group.[56] He alleged that the Timbercorp Group's primary sources of positive cash flow were receipts from scheme members, loan securitisation and borrowings from external lenders. The plaintiff might have, but did not include, equity raising and asset sales.

212 The next step in the financial structure case was the allegation that in most years from 30 June 2000, and in particular for the financial years ended 30 September 2006, 30 September 2007 and 30 September 2008, the Group operating cash flow was negative. The phrase operating cash flow, is a term of art which, for the purpose of preparing accounts, meant that from the financial year ended 30 September 2005, the Group did not include cash from the securitisation of investor loans as part of its operating cash flow. That did not mean, however, that the Group did not derive a positive cash benefit from securitisation. Nevertheless, the plaintiff drew a distinction between cash flow and operating cash flow for the purpose of this part of the pleading.

213 The plaintiff alleged that the capacity of Timbercorp Securities to meet scheme costs and expenses, depended upon the financial viability of the Group and each scheme operated by the Group, and in particular, the Group maintaining cash flow sufficient to meet those expenses from ongoing payments by scheme members of scheme contributions, the repayment of their loans from Timbercorp Finance, the proceeds from the securitisation of loans, and external funding.[57] There was no mention of equity raising or asset sales. This dependency, it was alleged, meant that when entering into a scheme, agreeing to pay scheme contributions and borrowing from Timbercorp Finance:

> scheme members became exposed to any risks associated with the maintenance of cash flows of the Timbercorp Group which risks included:
> (a) A failure of other scheme members to make scheme contributions to TSL and/or where relevant, to repay loans to TFL;
>
> (b) The capacity of the Timbercorp Group to obtain and/or service external funding;
>
> (c) The availability to the Timbercorp Group of securitisation of loans.[58]

214 The plaintiff alleged that exposure to these risks was material to any decision by a person to invest in a scheme and constituted a significant risk associated with holding an interest in a scheme. The allegations were plainly designed to invoke ss 1013D(1)(c) and 1013E of the Act.

215 In paragraph 75H, the plaintiff alleged actual knowledge by each of Timbercorp Securities, Timbercorp Finance and the directors of each of the matters alleged in paragraph 75A to 75G. That is, the financial structure case, including the risk associated with the maintenance of cash flows of the Timbercorp Group. He went on:

> and in particular that the dependence of scheme member investments on maintenance of sufficient cash flows in the Timbercorp Group to meet TSL scheme costs and expenses was inherent in the Timbercorp Group's financial arrangements and business model.

216 What was plain from the pleading was that the financial structure case advanced by the plaintiff, in which a new significant risk was identified, concerned a risk associated with the maintenance of cash flows. Thus, the weakness identified in the business model which the plaintiff alleged ought to have been disclosed in each prospectus between 4 April 2000 and 11 March 2002, and thereafter in each Product Disclosure Statement, was a risk that the Group would experience adverse cash flows from particular causes, and thus be unable to maintain the schemes. The threat to the Group's cash flow arose, according to the pleading, because there was a risk that members may not make their contributions or repay loans, that the Group would be unable to renew, obtain or service its external funding arrangements, and a risk that the Group would not be able to derive sufficient cash through loan securitisation.

217 These financial risks, identified in paragraph 75F of the statement of claim, were addressed by the parties in their evidence and through their cross-examination, including the joint report of the experts.

218 The financial structure case advanced in paragraph 75A to 75R of the statement of claim did not depend upon the happening of one of the adverse matters to require disclosure. That is plain enough because the plaintiff extended the disclosure obligation back to 4 April 2000. The obligation was to disclose a theoretical business risk.

219 The plaintiff alleged that Timbercorp Securities failed to disclose the risks in each Product Disclosure Statement or prospectus, which made each Product Disclosure Statement defective and each prospectus contravene s 710 of the Corporations Law. The plaintiff further alleged that the failure of Timbercorp Securities to disclose those facts and to remain silent was conduct by them that was misleading or deceptive in contravention of s 52 of the Trade Practices Act until 11 March 2002; s 9 of the Fair Trading Act until 23 April 2009; s 1041H of the Corporations Act from 11 March 2002 to 23 April 2009; s 995 of the Corporations Law until 11 March 2002; and s 12DA of the ASIC Act from 11 March 2002 until 23 April 2009.

220 In paragraph 75Q the plaintiff alleged that if any of Timbercorp Securities, Timbercorp Finance or the directors had disclosed the financial structure or business model before he or group members acquired an interest in a scheme, they would not have acquired the interest and would not have borrowed from Timbercorp Finance. He alleged that because of the contraventions by the defendants, he and group members acquired interests in the schemes, suffered loss and damage because of the collapse of the Group, and may be liable for further payments of principal and interest to Timbercorp Finance. The plaintiff claimed to be entitled to remedies under the Corporations Act, ASIC Act, Fair Trading Act, and, for the period prior to 11 March 2002, the Corporations Law and the Trade Practices Act.

Particulars

221 The next phase of this analysis concerns the particulars delivered on behalf of the plaintiff and Mr Van Hoff. The particulars delivered on 6 and 8 April 2011 were an important development in the plaintiff's case. Of particular importance were the particulars dated 8 April 2011, in which the plaintiff set out the information he alleged should have been included in each Product Disclosure Statement relevant to the investments by Mr Van Hoff and himself. In relation to the 2007 Almond scheme Product Disclosure Statement and supplementary Product Disclosure Statement the plaintiff contends that four categories of information were required to be disclosed. He described the information in the following terms: the exposure risk information; the tax decision information; the credit deterioration and the non-completion risk information.

222 The exposure risk information, which the plaintiff alleged the 2007 Almond Scheme Product Disclosure Statement and supplementary Product Disclosure Statement should have included, was as follows:

> When acquiring interests in the project and/or borrowing from Timbercorp to meet scheme contributions, the grower is exposed to the risks associated with the Timbercorp Group continuing to be financially viable and maintaining sufficient cash flows to meet the scheme costs and expenses of each scheme as they fall due. These risks include:
> (a) a failure of other growers in this scheme and/or growers who invest, or have invested in other schemes of which Timbercorp Securities Ltd (**TSL**) or another entity in the Timbercorp Group is the responsible Entity to make scheme contributions to and/or, where relevant, to repay loans to Timbercorp Finance Pty Ltd (**TFL**) or any other entity in the Timbercorp Group which lends money to growers;
>
> (b) the ongoing capacity of the Timbercorp Group to obtain and/or service external funding including from banks and other financial institutions;
>
> (c) the ability of the Timbercorp Group to securitise loans made by TFL (or another Timbercorp entity) to growers to finance their scheme contributions. The effect of securitisation is to enable the Timbercorp Group to receive a substantial portion of such loans on an up-front basis and the balance on a deferred basis.

The exposure risk information is closely aligned with the expression of the *structural risk* described in paragraph 75F and 75H of the statement of claim.

223 The tax decision information, credit deterioration information and non-completion risk information related to three of the adverse matters mentioned in paragraphs 13, 15 and 15A respectively. The tax decision (sometimes referred to as the tax announcement) information, which the plaintiff alleged should have been included in the 2007 Almond scheme Product Disclosure Statement, and the supplementary Product Disclosure Statement, is as follows:

> On 6 February 2007, the Commonwealth Government announced that from 1 July 2007, the tax law would no longer allow upfront tax deductions to be claimed in respect of investments in and payments to non-forestry managed investment schemes (**the tax decision**). The tax decision had an immediate material and negative impact on the Timbercorp Group's cashflows, revenues and profits. This impacts on the Timbercorp Group's financial position and there is a risk that it could affect the Timbercorp Group's ability to see the project through to completion.

224 The credit deterioration (sometimes referred to as the Global Financial Crisis) information which the plaintiff alleged should have been included in the 2007 Almond scheme Product Disclosure Statement and supplementary Product Disclosure Statement was as follows:

> In late 2007, there was a substantial deterioration in credit and financial markets worldwide which materially:
> (a) limited the Timbercorp Group's ability to raise capital;

> (b) restricted the Timbercorp Group's access to credit and prevented the Timbercorp Group from refinancing or extending its existing loan facilities;
>
> (c) depressed the value of Timbercorp Group assets; and
>
> (d) restricted the Timbercorp Group's ability to sell assets
>
> These circumstances impacted on the Timbercorp Group's financial position and there is a risk that they could affect the ability of TSL and the Timbercorp Group's to see the project through to completion.

225 The non-completion risk (sometimes referred to as the near insolvency) information which the plaintiff alleged should have been included in the 2007 Almond Scheme Product Disclosure Statement and supplementary Product Disclosure Statement is as follows:

> Since early 2008, the Timbercorp Group has been in significant financial difficulty and there is a risk that the Timbercorp Group will not able to see this project through to completion and will not be able to manage any other project or future project through to completion.

226 The plaintiff alleged that the 2007/2008 Timberlot Product Disclosure Statement should have included the exposure risk information; and from February 2007 there should have been issued a Supplementary Product Disclosure Statement which included the tax decision information; from late 2007 a Supplementary Product Disclosure Statement should have issued which included the credit deterioration information; and in early 2008 there should have been issued a Supplementary Product Disclosure Statement which included the non-completion risk information. The plaintiff alleged that the Supplementary Product Disclosure Statements that were issued in relation to the 2007/2008 Timberlot project should also have included that information. In relation to the 2008 Olive project, the plaintiff alleged that it should have included each category of information.

227 In relation to the alleged breach of loan covenants around September 2008, the plaintiff contended that he should have been informed:

> That the Timbercorp Group was, or would be, in breach of certain loan covenants unless its financiers waived the covenants and that this event impacts on Timbercorp Group's financial position and there is a significant risk that it could affect the Timbercorp Group's ability to see the project through to completion.

228 In relation to the going concern doubts, the plaintiff alleged that he should have been informed, to the effect or substance that:

> (i) the auditors of the Timbercorp Group would have qualified their report but for the mitigating factors referred to as pp 51-52 of the Annual Report ...; and
> (ii) if the mitigating factors do not eventuate, there is a material uncertainty about the Timbercorp Group's ability to continue as a growing concern,
>
> and that this event impacts on the Timbercorp Group's financial position and there is a significant risk that it could affect the Timbercorp Group's ability to see the project through to completion.

The reference to the mitigating factors in the Annual Report concern intended assets sales by the Group. The auditors stated that having assessed the uncertainties relating to the asset sales, the directors believed that the Group will continue as a going concern. The conditions contemplated the possibility that the asset sales and consequent repayment of debt, would not proceed as planned, in which case there was a material uncertainty in relation to the Group's continued operation as a *going concern*.

229 The disclosure obligations in relation to the plaintiff and Mr Van Hoff were different only insofar as the timing of their respective investments influenced the timely disclosure of information. They may be conveniently dealt with at the same time. The formulation, by the plaintiff, of the information that was required to be disclosed, subject to the time of investments, was identical.

230 The particulars further provided that each of the adverse matters should have been notified to the plaintiff as soon as practicable after the event occurred, together with the corresponding tax decision information, credit deterioration information, non-completion risk information. In relation to the adverse matters concerning the breach of loan covenants, the plaintiff alleged that information should have been provided to the effect that unless the financiers waived the covenants there was a significant risk that a breach could affect Timbercorp Group's ability to complete scheme obligations.

The plaintiff's opening submission

231 In his opening submissions, senior counsel for the plaintiff immediately focussed upon a new formulation of a structural risk, which came to be known as the financing risk or fragile business model risk by the time of closing submissions. He submitted in opening:

> It's fundamental to the plaintiff's case that this financial structure was inherently unstable. It necessarily depended on the group being able to raise substantial and increasing amounts of capital, either by way of debt or equity, to fund the cost of establishing and operating existing and new projects. The Timbercorp Group, it seems, recognised internally this financial instability from at least 2004 when a SWOT analysis and risk profiles generated by the group or for the group emphasised as major risks the following things, amongst others: a change to the taxation law concerning horticulture projects, the group's ability to service debt, the group's access to debt and capital and inappropriate cash planning.
>
> Because of the risks inherent with this intrinsically unstable structure, when each of the adverse events occurred, which are referred to in the pleadings, the impact on the financial position of the group was greater than it might otherwise have been. When the tax office announced a decision on 6 February 2007 in connection with horticultural projects, the effect within the Timbercorp Group was electric.

232 The balance of the opening submissions was substantially devoted to demonstrating an awareness by the board of the financing risk, and of the significance of the adverse matters, or some of them, to the viability of the Timbercorp Group. Thus, the plaintiff's case was, in substance, that the defendants knew of and ought to have disclosed the financing risk, and with the happening of each adverse matter, disclosed its impact on the fragile business model of the Group.

The plaintiff's case in a nutshell

233 The apparent concentration of the plaintiff's case in the opening provoked an invitation from the Court to prepare a brief statement of his case, clarifying precisely what he contended should have been disclosed. He provided such a statement, entitled Plaintiff's case in a nutshell. He submitted that each Product Disclosure Statement should have included specific information about the facts which gave rise to the risks of the Group failing and not being able to see out the terms of projects. He submitted that Product Disclosure Statement should have disclosed that the Timbercorp Group was critically dependent on its ability to increase its short term borrowings, its ability to continue to raise equity and to sell capital assets in a timely manner. He submitted each Statement should have disclosed that if capital or debt markets tightened, there was a real risk that the Group would fail and the projects would fail with it. He submitted that disclosure of the overarching, or structural risk, should have been supported by information about the increasing levels of short term debt and the risk that the debt could not be refinanced or replaced. The plaintiff submitted that, following the occurrence of each adverse matter, a Statement should have been released that disclosed the true impact of the event and like information should have been provided to existing investors.

234 Even after his amendment in February 2011, the structural risk, and each adverse matter stood alone as requiring disclosure. The significance attaching to each adverse matter was not dependent on the structural risk. That position changed, however, as the case advanced at trial. The change found expression in the plaintiff's opening submissions, and ultimately in Key Propositions (3), (4) and (5).

235 Furthermore, until trial, the structural risk involved the dependency of the Group on cash flows, and factors that might adversely affect cash flows – grower default, the Group's ability to obtain and service debt funding, and its ability to securitise loans. That much was clear from paragraphs 75F and 75H and the particulars dated 8 April 2011.

Significance to the case preparation

236 In my opinion, the plaintiff's case at trial diverged in at least two important respects from the pleaded and particularised case, and even from the plaintiff's own evidence. One significant shift was the diminished importance of the adverse matters as stand alone risks. They achieved their materiality from the financing risk. Another change was the transition from the structural risk, as expressed in the statement of claim, to the financing risk, expressed in Key Proposition (3).

237 There was some connection made between the adverse matters and the structural risk in the statement of claim, introduced by the plaintiff's particulars, dated 8 April 2011. The particulars attributed significance to the adverse matters. For example, it was alleged in the particulars that the tax announcement had an immediate material and negative impact on cash flows, revenues and profits of the Group, and that there was a risk that it could affect the Group's ability to perform its contractual obligations to scheme investors. That, in turn, invited an analysis of whether the events described as adverse matters were events or circumstances that required disclosure; whether they were generally available information; and an examination of the impact of the decision on cash flows, revenues and profits, in order to understand its significance to the Group in terms of its ability to manage and fund projects. Because actual knowledge of such risks was a necessary ingredient, the conduct, perceptions and risk management activity of the board was a live issue. Thus, the directors advanced a case which involved a detailed analysis, on a meeting by meeting basis, of how various risks were identified, managed and mitigated.

238 The plaintiff's new case advanced at trial was, in my view, an attempt to sidestep much of the defendants' case directed to the disclosure of information, risk management and continuing bank support; and instead concentrate, at a much more high level, on a theoretical case in which disclosure of the fact of an adverse matter and the ability of the board to manage risks was of little or no consequence. Thus, even if the adverse matter had been wholly disclosed or the information in relation to it was generally available, the plaintiff could nevertheless argue that the fragile business model must be explained in each Product Disclosure Statement; and, with the happening of the event, it became necessary to explain to potential and existing investors its impact on the fragile business model.

239 The most significant shift in the plaintiff's case was the change in composition of the structural risk, as pleaded and particularised. According to the particulars, it was a risk associated with the Timbercorp Group continuing to be financially viable and maintaining sufficient cash flows to meet the scheme costs and expenses. The maintenance of cash flow was susceptible to three forces: first, that scheme members might not make scheme contributions and loan repayments. In other words, a risk that investors would default on their contractual obligations to pay money to the Group. Second, the capacity of the Group to obtain and service external funding from banks and other financial institutions. In other words, their ability to procure and manage debt finance, and the relationship with bankers. Third, the Group's ability to access cash through the securitization of grower loans. This was in reality another aspect of its banking relationship and debt financing.

240 The components of the structural risk as pleaded were confirmed in the particulars dated 8 April 2011. In that regard there was no ambiguity about what case the defendants must meet. The defendants' response was perhaps best expressed in concessions derived during cross-examination from the plaintiff's expert, Mr Dicks.

241 The plaintiff made no challenge to the capacity and capabilities of the board to management the Group. Apart from the failure of the defendants to disclose certain information to prospective and existing investors, there was no criticism of the board, save for a veiled allegation that banks should have been provided some additional

information. The plaintiff did not suggest that any officer of a group company was dishonest or that the accounts and reports prepared or authorised by the board were not accurate.

242 In the joint report prepared by Mr Dicks, Mr Hill and Mr Honey, they were asked to respond to the following question:

> The date from when it should have first been apparent to TSL's directors and officers that TSL was facing financial difficulty.

Mr Dicks said that from a financial performance perspective, it was not possible to conclude that the Group was facing financial difficulty during the *Relevant Period*, that is from 6 February 2007. He did, however, point to a number of signs suggesting performance was on the decline, which he said was apparent during the 2007 financial year. Mr Dicks expressed the opinion that from a trial balance sheet perspective, the Group was showing signs of financial difficulty as at 30 September 2008. The term, *financial difficulty*, was an unnecessary encumbrance imposed on the experts. Mr Dicks said that in his view a company was in *financial difficulty* when at some point in the foreseeable future, there was a prospect that the company would not be able to pay its debts when they fell due. He acknowledged that *financial difficulty* should not be confused with *insolvency*.

When analysing *financial difficulty*, Mr Dicks highlighted what he described as *warning signs* that threatened key performance drivers of the Group, which in turn led to the Group experiencing trading difficulties and cash flow shortages during the *Relevant Period*. In Mr Dicks' opinion a company could be experiencing *financial difficulty* even though it maintained the support of its bankers. It was in that context that Mr Dicks expressed his opinion that as at 30 September 2008 the Group was showing signs of financial difficulty from a balance sheet perspective. He listed some matters which he said supported that conclusion. One such item was

> A significant increase in the level of direct debit rejects for monthly principal and interest loan repayments from early FY08.[59]

Under cross-examination Mr Dicks conceded that although there had been an increase in the number of failed direct debit transactions, in terms of the total value of the loan book, the change was not material.

243 A further matter relied upon by Mr Dicks to support his opinion that, at 30 September 2008, the Group were showing signs of financial difficulty was

> An 83% and 68% increase in the provision for doubtful debts in 2007 and 2008 respectively.[60]

Under cross-examination Mr Dicks had his attention directed to an internal memorandum from the Chief Financial Officer to the Chief Executive Officer dated 16 July 2008 which contained an analysis of loan arrears. In January 2007 the loan amount in arrears represented 2.12% of the total loan book, rising slightly throughout the first half of 2007, then levelling at around 2% until the end of that year; rising to 2.61% in April and May, and then settling to 2.51% in June 2008. Mr Dicks agreed that the change in loan arrears was not *material*. He had expressed his opinion about the increase in the provision for doubtful debts by analysing the dollar amount in arrears without comparison to the overall loan book in order to assess materiality from a balance sheet perspective.

244 Other factors relied upon by Mr Dicks in expressing his opinion as to when the Group began to show signs of financial difficulty were:

> (f) Total borrowings increased by 39% from $671 million in FY06 to $936 million in FY08. The most significant increase occurred in FY07, where borrowings increased by 29% to $864 million.
> (g) The group was reliant on its bankers to continue to support the group through increased borrowings. There was evidence of covenant breaches as early as September 2007, which were waived by the banks.

(h) The group was highly geared (60% debt to capital ratio) during the period FY06 to FY08, compared to the industry average of 36%.

(i) With the exception of 31 March 2008, the group had a working capital ratio deficiency for each six month period from 31 March 2007 to September 2008. A further concern to Mr Dicks was the significant difference between TFPL's current assets and its current liabilities in both 2007 and 2008.

(j) To prevent potential breaches of covenants, the group requested various amendments to bank covenants during the period September 2007 to September 2008. In particular, the group was nearing breaches of interest cover ratios in FY07, and then breaching the interest cover ratio covenant in FY08 before this covenant was revised to a lower threshold.

245 The evidence disclosed that in late September 2007 one of the Group's lead bankers, HBOS, was informed that while the Group believed that it would comply with shareholder funds, gearing and interest cover covenants, it was likely to slightly exceed its leverage ratio covenant. The directors recognised a risk of non-compliance and notified to the bank. Notwithstanding the possible breach, the bank increased its level of support for the Group. In 2008 there was another occasion on which breaches of loan covenants were contemplated, arising out of the consequence to the Group from the anticipated sale of its forestry assets to Harvard Management Company. The risk of breach was recognised and the directors sought waivers from its bankers in relation to interest cover ratios and leverage ratios. They recognised that the sale would crystallise a loss based upon a difference between the book value of the assets and sale price. Mr Dicks seemed unaware of the background circumstances to the anticipated breaches. He said that he did not have the relevant material at his disposal and had been under time pressure; yet he was willing to express opinions as to the significance of the breaches or anticipated breaches to the balance sheet as events demonstrating financial difficulty.

246 The lack of materiality of investor defaults and the willingness of the banks to increase their level of support for the Group until the end of 2008, had the effect of eroding the content of the structural risk as pleaded and particularised by the plaintiff.

247 Another indicator of the significance of the plaintiff's refashioned case at trial was evident in the questions framed for the expert witnesses on both sides. The plaintiff's expert, Mr Dicks, effectively set the agenda. Mr Dicks was asked the following questions:

(1) When, if at all, it should have been first apparent to TSL's directors and officers that TSL was facing financial difficulty, and the cause of that difficulty?
(2) When, if at all, it was or should have been first apparent that there was a significant possibility of TSL facing difficulty of paying its debts as and when they fell due and the cause of that difficulty?

(3) When, if at all, it was or should have been apparent that the Schemes in which the lead plaintiff invested were facing financial difficulty and the cause of this difficulty?

(4) Whether at any time TSL acted contrary to its financial and accounting obligations as the RE.

(5) Was the Timbercorp Group nearing insolvency in early calendar 2008?

(6) Was there a significant risk that the Timbercorp Group would not have the financial capacity to manage any of the Schemes throughout their contemplated duration?

(7) Was there a significant risk that TSL would be incapable of continuing to provide services as RE for the duration of each scheme then in existence or for future schemes?

(8) Was Timbercorp's financial structure and operations as alleged in paragraph 75A of the statement of claim in the relevant period?

(9) Were the investments in the TSL Schemes vulnerable to the cash flow of the Timbercorp Group during the relevant period in the manner alleged in paragraph 75B of the statement of claim?

(10) During the relevant period, were the group's cash flows and sources of cash flow as alleged in paragraph 75C of the statement of claim?

(11) During the relevant period, was the safety and prospects of each scheme members investment in a TSL Scheme, and the prospects of the scheme member receiving any returns from the Scheme, dependent on TSL and other relevant companies in the group meeting the scheme costs and expenses?

(12) During the relevant period, was the capacity of TSL and other relevant companies in the group to meet the scheme costs and expenses dependent on:

(a) the ongoing financial viability of the group and each scheme operated by the group;
(b) the group maintaining cash flow sufficient to meet those expenses from:

(i) ongoing payments by scheme members of scheme contributions and principal and interest on their loans from Timbercorp Finance;

(ii) the proceeds from the securitization of loans; and

(iii) external funding?

(13) During the relevant period, as alleged in paragraph 75F of the statement of claim, were scheme members exposed to any risks associated with the maintenance of cash flows of the Timbercorp Group including:

(a) the failure of the other scheme members to make scheme contributions to TSL and/or, where relevant, repay loans to Timbercorp Finance;
(b) the capacity of the group to obtain and/or service external funding; and

(c) the availability of the group of securitization of loans.

(14) During the relevant period, was the fact of exposure to the risks alleged in paragraph 75F of the statement of claim:

(a) material to any decision by a person to invest in a TSL Scheme;
(b) a significant risk associated with holding an interest in a TSL Scheme?

248 The questions posed for Mr Dicks were plainly difficult to answer. Concepts such as facing difficulty and facing financial difficulty were undefined and unhelpful. The expression nearing insolvency was unhelpful. The Joint Experts Report also struggled under the burden of the badly framed questions. How was Mr Dicks to decide what was a significant risk? In my view the questions formulated for answer by Mr Dicks were almost all wholly inappropriate.

249 Some of the difficulty caused by the badly framed questions was eliminated in the joint report. The individual expert reports and the joint report were, of course, directed to the case as pleaded. Had the plaintiff intended to advance the financing risk or fragile business model risk case, the questions would have been materially different. Presumably, Mr Dicks would have been asked to direct his attention to the features of the business model employed by the Timbercorp Group. The defendants' experts would likewise have had their attention directed to such matters, including the new components of the risk – the banking relationship and asset sales. There might have been evidence about comparative business models and the impact on management capabilities.

250 Other indicators of the significance of the change in the plaintiff's case is evidence from his own witness statement evidence and that of Mr Van Hoff. For example, the plaintiff said that he was not aware of the tax announcement. He said that Timbercorp did not inform him of the effect of the Global Financial Crisis on the business, or that it was near insolvency in early 2008. The plaintiff said, making specific reference to paragraph 75A to 75G, that he was not aware of the financial structure of Timbercorp and the way it was run. He said that he believed that Timbercorp was a multi-billion dollar company and that it would not fail. He continued:

> Had I known that the Timbercorp structure was inherently risky and the funds I had invested were not necessarily being used for the specific project in which I was investing, or that my funds were being used to keep the Timbercorp Group going, I would never have invested in any project with Timbercorp in the first place.

251 The evidence of Mr Van Hoff was to like effect. After making specific reference to paragraph 75A to 75G, he said that he was not aware of the financial structure of Timbercorp or the way it was run. He continued:

> If I was aware of these matters, I would not have invested in the first place. If there was the slightest inclination of danger, I would not have invested in Timbercorp. If I had become aware of the way that Timbercorp was structured and the risks associated with such a structure after I had already invested, I would have sought advice... as to an exit strategy so that I could cut my losses and exit the projects.

252 In relation to the adverse matters, Mr Van Hoff said that, while he was aware of the tax announcement, he was never told of its impact on the Timbercorp Group as a whole. Although he was aware of the financial crisis in 2007, he said that he did not recall having any discussions with any Timbercorp representative about the issue and was never told by anyone at Timbercorp as to how the crisis had specifically impacted them. He said that he was never told that Timbercorp was nearing insolvency, was in breach of loan covenants or of the uncertainty about the Group's ability to continue as a going concern.

253 Given the general thrust of their evidence, the plaintiff and Mr Van Hoff would no doubt have used similar expressions of alarm about the fragile business model or financing risk as expressed in Key Proposition (3), had they been asked to respond in evidence to its significance to them as potential investors. But that is not what they were asked to do or gave evidence about. In that respect their reliance evidence miscued.

254 Put shortly, when preparing his case for trial, the plaintiff did not set out to prove that the directors knew throughout the longer period that scheme investors were exposed to a risk associated with the failure of the Group during the currency of the projects, because the Group was critically dependent on its ability to maintain and increase its borrowings, its ability to continue to raise equity and to sell capital assets in a timely manner, so that if capital or debt markets tightened, there was a real prospect that the Group would fail.

255 In ASIC v Rich[61] Austin J set out the following principles concerning the significance of pleadings in a case where the defendant alleged a material change had been made by the plaintiff.

> **[158]** The following propositions seems to me to be uncontroversial:

1. As to pleadings:

(a) a properly pleaded statement of claim performs the functions of briefly and explicitly stating the material factual allegations which support the claim (Ritchie's Uniform Civil Procedure NSW, LexisNexis looseleaf, [14.2.10]), thereby:

(i) ensuring the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her (*Banque Commerciale SA, en liquidatien v Akhil Holdings Ltd* (1990) 169 CLR 279 ; [1990] HCA 11, at 286 per Mason CJ and Gaudron J; *Dare v Pulham* (1982) 148 CLR 658 ; [1982] HCA 70, per Murphy, Brennan, Wilson, Deane and Dawson JJ; *Macdonald v ASIC* (2007) 65 ACSR 299 ; [2007] NSWCA 304, at [47] per Mason P; *Re Robinson's Settlement; Gant v Hobbs* [1912] 1 Ch 717, at 728 per Buckley LJ);

(ii) defining the issues for decision *(Banque Commerciale*, at 286 per Mason CJ and Gaudron J; *Nowlan v Marson Transport Ltd* (2001) 53 NSWLR 116 ; [2001] NSWCA 346; *ASIC v Loiterton* [2004] NSWSC 172);

(iii) enabling the court to ascertain the facts forming the ingredients of the cause of action that has been dealt with in the proceedings (so that, for example, the matters subject to an issue estoppel can be identified: *Blair v Curran* (1939) 62 CLR 462 ; [1939] HCA 23, at 531 per Dixon J);

(b) generally, relief is confined to that available on the pleadings, securing the basic requirement of procedural fairness, and accordingly a case may be decided on a basis different from that disclosed by the pleadings only if the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities (*Banque Commerciale*, at 286-7 per Mason CJ and Gaudron J; *Dare v Pulham*, at 664; *New South Wales v Thomas* [2004] NSWCA 52; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 252 ALR 659 ; [2008] NSWCA 206, at [424] per Ipp JA, Giles and Hodgson JJA agreeing);

(c) there can be no suggestion that the parties have chosen a different basis for determination of this case, for ASIC has consistently maintained that the statement of claim constitutes its pleaded case (see Pleading Submissions, para 11), and the defendants have vigorously objected whenever they have detected what they regard as departures from the pleaded case;

(d) the statement of claim must contain only a summary of the material facts on which the party relies, and not the evidence by which those facts are to be proved, "material" meaning in this context material to the cause of action relied on (UCPR 14.7; *Darbyshire v Leigh* [1896] 1 QB 554; *Re Rica Gold Washing Co* (1879) 11 Ch D 36, at 43 per Jessel MR; *Kirby v Sanderson Motors Pty Ltd* [2002] NSWCA 44; (2002) 54 NSWLR 135, at [20] per Hodgson JA (Mason P and Handley JA agreeing));

(e) in a statement of claim, the plaintiff must plead specifically any matter that, if not pleaded specifically, may take the defendant by surprise, and that means that the material facts must be stated in such a way that the defendant can understand the materiality of the facts, that is how they are material to an asserted cause of action (UCPR 14.14(1); *Kirby v Sanderson Motors* (2001) 59 NSWLR 135 ; [2002] NSWCA 44, at [20] per Hodgson JA (Mason P and Handley JA agreeing); as to the equivalent provision about pleading a defence, see *Bright v Sampson and Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346, at 350 per Kirby P, 353 per Samuels JA).

2. As to particulars:

(a) the function of particulars is to define the scope of the evidence to be led at the trial, and to prevent surprise by giving the opposing parties sufficient information to enable them to know the nature of that evidence (*Pilato v Metropolitan Water Sewerage & Drainage Board* (1959) 76 WN (NSW) 364, at 365 per McClemens J; *Spedding v Fitzpatrick* (1888) 38 ChD 410, at 413-14 per Cotton LJ; *National Starch Co v Robert Harper & Co Pty Ltd* [1906] VicLawRp 2; [1906] VLR 8, at 12 per Hodges J; *Miller v Miller Auto Body Co Ltd* (1922) 39 WN (NSW) 201, at 203 per James J; *Grollo & Co Pty Ltd v Hammond* (1977) 16 ALR 123, at 126 per Northrop J; *Commercial Bank of Australia Ltd v Thomson* (1964) 81 WN (Pt 1) (NSW) 553, at 557-8 per Walsh J (with whom Wallace J agreed); *Ellis v Grant* (1970) 91 WN (NSW) 920 (Meares J); Ritchie, op cit, at [15.1.10]);

(b) a pleading must give such particulars of any claim as are necessary to enable the defendant to identify the case that the pleading requires him or her to meet (UCPR 15.1(1));

(c) the particulars to be given of a pleading that alleges negligence or breach of statutory duty (and hence, by analogy, a statutory cause of action under s 180 in civil penalty proceedings brought by ASIC) must state the facts and circumstances on which the party pleading relies as constituting the alleged negligent act or omission or the alleged breach of statutory duty, and must do so separately in respect of each alleged negligent act or omission or breach, though it is not necessary for the particulars to define the cause of action (UCPR 15.5; *Anchor Products Ltd v Hedges* (1966) 115 CLR 493 ; [1966] HCA 70, at 499 per Windeyer J; *McCormack v Gilchrist, Watt & Sanderson Pty Ltd* [1962] NSWR 462, at 464 the Richardson J; *Ivkovic v Australian Iron & Steel Ltd* [1963] SR (NSW) 598 (Sugerman, Manning and Else-Mitchell JJ); Ritchie, op cit at [15.5.5]).

> **[159]** The rules of court regarding pleadings and particulars can be dispensed with by the court under s 14 of the Civil Procedure Act 2005 (NSW), if the court is "satisfied that it is appropriate to do so". Section 14 was used to grant partial dispensation from pleading requirements of the rules because of the defendant's penalty privilege, in *Macdonald v ASIC* (2007) 65 ACSR 299 ; [2007] NSWCA 304. More generally, departure from the pleaded issues has been said to be a matter for discretion of the trial judge (*Ingot Capital*, at [425] per Ipp JA), having regard to the interests of justice including, in particular, procedural fairness (*Ingot Capital*, at [359] per Ipp JA). The courts had power to grant a dispensation from compliance with strict pleading requirements well before the introduction of the Civil Procedure Act, and they exercised that power having regard to the justice of the particular case. As Collins MR said in *Re Coles & Ravenshear* [1907] 1 KB 1 at 4:

Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

> **[160]** For more modern Australian authority on the considerations of justice, see *Hillier v Lucas* [2000] SASC 331, at [220]-[221] (Lander J, Duggan and Bleby JJ agreeing); *Minister for Immigration & Multicultural Affairs v B* [2000] FCA 930; (2000) 105 FCR 304 (Wilcox J); *Rishmawi v Minister for Immigration and Multicultural Affairs* [1977] FCA 611 (Kiefel J); *Zoia v Secretary, Dept of Education, Employment and Workplace Relations* [2009] FCA 661 (McKerracher J). It seems to me that in a case such as the present, when the issue is whether the court should dispense retrospectively with a failure by ASIC to comply with the rules (if such a failure is shown), that a crucial question will be whether the defendants have been significantly prejudiced by the non-compliance.
> **[161]** The defendants did not submit that the statement of claim failed to comply with the requirements for pleading that I have set out above, but rather that its evidentiary case and submissions at the hearing have impermissibly strayed from the pleading and particulars, and to that extent its evidence should be excluded and its submissions disallowed. They do not make a submission about defective pleading, but about the undisciplined presentation of the pleaded case and the failure to give adequate particulars in compliance with UCPR 15.1. Principles about the purpose of pleadings and particulars are relevant to their argument because they show that pleadings and particulars are designed to permit the other party to be informed in a timely way of the case to be answered, and to avoid the element of surprise. The defendants submitted, in effect, that these objectives have not been achieved in the present case.
>
> **[162]** The defendants referred to three matters that, they said, strengthen the argument for holding a plaintiff to its pleaded case (DPS [127]-[128]), relating to cases where:

the litigation is large and complex, with serious consequences for the defendants if the plaintiff succeeds, and the parties are required to incur very substantial costs, as in this case;
the plaintiff is a "model litigant", as ASIC is said to be; and
the courts have turned their face against any form of "trial by ambush".

> **[163]** As to the size and complexity of litigation, in *Edingbay Pty Ltd v Horwath (Vic) Pty Ltd* [1999] VSC 317, Hansen J said (at [62]):

The role and importance of the pleadings in identifying the issues which are in dispute and which require a determination is critical, and all the more so in massive litigation involving huge costs of the type which these parties have engaged in. It would conduce to mischief and possible scandal in my view if the true role of pleadings in the fair administration of justice was to be disregarded in circumstances such as the present.

> **[164]** The kind of mischief that can arise in lengthy and complex commercial proceedings if the plaintiff is not held to its pleaded case was explained by Tamberlin J in *Patrick v Capital Finance Pty Ltd* [2003] FCA 206 at [10], as follows:

The conduct of a lengthy complex commercial proceeding, such as the present, may, as the case is prepared and progresses, involve fine assessments as to what documentary or oral evidence ought to be adduced and as to whether or not to cross-examine a witness. If it is thought desirable to cross-examine, then decisions need to be made and instructions obtained as to the nature and extent of the cross-examination. In the effective presentation of a case, these matters are decided by the specific issues raised in the pleadings. If there are substantial variations in the issues raised, then the way in which the case is conducted may be significantly different. Often, but not always, at the close of proceedings, to permit significant amendments that raise issues which, practicably, cannot be effectively addressed, may cause substantial injustice to the other parties. This principle is of particular significance in the present case where the application to amend is sought at the close of evidence in circumstances where extensive amendments were permitted prior to and after the commencement of the hearing.

> **[165]** Of course, in the present case there is no application by ASIC to amend its statement of claim; indeed, ASIC firmly asserts that its evidentiary case falls within the ambit of its pleaded case. But the mischief identified by Tamberlin J can arise where there is no application to amend, if the plaintiff seeks to adduce unexpected evidence or to make an unexpected argument outside its pleaded case after the defendants have set their strategy.
> **[166]** As to the significance of the fact that ASIC as a government agency is expected to be a model litigant, in *Scott v Handley* [1999] FCA 404 the Full Federal Court (Spender, Finn and Weinberg JJ) noted that a respondent to the proceedings was an officer of the Commonwealth, and "as such he properly is to be expected to adhere to those standards of fair dealing in the conduct of litigation that courts in this country have come to expect -- and where there has been a lapse therefrom, to exact -- from the Commonwealth and from its officers and agencies". Their Honours later continued (at [45]):

As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligation of "conscientious compliance with procedures designed to minimise cost and delay" ... ; and of assisting "the court to arrive at the proper and just result" ... And they have spoken, negatively, of not taking purely technical points of practice and procedure ... ; of not unfairly impairing the other party's capacity to defend itself ... ; and of not taking advantage of its own default ...

> **[167]** As to concerns about "trial by ambush", the defendants do not contend that ASIC has deliberately concealed its true case or deliberately allowed the defendants to proceed in ignorance of it, but rather that it has not disclosed its true case in a timely

fashion through its statement of claim and particulars, and consequently the defendants have been prejudiced because their conduct of the trial has been strictly on the basis of the pleaded case. They have referred to cases in which courts have expressed particular concern about the practice of "leaving footprints to be uncovered later in an attempt to say that a matter was always in issue": *White v Overland* [2001] FCA 1333, at [4] per Allsop J; *Pacific National (ACT) Ltd v Queensland Rail* (2005) 215 ALR 544 ; [2005] FCA 535, at [47]-[49] per Jacobson J; *Nowlan v Marson Transport Pty Ltd* (2003) 53 NSWLR 116 ; [2001] NSWCA 346, at [28] per Heydon JA (with whom Mason P and Young CJ in Eq agreed). Concern about this practice extends to "footprints" in correspondence and also, as Jacobson J indicated in *Pacific National* at [49], the opening of the case. Presumably it also extends to interpretations of the evidence advanced in final submissions.

[168] In my view this is not case where ASIC can be fairly accused of "leaving footprints" to provide a foundation for subsequently contending that unpleaded matters are in fact in issue. As I have said, ASIC has always relied on the statement of claim as its pleaded case (subject to an application to amend with respect to non-UK European creditors, rejected in *ASIC v Rich* [2005] NSWSC 940), and the defendants have objected whenever they have detected what they regarded as deviation from the pleaded case. But the case law has a more general relevance: in civil penalty proceedings brought by a model litigant, the court should not allow the case to change shape during the trial without any proper reconsideration of the pleadings, if there is an identifiable risk of prejudice to the defendants in terms of having a fair opportunity to meet the case presented against them. In the words of Allsop J in *White v Overland*, at [4]: "it should always be recognised that in the propounding of issues for trial the parties should take steps to ensure that all relevant parties to the dispute are cognisant of what the issues are".

[169] The correct approach to civil litigation is now a "cards on the table" approach and the "ambush theory of litigation" is dead, as Ipp JA said in *Glover v Australian Ultra Concrete Floors* [2003] NSWCA 80 at [60], observations cited with approval by Jacobson J in *Pacific National* at [50], and by Bergin J in *ASIC v Loiterton* [2004] NSWSC 172 at [39]; see also *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2003) 53 NSWLR 116, at [21]-[32] (with which Mason P and Young CJ in Eq agreed). *ASIC v Loiterton* deserves particular attention in the present case because it is a civil penalty case brought by ASIC, in which Bergin J referred to ASIC's duty of fairness to the defendants and the importance of ensuring that the prosecution case has clarity and is fair, all the more so because the proceedings are civil penalty proceedings (at [38]-[39]).

256 In my opinion, the change in the plaintiff's formulation of the structural risk, transforming the cash flow risk as pleaded into the financing risk or the fragile business model risk, involved a material change in his case. The defendants rightly complained about the change. While the evidence that was given by the experts and lay-witnesses, including the reliance evidence given by the plaintiff and Mr Van Hoff, might be said to be generally relevant to the new case, it was not directed at addressing the financing risk case and its components. The change that was made by the plaintiff to his case, at trial was perhaps understandable, but it is not permissible. No application to amend was made. Had an application been made it would almost certainly have been refused, given the stage of the trial, the nature of the case and the fact that the defendants had already prepared their evidence to address the components of the cash flow risk, not the financing risk or fragile business model risk.

257 In any event, the plaintiff's case based upon the financing risk or fragile business model risk was no more persuasive than his case based upon the financial structure risk, although for different reasons.

Institution risk

258 The plaintiff's formulation of the financing risk, involving as it does a risk of business failure of the Responsible Entity, was not unanticipated by the legislature when enacting the modern regime to regulate managed investment schemes. In Brookfield Multiplex Ltd v International Litigation Funding Partners PTE Ltd[62] the full court of the Federal Court of Australia had occasion to consider the features of the regime introduced in 1998. Referring to the report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee, preceding the Managed Investments Act 1998, the court said:

> In the Report at 2.5 the Commission identified the risks against which any regulatory system would guard. They were:

investment or market risk — the risk that the investment will decline in value, either because the market as a whole declines in value or because the particular investments of the scheme decline in value
institution risk — the risk that the institution which operates the scheme will collapse
compliance risk — the risk that the operator of a scheme will not follow the rules set out in the scheme's constitution or the laws governing the scheme, or will act fraudulently or dishonestly.

> We consider that to be a fair summary of the risks likely to be encountered by investors. Although the risk of a decline in value of the investment may not be particularly relevant to a scheme of the present kind, one can imagine a situation in which such a risk could arise. There may be a risk that claims will be devalued by a decline in the fortunes or asset position of Multiplex, the Funder or MBC or by the likely incurrence of previously unexpected costs, necessitating some action to protect the group members' interests. It is not difficult to imagine circumstances in which there could be institutional or compliance risk. Many of the provisions of Ch 5C are designed to minimize such risks. We refer particularly to ss 601FC, 601FD, 601FE, 601FF, 601GA, 601GB, 601HA and subsequent sections dealing with compliance plans. It is no answer to say that a solicitor's duty would sufficiently safeguard the interests of group members against professional misconduct by MBC. However such a matter may be relevant in connection with any contemplated exercise of the power conferred by para (n) of the s 9 definition or that conferred by Pt 5C.11.[63]

259 The provisions of the Corporations Act, finding their origin in the Managed Investments Act, plainly acknowledge, regulate and guard against the institution risk. An appreciation of that risk is reflected throughout Part 5C of the Act. Section 601FA provides that the Responsible Entity of the registered scheme must be a public company that holds an AFSL authorising it to operate a managed investment scheme. There is a requirement that the Responsible Entity be a public company. Timbercorp shares were listed on the ASX. As such, it was amendable to the continuous disclosure obligations under Chapter 6CA. It is worth remembering that amongst the factors to be considered when deciding, for the purpose of s 1013F, whether certain information is not required to be included in a Product Disclosure Statement, is Chapter 2M as it applies to disclosing entities, and ss 674 and 675. Section 674 is concerned with continuous disclosure by a listed disclosing entity such as Timbercorp.

260 Putting to one side a listed disclosing entity, public companies must prepare and file financial reports for each financial year.[64] The financial report must include (a) a director's report containing a review of operations during the year, (b) the results of those operations, (c) details of any significant changes in the entity's state of affairs during the year, (d) the entity's principal activities and any significant changes in the nature of those activities, (e) details of any matter or circumstance that has arisen since the end of the year that has significantly affected or may significantly affect the entity's operations in future years, (f) refer to likely developments in the entity's operations in future years, and (g) if the entity's operations are subject to any significant regulation, give details of its performance in relation to the regulation.[65]

261 The public company must appoint an auditor who conducts an audit of the financial report in accordance with the Act. A Responsible Entity also requires an AFSL. In addition to obligations on the licensee to keep and maintain prescribed financial records and lodge them with ASIC, a licence may contain conditions. The licence granted to Timbercorp Securities incorporated numerous conditions, including a requirement that ASIC be notified of a change in key personnel, a requirement that the licensee establish and maintain compliance measures that ensure, as far as reasonably practicable, that it complied with the provisions of the financial services laws; provided training for its representatives and met Base Level Financial Requirements. These included basic solvency requirements, the requirement that cash flows were managed on a consolidated basis to meet cash flow objectives, and to hold at least $5 million net tangible assets, unless scheme property and other assets are held by a custodian or other conditions are satisfied.

262 These requirements are plainly designed to ensure that the custodian of scheme property and other assets has a minimum net tangible worth to protect the value of the schemes and thus the investments by members of the public. There were further conditions concern reporting triggers. They included the availability of surplus funds, calculated by reference to a formula. Some additional audit requirements were imposed, including an opinion by a registered company auditor as to whether the licensee complied with all financial requirements of the licence. The licensee was required to ensure that each person that held scheme property of a registered scheme it operated complied with the requirements of a specified ASIC policy relating to the holding of scheme property and maintaining proper records. The licensee was also required to ensure that any instrument that conferred the right to use land for the purpose of a scheme was lodged for registration.

263 The Act required the Responsible Entity of a registered scheme to operate the scheme and to perform the functions conferred on it by the schemes constitution and the Act.[66] The Act also imposed a range of duties that resemble those imposed on officers of a corporation. Section 601FC provides:

> **601FC Duties of responsible entity**
> (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
>
> (a) act honestly; and
> (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
>
> (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
>
> (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
>
> (e) not make use of information acquired through being the responsible entity in order to:
>
> (i) gain an improper advantage for itself or another person; or
>
> (ii) cause detriment to the members of the scheme; and
>
> (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
>
> (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
>
> (h) comply with the scheme's compliance plan; and

(i) ensure that scheme property is:

(i) clearly identified as scheme property; and

(ii) held separately from property of the responsible entity and property of any other scheme; and

(j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
(k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and

(l) report to ASIC any breach of this Act that:

(i) relates to the scheme; and

(ii) has had, or is likely to have, a materially adverse effect on the interests of members;

as soon as practicable after it becomes aware of the breach; and

(m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

(2) The responsible entity holds scheme property on trust for scheme members.
(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

(5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

(6) A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1).

264 The plaintiff relied upon the duty to prefer the interests of scheme members to its own interest[67] to support its case for a breach of statutory duty. Other duties formed part of the statutory regime designed to mitigate the institution risk. For example, a compliance plan[68] was to be prepared and applied. Section 601FC also requires scheme property to be clearly identified and held separately. It is held on trust for scheme members.

265 ASIC was authorised to check whether the Responsible Entity complied with the constitution, compliance plan and the Act.[69] Scheme members had an opportunity to remove a Responsible Entity.[70] The plaintiff submitted that the power of removal was not an adequate protection against the financing risk because the exercise of the power would only be practically effective when the schemes were self-sufficient. The defendants argued that the power to remove a Responsible Entity and replace it was a powerful remedy for members and that most schemes reached a point of independent viability relatively early in the life of the scheme. For example, returns were expected from the non-forestry schemes within three or four years, while the viability of forestry schemes may take a little longer. Notwithstanding the practical difficulty in finding a replacement Responsible Entity and the fact that during the early stages of a scheme, the collapse of the Responsible Entity may render the scheme financially unviable, the opportunity to remove and replace the Responsible Entity was part of the legislative regime designed to address the institution risk.

266 The compliance plan and the compliance committee, both required under the Act, are important components of the legislative regime designed to address the institution risk. For example, the compliance plan of a registered scheme must set out adequate measures that the Responsible Entity is to apply in operating the scheme to ensure compliance with the Act and the schemes constitution. Section 601HA provides:

601HA Contents of the compliance plan

(1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Act and the scheme's constitution, including the arrangements for:

(a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and
(b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:

(i) the membership of the committee; and

(ii) how often committee meetings are to be held; and

(iii) the committee's reports and recommendations to the responsible entity; and

(iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and

(v) the committee's access to information that is relevant to the responsible entity's compliance with this Act; and

(c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and
(d) ensuring that compliance with the plan is audited as required by section 601HG; and

(e) ensuring adequate records of the scheme's operations are kept; and

(f) any other matter prescribed by the regulations.

(2) If:

(a) a registration application is made as a result of a resolution passed under subparagraph 1457(1)(a)(i); and
(b) the resolution included a direction under subsection 1457(1A);

The compliance plan lodged with the application must provide for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.

267 The Responsible Entity of a registered scheme must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the compliance plan.[71] Within three months after the end of the financial year of the scheme the auditor of the compliance plan must examine the plan and audit compliance, and provide a report that states whether, in the auditor's opinion, the plan continues to meet the requirements of the Act and the Responsible Entity has complied with the plan.[72]

268 To support the implementation of the compliance plan, the Act requires the Responsible Entity to establish a compliance committee if less than half of the directors of the Responsible Entity are external directors. Timbercorp Securities had a compliance plan and compliance committee. There was no suggestion that the compliance plan did

not comply with the statutory requirements or that the committee or the auditors did not discharge their respective obligations. Mr Rabinowicz said:

966. In accordance with the *Managed Investments Act 1998* (Cth) and the new Section 5C which it introduced into the Corporations Law (as set out in section 82 of the *Corporations Act* 1989 (Cth)) (***the MIA***), TSL was required to implement a Compliance Plan in respect of each Scheme for which it acted as RE. I as director of TSL, executed the Compliance Plans for all recent schemes; these were then lodged with ASIC. In addition, TSL was required TSL to establish a Compliance Committee.
967. The TSL Compliance Committee was responsible to TSL's Board for overseeing the compliance of the registered managed investment schemes' compliance plans. Its function was to report to TSL any breach of the Corporations Act involving the schemes or any breach of a provision of the scheme's constitution.
968. The TSL Compliance Committee comprised of two Timbercorp employees, Gideon Meltzer (Meltzer), Timbercorp's General Counsel and Angela Granter as compliance officer as well as two external and independent members being Michael Walter as Chair and Greg Bush.
969. In relation to the financial year of each scheme, Deloittes conducted an audit of TSL's compliance with the Compliance Plan for that scheme in accordance with section 601HG of the Corporations Act.
970. Information concerning the Compliance Committee formed part of the standard board packs. In particular, the board packs contained the details of any breaches as well as an action list for rectifying these breaches. This meant that although I did not sit on the TSL Compliance Committee itself, as a member of the board, I was kept informed of any breaches particularly given that the board was informed of and required to verify the rectification of these breaches from information provided to it.

269 Timbercorp Securities was part of the Group that reported to the ASX on a consolidated basis. Having regard to the nature and components of the structural risk as pleaded, or the financing risk advanced at trial, information in relation to those matters was required to be reported by the Group in compliance with Timbercorp's obligations as a listed entity and Timbercorp Securities as an unlisted public company and the holder of an AFSL with conditions. The continuing disclosure obligation in s 674 applied.

270 Having regard to these considerations, it would not be reasonable for a retail client, when considering whether to invest in a scheme, to expect to find the financial information required to be published and disclosed by Timbercorp to be included in the Product Disclosure Statements when not specifically required under s 1013D.

271 Further, the information that the plaintiff would have included in a Product Disclosure Statement was divorced from any analysis of the impact of the event on the performance risk. It ignored remedial action and would, if disclosed in that state to investors, have provided a misleading impression of the impact of the event on their investment in a scheme.

The trial

272 Before leaving the analysis of the plaintiff's case, something should be said about the way in which the trial was conducted. There may be valuable lessons to be learned for future trials of this kind. First, I acknowledge the industry of counsel and solicitors in the preparation of the case for trial. There was a high degree of cooperation and interlocutory disputes were minimal. The case was presented efficiently and within a shorter time frame than initially anticipated.

273 It was always anticipated that the case would be largely a documentary case, requiring a review of Product Disclosure Statements and other material published by Timbercorp and Timbercorp Securities including financial management material, correspondence, reports from consultants and advisors, business plans, forecasts, Annual Reports and other material exposing the state of knowledge of the directors and management concerning risks identified by the plaintiff. There were, of course, witnesses. The lead plaintiff, Mr Woodcroft-Brown and a representative of a sub-group, Mr Van Hoff gave evidence. The plaintiff called an expert, Mr Dicks. The directors who were named as defendants gave evidence. One of the liquidators, Mr Korda, gave evidence, as did Mr Lightfoot, an ANZ Bank officer, Mr Beaton, who prepared financial models at Timbercorp, Mr Lipton who assisted in the preparation of scheme budgets and future projections at Timbercorp, Mr Walter, who was a member of the

Compliance Committee and Mr Murray, the former CFO at Timbercorp. Mr Hill, was an expert called on behalf of the directors, and Mr Honey, the expert called behalf of Timbercorp Finance.

274 By the end of the hearing the volumes of material presented to the court including witness statements, exhibits to the witness statements, chronologically arranged material and authorities exceeded 200 Lever Arch folders. When the case commenced, there was a short lived assumption that a Court Book of documents prepared by the plaintiff, comprising 23 Lever Arch folders would be received into evidence, subject to any specific objection, as part of the documentary evidence in the case. I was not prepared to proceed on that basis and required the parties to identify each and every document upon which they relied and to refer to particular passages relied upon, and explain the relevance. Unless such an approach was adopted it was possible that buried within a multi-page document, was a passage that might be later said to have been overlooked. As a consequence, lists were prepared of the documents to which reference had been made and these lists given an exhibit reference. Thus, the volumes of material prepared by the parties became a library from which select documents were tendered.

275 Other aspects of the preparation for trial deserve mention. I have already expressed concern about the plaintiff's statement of claim and the difficulty it presented as a useful document to inform the court of the central issues in the case. The unwillingness of the plaintiff to confine and simplify his case was disappointing. The preparation of the expert reports was a matter that should have attracted more supervision from the court. Much of what was advanced by the experts as opinion evidence was no more than a commentary on primary and secondary materials. In some cases such a commentary can be useful because a related body of material is assembled in an orderly fashion. That was true to some extent in this case, although the questions formulated for Mr Dicks to answer rendered his initial reports of limited value. As is so often the case, it was not until a joint report was prepared that the experts began to focus on some issues that were of significance to the resolution of the case.

276 This case confirmed the danger in the overuse of witness statement. The statements prepared for the plaintiff and Mr Van Hoff discredited their evidence as a whole. I say more about that below.

PRODUCT DISCLOSURE STATEMENTS – What they in fact disclosed

277 The non-disclosure allegations, which for the most part depend upon the statutory obligation to disclose significant risks and other matters in Product Disclosure Statement, requires a review of the content of each relevant statement that was published to the plaintiff and Mr Van Hoff. The Product Disclosure Statements are also an important basis for the misleading or deceptive conduct allegations. The starting point of those allegations is paragraph 38A in the statement of claim, where the Statements are converted by the plaintiff into the financial representations, and scheme contribution representations. Even the alleged conduct by silence seems to depend upon the content of the relevant Product Disclosure Statements; because the significant facts, upon which the plaintiff relied to establish a reasonable expectation that he would be informed of the adverse matters, are the allegations[73] that each Product Disclosure Statement purported to contain financial information in relation to the Timbercorp Group and identify the significant risks. It follows, that the conduct by silence part of the plaintiff's case required the elevation of each adverse matter to the status of a significant risk that should have been, but was not disclosed. The remaining representations – the March 2008 and September 2008 representations - do not depend upon a detailed analysis of the Product Disclosure Statements. The Product Disclosure Statements also have a role in the plaintiff's reliance case.

278 Mr Van Hoff invested in the 2005 Timbercorp (Single Payment) Timberlot Project on about 30 June 2005. On about 10 May 2006 he invested in the 2006 Almond project and the 2006 Avocado project. On about 14 June 2007 Mr Van Hoff invested in the 2007 Almond project and on the following day, so did the plaintiff. On 14 June 2008, Mr Van Hoff invested in the 2008 Olive project. The plaintiff also invested in the 2008 Olive project on about 30 May 2008 and the 2007/8 Timberlot Project on about 30 June 2008.

2005 Timbercorp (Single Payment) Timberlot Project

279 The Product Disclosure Statement for the 2005 Timberlot project was dated 1 December 2004. While it predated any of the adverse matters, the plaintiff alleged that each Product Disclosure Statement issued by

Timbercorp Securities should have disclosed the fact that each scheme member became exposed to the financial structure risk, associated with the maintenance of cash flows of the Timbercorp Group which risks included:

> (a) A failure of other scheme members to make scheme contributions to Timbercorp Securities or to repay loans to Timbercorp Finance;
> (b) The capacity of the Timbercorp Group to obtain and/or service external funding; and
>
> (c) The availability to the Timbercorp Group of securitization of loans.

280 If the plaintiff were to be permitted to advance his financing risk or fragile business model risk case, he might argue that the Product Disclosure Statement should have informed investors that they were:

> Exposed to a risk associated with the Timbercorp Group failing during the currency of project terms and in particular, that the Timbercorp Group was critically dependent on its ability to maintain and increase its borrowings, its ability to continue to raise equity and to sell capital assets in a timely manner and that if capital or debt markets tightened, there was a real prospect that the Timbercorp Group would be at risk, and the grower investments with it.

281 If the formulation of the risks advanced in his particulars dated 8 April 2011 is adopted, the plaintiff required that Timbercorp Securities should have disclosed information in the Product Disclosure Statement to the following effect or substance:

> When acquiring interests in the project and/or borrowing from Timbercorp to meet scheme contributions, the grower is exposed to the risks associated with the Timbercorp Group continuing to be financially viable and maintaining sufficient cash flows to meet the scheme costs and expenses of each scheme as they fall due. These risks include:
> (a) a failure of other growers in this scheme and/or growers who invest, or have invested in other schemes of which Timbercorp Securities Ltd (**TSL**) or another entity in the Timbercorp Group is the responsible Entity to make scheme contributions to and/or, where relevant, to repay loans to Timbercorp Finance Pty Ltd (**TFL**) or any other entity in the Timbercorp Group which lends money to growers;
>
> (b) the ongoing capacity of the Timbercorp Group to obtain and/or service external funding including from banks and other financial institutions;
>
> (c) the ability of the Timbercorp Group to securitise loans made by TFL (or another Timbercorp entity) to growers to finance their scheme contributions. The effect of securitisation is to enable the Timbercorp Group to receive a substantial portion of such loans on an up-front basis and the balance on a deferred basis.

282 The 2005 Timberlot Product Disclosure Statement did not disclose any risk in words or to the effect or substance of the financial structure risk or financing risk identified by the plaintiff.

283 The plaintiff did not rely upon the content of the 2005 Timberlot Product Disclosure Statement as a foundation for his misleading or deceptive conduct case, although he did point out that Timbercorp Securities was introduced as a wholly owned subsidiary of Timbercorp Ltd, a public company listed on the ASX, with net assets in excess of $365 million as at 30 September 2004. Timbercorp Securities was identified as a market leader in agribusiness investment with a proven track record. The Statement noted that the Timbercorp group of companies had been established for 13 years and then managed more than 80,000 hectares of eucalypt plantations in addition to projects in olives, almonds, citrus and table grapes. The Product Disclosure Statement contained extracts from the financial accounts of the Timbercorp Group. Timbercorp Securities was identified as the Responsible Entity, the issuer of the Product Disclosure Statement and the holder of an Australian Financial Services Licence.

284 As with all other Product Disclosure Statements, this document must be read as a whole. There was a section set aside for Risks and Safeguards, which identified the primary production risks, market risks, force majeure and damage to timberlots, the risk of taxation legislation changes, of securing land and tenure, and information about the replacement of the Responsible Entity, grower liability, insurance, drought and negotiability of the investors' interest. A number of risks should be emphasised. These were:

Although the product rulings constitute a binding public ruling in respect of the project, they may be superseded by a legislative change in tax laws.
We do not, nor does any person, firm or corporation associated with the issue of this PDS guarantee the amount or timing of any tax deduction, and there remains the risk that the ATO may disallow any claim in this regard. If income tax deductions are disallowed, you may be required to pay penalty tax and interest.
There is no secondary market for buying and selling timberlots and we are not obliged to purchase from any grower any timberlots issued pursuant to this PDS.
285 The plaintiff relied upon the statement under the heading 'how the project works':

> In our capacity as Project Manager, we will maintain your timberlots throughout the Project Term. The Management Agreement that you will enter into with us sets out the basis on which we will provide Timberlot Establishment Services and ongoing maintenance services to you. A summary of the Management Agreement is set out in section 11.

286 In its summary of the Management Agreement, the Product Disclosure Statement contained an explanation of the grower relationship with Timbercorp Securities. The Statement explained that the grower engaged Timbercorp Securities as an independent contractor, to carry out the Establishment Services and Plantation Services during the term in accordance with the Management Plan and to harvest, sell and otherwise turn to account the wood on behalf of the grower. Timbercorp Securities was to be remunerated by fees payable to it by the grower. Those fees were set out.

2006 Timbercorp Almond project

287 The 2006 Almond project Product Disclosure Statement also predated the adverse matters. Nevertheless, it was a project in which Mr Van Hoff invested and, although not specifically mentioned in the statement of claim, appears to be a Product Disclosure Statement which, the plaintiff would contend, ought to have included a statement of the financial structure risk or the financing risk.

288 The 2006 Almond project differs, of course, from the Timberlot Project by the reason of the nature of the agricultural undertaking. For example, for the Timberlot Project, harvesting was projected to take place from eight to 12 years after planting. Under the almond project, the first harvest was expected in or about February 2009. The duration of the almond project was 23 years, compared with the Timberlot Project, which was until harvest. There was a different fee structure. The statements contained in the 2006 Almond project Product Disclosure Statement concerning the business of Timbercorp Securities and its relationship with the Timbercorp Group, the financial position, risks and relationships was, in material respects, the same as for the 2005 Timberlot Project. The Product Disclosure Statement was dated 3 March 2006.

289 The Statement made reference to the performance risk in section 11 – Risk Analysis. Thereafter, each Product Disclosure Statement included a similar description of that risk.

2006 Timbercorp Avocado project

290 The 2006 Avocado project Product Disclosure Statement was dated 3 May 2006. In form and content it is the same, in material respects as the 2006 Almond project, save for its duration, which was only 20 years, and the fee structure.

2007 Timbercorp Almond project

291 The 2007 Almond project Product Disclosure Statement was dated 27 November 2008. Both the plaintiff and Mr Van Hoff invested in this project and were provided with a copy of the Product Disclosure Statement. There was a great deal of similarity between the form and content of each Product Disclosure Statement, although they are not identical. Those parts of the Statements on which the plaintiff relied are substantially the same. Accordingly, it is not necessary to repeat like statements from the Product Disclosure Statements for different projects. Material differences will be identified.

292 The 2007 Almond Product Disclosure Statement described the project as an integrated horticultural venture established by one of Australia's leading agribusiness managers to take advantage of opportunities in Australia's almond industry. The project was described thus:

> The 2007 Timbercorp almond project is an opportunity for you to participate in horticulture and establish a future long-term income stream with immediate tax benefits.

Investors would lease at least two allotments of land (almondlots) of approximately .25 hectares each, fully developed with all of the improvements required to grow almonds, including almond trees, irrigation infrastructure and an allocation of irrigation water. The Statement continued:

> You will engage us to manage your almond lots and harvest and sell your almonds, on your behalf. You will be entitled to the net proceeds from the sale of your almonds during the term of the project.

293 The project term was approximately 23 years. Timbercorp Securities was identified as the Responsible Entity for the project, and the issuer of the Product Disclosure Statement, and responsible for all aspects of the project throughout its term. Project Management was to be undertaken through a business known as Almond Management, a subsidiary of Timbercorp Ltd. Almond Management would, in turn, engage select harvests to perform various tasks in relation to the project. The project was described as a long term horticultural project, with all the risks attendant upon such an undertaking.

294 Section 6 of the Product Disclosure Statement was dedicated to a description of the Timbercorp Group, and included financial information. Timbercorp was described as a leading investment manager specialising in agribusiness. The document stated:

> Established in 1992, today Timbercorp's portfolio of managed agribusiness assets (including established and committed plantings, consists of over 91,000 hectares of eucalypt plantation, 4,000 hectares of olive groves, 412 hectares of table grape vineyards, 1,250 hectares of citrus orchards, 650 hectares of mango orchards and 800 hectares of avocado orchards. Importantly, Timbercorp also manages approximately 8,000 hectares of almond orchards in northern Victoria, close to the site of the Project.

295 Under the heading Financial Information, Timbercorp was described as an ASX/S&P200 public listed company with consolidated net group assets in excess of $440,000,000 as at 30 September 2006. Extracts from unaudited financial statements for the Group and Timbercorp Securities were included.

296 Under the heading Risk Analysis in section 11 it was noted:

> With any long-term commercial undertaking, and particularly one that involves agriculture, there are numerous risks that may impact upon profitability. We have considered these risks and in this section we identify some of the principle risks associated with the Project and the strategies we have developed to reduce the incidence, and mitigate the impact of, these risks. While the use of appropriate systems and safeguards may mitigate a number of these risks many our outside our control and cannot be avoided or effectively mitigated against.

The specific risks identified included the selection of the almond trees, yields, pests and diseases, drought and failure of water supply, water quality, irrigation systems and infrastructure services. Under the last heading was the following note:

> The success of the Project will also depend on our continued access to infrastructure, including power, irrigation and transport, and our ability to obtain all necessary regulatory approvals to operate the Orchard including a licence to divert water to the Orchard from the Murray River and market the almonds. This may be jeopardised as a result in government policy or the law.

297 Some Revenue and Financial risks were identified, which were almond prices, almond sales and returns. Under the heading Other Risks there was grower liability, force majeure, damage to almond lots, replacement of Responsible Entity, changes in the law, taxation and taxation review, consumer demand, changes in technology, local competition, default by growers, grower agreements, non-liquid interests and security of land tenure. Some deserve closer attention.

> **Replacement of Responsible Entity**
> If we are replaced as Responsible Entity, your interest in the Project will not be compromised as the Almondlots Management Agreement and Sub-leases you have entered into with us will remain in full force and effect as will the Management Agreement between us and the Project Manager in relation to the management of the Orchard.
>
> **Default by Growers**
>
> *Our ability and the ability of the Project Manager to provide quality services may be affected by Growers' failure to pay annual management fees and rent when due*. If a Grower defaults, we may take all appropriate action to ensure that fees are paid when they fall due. Default provisions are contained in the Constitution and the Grower Agreements.
>
> **Grower Agreements**
>
> *Anything that affects our ability to meet our obligations under the Almondlot Management Agreement and Sub-leases, and the ability of the Land Owner to meet its obligations under the Sub-leases, could also, constitute a risk to Growers*.
>
> **Non-liquid Interests**
>
> The Project is not intended to be a short-term investment and should be viewed as being one for a fixed term of approximately 23 years, with the possibility of extension for a further 2 years.
>
> There is no established secondary market for buying and selling Almondlots and consequently, it is expected that interests issued under this PDS will be illiquid. We are not obliged to purchase from any Grower any Almondlots issued pursuant to this PDS. [74]

298 Part 13 of the Statement contained a summary of material documents which were the Constitution, Custody Agreement, Sub-lease, Management Agreement, Almond Orchard Management Agreement and Tree Supply and Capital Works Agreement. As part of the summary of the Almond Lot Management Agreement, the reader was informed that the grower engaged Timbercorp Securities as an independent contractor to manage and administer the project, manage, direct and conduct project operations on behalf of the grower and perform the orchard services. The reader was informed of the fees and that the grower was not obliged to contribute any money in

respect of the project operations beyond the fees and other costs payable under the Sub-leases, the Constitution and the Management Agreement.

299 The application form stated:

> Before completing and signing this Application Form you should read the whole of this PDS.

At the conclusion of the application form there are certain declarations. Relevantly, the applicant declared:

> By signing the Application Form, you make the following declarations:
>
> You have read the PDS for the 2007 Timbercorp Almond project to which this Application Form relates.

300 On 12 December 2007 Timbercorp Securities issued a Supplementary Product Disclosure Statement to update the statement dated 27 November 2006. The additional information concerned use of personal information and the introduction of anti-money laundering and counter terrorism legislation. While the tax announcement had not been made at the time the Project Product Disclosure Statement first issued, it had occurred by the time the plaintiff and Mr Van Hoff subscribed for interests in the scheme, and by the time of the Supplementary Statement.

2008 Timbercorp Olive project

301 The 2008 Olive project Product Disclosure Statement was dated 26 February 2008. Both the plaintiff and Mr Van Hoff subscribed for allotments (grovelots) each of approximately .25 hectares. The plaintiff subscribed for his interest on about 30 May 2008, and Mr Van Hoff on about 14 June 2008. At the time the Statement had issued, the tax announcement had been made and the adverse matters described by the plaintiff as a deterioration in credit and financial markets in late 2007, and the nearing insolvency events had occurred. There was nothing contained in the Product Disclosure Statement concerning the alleged deterioration in credit and financial markets or to the effect that the Timbercorp Group was nearing insolvency. It should be noted however that in Part 11 Risk Analysis, there was specific reference to the tax announcement to the following effect:

> **ATO Taxation Review**
> The ATO has reconsidered its long held position in relation to the tax treatment of investment in non-forestry agribusiness MIS and now considers that investors should no longer be able to claim upfront deductions for their contributions on the basis that the investor is 'carrying on a business'. The ATO has issued Taxation Ruling TR 2007/8 setting out its reconsidered position.
>
> On 27 March 2007, the Tax Commissioner announced that a period of transition will apply to the implementation of its reconsidered view until 1 July 2008 after which transitional period the ATO will cease to issue product rulings for investments in non-forestry MIS. In the interim a suitable test case is being sought to test the ATO's reconsidered view in the courts. However, if the test case is finalised prior to 30 June 2008 and confirms the ATO's reconsidered view, product rulings will not issue past the date of the decision.
>
> The ATO has stated that investments in non-forestry MIS that are covered by existing product rulings, such as the Project, will not be affected by the taxation ruling. Therefore, Growers may rely upon Product Ruling PR 2007/105 and will be able to claim tax deductions in accordance with the Ruling, provided the conditions upon which the Ruling is issued are complied with.
>
> The ATO's reconsidered position will not have a materially adverse effect on Timbercorp's ability to perform its obligations under the Project.

302 Save for the fee structure and other details such as scheme arrangements, duration and financial information, the differences are not material to the plaintiff's case. There were no material differences between the content of the

2008 Olive project Product Disclosure Statement and the 2007 Almond project Product Disclosure Statement.

2007/2008 Timbercorp (Single Payment) Timberlot Project

303 The 2007/2008 Single Payment Timberlot Project Product Disclosure Statement was dated 5 December 2006. There were Supplementary Statements dated 23 April 2007, by which time the tax announcement had been made; and another on 12 December 2007, by which time the substantial deterioration in credit and financial markets had commenced, according to the plaintiff. The plaintiff invested in the Timberlot Project, but Mr Van Hoff did not.

304 The Product Disclosure Statement was substantially in the same form as the earlier and later versions considered above, save for the anticipated duration, management arrangements, fee structure and statement of risks. The financial information provided was as at 30 September 2006.

305 The information provided in the first Supplementary Statement concerned the price of woodchips. The Second Supplementary Statement, dated 12 December 2007 concerned the use of personal information and the anti-money laundering and counter-terrorism legislation.

EVIDENCE ABOUT THE RISKS

Introduction

306 The plaintiff approached his case at trial, concerning the financing risk by, (1) identifying the particular features of the 'fragile business model'; (2) pointing out the various ways in which the board of Timbercorp and the relevant entities became acquainted with the particular risks; (3) identifying and explaining the debt risk, or the dependency of the Group on debt finance, coupled with an appreciation by the board that the banks might withdraw their support; and (4) explaining the dependency of the model on asset sales, which he submitted were susceptible to the exigencies of capital markets. The plaintiff rounded out this part of his submission by submitting that the financial position of Timbercorp deteriorated between 2006 and 2008.

307 The plaintiff submitted that from at least 2005 the Timbercorp Group had been alerted, by its financial advisors, including Inteq and Austock, of a mismatch between the duration of schemes and associated debt. The complexity of its debt structure, the absence of a single funder and the absence of long term solutions were considered to be a structural weakness. Short term funding arrangements meant that there was a refinancing risk. In other words, a risk that one or more maturing facilities would not be renewed.

308 The plaintiff submitted that no Timbercorp witness gave evidence that the Group had consciously formulated a plan to avoid long term funding based on inflexibility or cost. One difficulty with that submission was that the financing risk or fragile business model risk case had only been advanced at trial. Had the plaintiff identified the components of that structural risk thesis, and its significance at an earlier point in the proceeding, the defendants might well have addressed the alleged weaknesses in the business model, including the short term funding arrangements and sale of assets. One might suppose that evidence would have been adduced in an effort to explain the correspondence between facility terms and the maturing of projects for sale into trusts, mentioned by Mr Hance in his evidence. Insofar as the business model was explored in evidence by the defendants, it was little more than as background and to explain the role of asset sales as a capital raising mechanism. The defendants can hardly be blamed for failing to address the particular components of the plaintiff's financing risk or fragile business model risk, and their significance.

Treasury risk

309 The plaintiff relied on the risk management process undertaken by the board as evidence that the board, and thus the Group, was well aware of the critical capital management issues and in particular, the treasury risk. A convenient starting point for the analysis of the significance of Timbercorp's risk management processes to the plaintiff's case is a risk management strategy prepared for Timbercorp in July 2005 and updated in March 2007. The document outlined its objective, identifies the risk management policy, provides a management framework, structure and process, made provision for manuals and documentation, compliance obligations, internal audit role and a process and for review of the risk management strategy. There was no suggestion by the plaintiff that the risk

management strategy was inappropriately designed or implemented. The evidence indicates that the strategy was sophisticated, thorough and applied. In fact the plaintiff's case relied upon the regular review by management of business risks so as to fix the entities within the Group, the directors and senior management with knowledge of those risks.

310 In my opinion the plaintiff's reliance on risk management, to establish knowledge of risks which he submitted ought to have been disclosed, was misconceived. The risk management strategy of the Group was designed to enable management to identify, assess and appropriately manage business risks. The Risk Management Strategy document described the strategy objective and risk management policy of the Group in the following terms:

> **Objective**
> This Risk Management Strategy aims to ensure that Timbercorp Limited has in place a prudent management system to effectively identify, evaluate, mitigate and monitor the risks that the company faces during the course of its operations.
>
> The Board of Directors and Executive and Senior Managers have the responsibility to ensure the assets of the company are safeguarded from risk to provide its shareholders with assurance that their investment is being soundly and prudently managed, to provide employees with a safe working environment, and to ensure that the company is able to meet its obligations to Members, investors/growers and stakeholders as and when they fall due.
>
> **Risk Management Policy**
>
> Timbercorp is an Australian listed public company limited by shares.
>
> Timbercorp is an active investment manager, specialising in Australian agribusiness. Timbercorp source high quality, large-scale agribusiness projects in growth industries with strong global demand. They manage that portfolio intensively to ensure a best practice approach that delivers added value and improved performance. Timbercorp create wealth through a diverse range of products that offer attractive returns and immediate tax savings.
>
> Timbercorp's strategy is to leverage their core investment management skills to grow and diversify business streams and broaden their product offerings, within the agribusiness sector.
>
> The principal focus of this RMS is to contribute to the efficient and effective governance and operations of the company. The RMS is a key document of the company in that it:

demonstrates the process is conducted properly;
provides evidence of a systematic approach to risk identification and analysis;
provides a record of risks and to develop the company's knowledge database;
provides relevant decision makers with a risk management plan for approval and subsequent implantation;
provides an accountability mechanism and tool;
facilitates continuing monitoring and review;
provides an audit trail; and
shares and communicates information.

311 The risk management framework was described as follows:

> The prime responsibility for the sound and prudent management of Timbercorp rests with the Board and Executive and Senior Managers.
> The operations of the company are managed in accordance with the constraints of the 3-year business plan that is approved by the Board each year. The business plan is developed annually and includes financial and statistical budgets, the annual capital

management strategy, external and internal analysis, strategic factors and development and operational action plan. Deviations from the business plan are reported on a timely basis to the Board.

Timbercorp has developed this RMS to provide a logical process for identifying and evaluating and managing risks affecting the company, and to ensure that they are controlled, so as to provide effective protection to the company at an acceptable cost.

The RMS is required to be approved by the Board and is to be observed at all times by Executive and Senior Managers and staff of the company.

The strategy has the personal commitment of the Executive and Senior Managers and the Board.

This document describes the RMS, including:

defined managerial responsibilities and delegation levels;
processes to identify, monitor and control risks;
relevant documentation;
compliance issues;
role of internal audit; and
process to review this document.

312 The roles and responsibilities for the management of risks were defined. The company officers and organs who had primary responsibility to manage risks were the directors, the ARCC, the Chief Financial Officer, the ARCC Compliance Officer, the compliance manager and the external auditors. The document set out a risk management process under which management identified risks through a process of analysis of business objectives and processes with the key question – what could go wrong? Risks were categorised to assist in identifying appropriate risk treatment and for reporting purposes. Once risks were identified they would to be analysed.

Risk categories that have been identified and included in the Risk Register.

Phase 3: Analyse Risks

In order to prioritise the actions for dealing with the risks identified, a consistent method is required to evaluate each one. This is the determination of existing controls and the analysis of risks in terms of the consequence and likelihood in the context of those controls. Each risk is assessed in terms of its consequence and is combined to produce as estimated level of risk.

The consequences of each risk is assessed in terms of a 5 level scale from Insignificant to Catastrophic. The likelihood of the event happening is then assessed in terms of a 5 level scale ranging from Almost Certain to Rare. Likelihood reflects the probability of a risk eventuating.

To facilitate standardised measurements, the tables below contain chart details of risk levels, based on likelihood and consequence. Each risk is rated using the following matrix by cross-matching consequence and likelihood assessments. Risks are therefore rated as a Low, Moderate, Major or High.

...

Likelihood

Risk analysis should include an estimation of likelihood, meaning the estimated frequency of occurrence of a given risk event. In some circumstances it may not be possible to quantitatively measure this likelihood and so a qualitative approach may be

sued instead. For consistency, the following standards should be applied wherever appropriate.

	Level	***Descriptor***	***Frequency – Quantitative***	***Frequency - Qualitative***
	1	Rare	Less than once in 100 years	Occurs only in exceptional circumstances
	2	Unlikely	Less than once in 20 years but more often than rare events	Could occur at some time
	3	Possible	Less than once in 10 years but more often than unlikely events	Might occur at some time
	4	Likely	Less than once per year but more often than possible events	Will probably occur
	5	Almost certain	Occurs once per years or more often	Expected to occur

Consequence

Risk analysis should include an estimation of the magnitude of the consequences which may potentially result from a given risk event. For consistency, the following standards should be applied wherever appropriate:

	Level	***Descriptor***	***Financial Loss***	***Reputation***	***Busine Interru***

	1	Insignificant	$0-$200,000	Unsubstantiated – low impact		1 day or less
	2	Minor	$200,001 to $500,000	Substantiated – low impact		2 - 5 days
	3	Moderate	$500,001 to $2,000,000	Substantiated – moderate public embarrassment		6 – 15 days
	4	Major	$2,000,001 to $10,000,000	Substantiated – high profile public embarrassment		16 – 30 days
	5	Catastrophic	$10,000,001 +	Substantiated – sustained high profile public embarrassment with Timbercorp name entering public lexicon or legal action		Restora

Phrase 4: Assess Risks

This is a comparison of estimated risk levels. This enables risks to be ranked and prioritised.

There is a need to evaluate the effectiveness of current internal controls in reducing the impact or probability to determine the residual risk. Internal controls encompass the policies, processes, tasks and behaviours that facilitate the company's effective and efficient operation and compliance with applicable laws and regulations.

Risks are assessed after consideration of the existing controls in place at the time of the assessment. If controls are affected after each assessment, the rating of a risk should gradually reduce to an acceptable cost/benefit cut-off point.

The next step in a more sophisticated approach is to evaluate the effectiveness of existing internal control procedures in reducing the impact or probability to determine the

net (or residual) risk. A comparison should then be made between the net risk and the acceptable risk level to the company and identify those risks requiring enhancement to their control measures. It may also show that some risks are over controlled.

The Board of a company is responsible for a company's system of internal control relating to the identified risks and should set appropriate policy on internal control. It is the role of management to implement Board policy on control. All staff has some responsibility for internal control as part of their accountability for achieving objectives.

Criteria for evaluating risks include:

The likelihood of the events constituting the risk occurring; and
The capacity of the event to:

- ➢ Cause major financial harm;
- ➢ Prevent or restrict operations;
- ➢ Cause loss of public credibility or reputation; and
- ➢ Bring personal liability on any person(s)

In deciding which controls are to be used for any risk, the potential risks must be considered and the tolerance level determined.
The Company has developed the following risk tolerance levels:

$0 - $500,000 Low risk

$500,001 - $2,000,000 Medium risk

$2,000,001 - $10,000,000 Major risk

$10,000,001 + High risk

The inherent risk value of each identified risk is considered in terms of the established tolerance levels during the Executive and Senior Manager's assessment and development of an appropriate, cost-effective mitigator.

Phase 5: Treat Risks

For high and major risks, Timbercorp is required to develop and implement specific risk management plans. Low and medium risks may be accepted and monitored.

In deciding which controls are to be used for any risk, the potential risks must be considered under one of the following four categories:

Accepting the risk – that is electing to have the risk without putting any control in place. This action would only be considered where no control is available to mitigate the risk or the cost of implementing the control far outweighed the relative benefit of implementing the control. Any risk for which it is used must be continuously monitored to ascertain whether the consequences of the risk have increased;
Reducing the likelihood or consequences of the risk – that is taking steps that wholly or partly reduce the exposure, such as by compliance programs, procedures, contract or policy conditions, or investment management;
Transferring the risk – that is by having someone else take responsibility for all or part of it, such as by insurance, contract or joint venture; and
Avoiding the risk – that is by ceasing the activity or by deciding not to engage in it. Typically, this will be where the risk is seen as large and not practical, cost-effective way of controlling the risk is available.

After determining the appropriate control to put in place, the Executi9ve and Senior Managers designated as having responsibility for each risk will promptly take such steps as deemed necessary in order to ensure that the selected risk control is put in place effectively.

> Control processes and mechanisms used to mitigate risk include:
>
> clearly defined managerial responsibilities;
> adequate segregation of duties;
> an internal audit function to establish, maintain and review all control processes;
> a system of approvals, limits, authorisations and reporting lines;
> policies to document the company's procedural controls;
> activity controls for each department;
> reviews by the Board, Executive and Senior Managers and Internal Audit; and
> physical controls.
>
> Any problems that are likely to cause ***delay*** in having an effective control in place within a reasonable timeframe must be discussed as early as is practical with the CFO. All such issues are to be reported to the ARCC as part of the regular reporting process.
> It is the intention of Timbercorp to actively manage risk at all levels and in each key area of the business. This goal will be achieved by measures that include appropriate Policies and Procedures, which will also be reviewed as set out below.

313 The Risk Management Strategy required continuous monitoring and review of the system, process and outcomes, communication and consultation, risk reporting, internal audit, record keeping, and the development of risk management strategies.

314 There was an executive retreat attended by directors and executives at the Hotel Como, Chapel Street, South Yarra, in May 2005. A bundle of papers had been prepared by Mr Rabinowicz, who at the time was Chief Financial Officer. In October that year he was appointed Deputy Chief Executive Officer. The papers included a three year business plan, SWOT analyses, budget and a draft risk management plan and risk matrix. One of the key considerations at the workshop was to address the alignment of cash flow with profit. The Group was generating substantial profits through the sale of schemes, but with the high capital expenditure required to establish the schemes, coupled with the business of financing up to 90% of grower investments, cash flow was under pressure. This key consideration for the board and executives was the Group's dependency on external funding and the associated risks of grower failure to repay and dependency on banks.

315 The plaintiff placed reliance on the SWOT analysis in which strengths, weaknesses, opportunities and threats were listed. The plaintiff pointed to some of the weaknesses. They included strong reliance on debt to fund capital development ... cash flow pressure ... adverse effect on dividends ... complex debt structure ... our investment products have ongoing costs – leading to cash indigestion. Threats included economic slowdown. The plaintiff submitted that the identification of these weaknesses and threats established a common recognition of their existence and thus an obligation of disclosure.

316 The misalignment between profits and cash flow was in part the product of a change in accounting practice that was first reflected in the 2006 accounts. This change resulted in the removal of cash flow from financing, such as the securitisation of the loan book from operating cash flow. While the accounting change did not impact on the overall cash position, it had the effect of substantially reducing operating cash flow, highlighting the misalignment between operating cash flow and net profit after tax.

317 The financial forecasts, prepared for the financial years 2004 to 2009 inclusive, recognised a decline in new business – scheme sales – commencing in 2008, but with a steady increase in annuity income. Annuity income was that derived by the Group from its management of the schemes through rental and fees. Thus, as early as 2005 management was predicting a downturn in new business commencing in the 2008 year. One significance of the prediction was the expressions of surprise in February 2007 following the tax announcement. The plaintiff submitted that the Group was taken by surprise by the tax announcement, effectively caught off guard. The plaintiff contended that Timbercorp Securities should have brought the announcement and its consequences to the notice of prospective and existing investors. The defendants, on the other hand, submitted that the evidence disclosed a long

term expectation and plan to move away from dependency on new business into a model which derived its profitability from annuity income.

318 In a document entitled Timbercorp Business Risks Key Actions, prepared in 2005, particular risks were enumerated, given a risk rating, priority, and coupled with a risk mitigation plan. The plan was allocated to particular executives for attention. The actual provenance of the document was uncertain, although it was generally accepted by the directors who gave evidence that they were aware of documents of that kind, and that such assessments and action plans were part of the risk management process undertaken by the board.

319 There were numerous such documents throughout the material relied upon by the plaintiff which make reference to a treasury risk. Reference to a treasury risk, with risk ratings for its components, priority and key actions became common during the trial as the plaintiff sought to attribute knowledge of the treasury risk and its significance. Under the heading Treasury, there were the following sub-risks, Inappropriate cash planning; and Access to additional debt/capital. The treasury risk was given a priority of 3 and a risk rating of 10. Human resources, and reliance on key personnel, were given priority 1, and a risk rating of 16. The key action involved the development of a succession plan. Risk priority 2 was competition, with a risk rating of 14. The related action plan involved an analysis of competitor activity and an update of a three year strategic plan. The key actions to manage the treasury risk were as follows:

> The risk of a **mismatch in the timing of capital spending and additional debt – equity fundraising** cannot be underestimated. The responsibility for cash flow planning lies with the General Manager Accounting and Treasury (GMAT) who must work closely with the General Manager Corporate Finance (GMCF) with primary responsibility for fundraising.

The plaintiff emphasised the words, *cannot be underestimated*.

320 The plaintiff relied on the SWOT analysis and risk assessment process to demonstrate an awareness of increasing reliance on debt levels and capital expenditure. That weakness, expressed as the treasury risk, would have catastrophic consequence for the Group if it was not successfully managed. The defendants, of course, relied upon their management of the risks until such time as the Global Financial Crisis took its toll. They argued that the directors were astute to the various business risks and diligent in managing them so as to ensure that they did not materialise and threaten the viability of the business.

321 While the plaintiff accepted that the risk analysis undertaken periodically by the board and management was simply a business tool, and necessarily subjective in the way they rate various risks, he submitted that the risk associated with Timbercorp's financial structure was plainly recognised as a risk to the very existence of the Group. The components of the financing risk involved access to sources of funding to meet capital expenditure requirements. The plaintiff submitted that each of Mr Rabinowicz and Mr Hance were aware of that risk. He submitted that the directors knew that there was a material risk that the Groups' financiers might withdraw their support during the life of the projects.

322 The plaintiff submitted that Mr Hance gave evidence that the treasury risk was an aspect of the way in which Timbercorp's business model was unusual. Mr Hance agreed that 'most companies don't lend their customers the amount that the customer is obliged to pay them for a sale'. It was put to Mr Hance that the business model was a relatively unusual one, to which Mr Hance replied, 'unusual but certainly not unique.' The following exchange took place between the plaintiff's counsel and Mr Hance in relation to the refinancing risk:

> So the company, in order to keep itself going had lots of relatively small and short-term borrowing facilities with the banks? --- As part of overall model of selling the assets on. And it was being recommended to you that you have a long term facility to overcome the refinancing risk? --- Yes.
>
> And you understood when you got the risk profile, exhibit TFL5, that the treasury risk was much more than just the ordinary risk of being in business and needing cash, didn't

you? --- I understood what the consequence of running out of money was.

That wasn't my question, was it? You understood that the treasury risk identified in the risk profile was more than just the ordinary risk that any business faces of running out of cash? --- Inasmuch as there would be an impact on the growers, is that what you are saying?

No, because the point about the treasury risk was that you constantly needed access to debt or equity in order to keep the business going in the way that it operated, do you agree with that? --- No. You constantly forget to put the part of the model as being the end sale process which you would expect to happen within the three to five year period.

That's the sale of assets? --- Yes.

And of course the sale of assets was indeed another source of cash? --- It was an intrinsic part of the business model.

But of course if the sales didn't occur as intended, then you had to look to other sources of cash? --- Yes.

And your business model was a relatively unusual one, you would agree? --- Unusual but certainly not unique.

You will recall that the particular problems that were identified as treasury risks were access to debt or capital, that was one of them? --- Two of them.

Pardon? --- Yes, debt capital, that's two.

It's identified as one of them actually, access to debt or capital? --- Yes.

And you agree access to debt was something that was important to you? --- Yes.

And access to capital was important to you? --- Yes.

If either of those failed then you would have a problem? --- Yes.

And that problem was catastrophic? --- I think - I saw the risk, the treasury risk as also not being able to sell the assets.

So that's a third element of it? --- Yes.

And if one or more of those failed, the result could be catastrophic? --- Yes.

And that result would have a major impact on your growers as well as everyone else? --- Yes.

You agree that those risks in particular were an aspect of the way you did business because of the nature of your business model? --- Yes.

So this was not just the ordinary risk that any company has of running out of cash, was it? --- No, but many companies have the same model.

And it's because it was specific to the peculiar model or the unusual model of your business that it wouldn't have been terribly easy for someone on the due diligence committee just to work out for themselves that as a matter of risk analysis, this would be a major risk, do you agree with that? --- They would have seen it as major risk by use of just common knowledge, if the company goes broke and it's the manager, it's got to be a major risk.

323 The plaintiff had identified three elements of the treasury risk – access to debt, access to capital and the ability to sell assets. Mr Hance agreed that if one or more of those mechanisms failed the result could be catastrophic, and have a major impact on growers. The cross-examination continued:

> You agree that those risks in particular were an aspect of the way you did business because of the nature of your business model? --- Yes.
> So this was not just the ordinary risk that any company has of running out of cash, was it? --- No, but many companies have the same model.
>
> And it's because it was specific to the peculiar model or the unusual model of your business that it wouldn't have been terribly easy for someone on the due diligence committee just to work out for themselves that as a matter of risk analysis, this would be a major risk, do you agree with that? --- They would have seen it as major risk by use of just common knowledge, if the company goes broke and it's the manager, it's got to be a major risk.
>
> Of course, but the due diligence committee members were not given the sort of information which enabled someone to come up with the risk profile specifically concerning treasury risk? --- If they had have had access to the risk profile they would have come to the same conclusion that everybody else in the room when it was created came to and they would have seen it as a high consequence risk but a low likelihood.
>
> If they had had access to it they would have come to the same conclusion as you did a few minutes ago that it would be a major risk for growers, do you agree with that? --- If it occurred, yes.
>
> But it wasn't drawn to their attention? --- Not to my knowledge.

324 A central theme of the plaintiff's case on this topic - the risk that the financiers would not renew facilities or might withdraw their support – a renewal risk - was said to be a risk well known to the directors. The plaintiff characterised the risk as a material risk that the financiers might withdraw their support during the life of projects. This formulation by the plaintiff incorporated his reliance on the mismatch between the duration of facilities and the life of projects, and the growing dependency on debt finance.

325 The directors' knowledge was, according to the plaintiff, evidenced from the Austock report, which mentioned that the bank's habitually withdraw support in adverse market or client specific adverse conditions; the fact that the Groups' loan facilities contained provisions permitting financiers to terminate a facility in the event of an adverse material change to the business; the existence of financial covenants; the different security rankings, priorities and interests of the banks; the concessions by Mr Murray and Mr Rabinowicz that some financiers had difficulty understanding the Timbercorp model; and a report by Deloitte in late 2007, in an audit plan and the audit report, that there may be greater uncertainty regarding the reliability of future cash flows and additional funding depending on the strategic direction adopted by Timbercorp. In May 2007 Deloitte had reported to the ARCC that management will need to demonstrate the continued support of financiers sufficient to fund cash requirements in the medium term.

Business model

326 The evidence relied upon by the plaintiff to support the existence of a fragile business model included changes that took place between 1996 and 2005, involving the transformation of Timbercorp from a virtually debt-free business to one where debt and cash flow management became critical. The plaintiff submitted that from at least 2005 the Group had been alerted by a number of external advisors to critical capital management issues. Capital management became critical, according to the plaintiff, because Timbercorp was required to manage a number of different debt instruments, multiple lenders, a mismatch between scheme life and associated debt, the absence of a permanent long term funding solution and a corresponding risk that funding would not be renewed. He described the Group's approach to funding as piecemeal.

327 The plaintiff submitted that from 2005 the business model involved substantial capital expenditure on horticultural and forestry projects, with long lead times before revenue could be generated from the sale of interests in the schemes. Mr Rabinowicz said that prior to 2000, the Timbercorp Finance loan book had been funded internally, but from 2000, it became part of the Timbercorp Finance and group business model that a significant portion of the loan book would be financed by securitising loans. Other segments of the loan book were used as security for borrowings. Thus, investor loans became substantially financed from external borrowings, increasing the dependency of the Group on debt finance. Also, the substantial growth in hectares under development and management from 2000 meant that there was a requirement for substantial capital expenditure. The growth of the Timbercorp Group business was capital intensive, with most of the capital requirements financed by borrowing from external bankers.

328 Timbercorp Securities was responsible for the costs and expenses of each project, including capital expenditure. While it could recover fees, rental and other costs from investors, these were, for the most part, recovered in arrears. Typically, investors obtained finance from Timbercorp Finance for up to 90% of their original application fee and for ongoing fees.

329 In order to fund its capital requirements for infrastructure and working capital, an essential features of the group business model involved selling assets, raising equity, securitizing loans and arranging debt facilities. The plaintiff emphasised the increasing debt for the Group, growing from $238,087,000 in 2005 to $689,902,000 in 2008. That level of debt included a loan securitisation facility of $103,082,000 and a grower loans facility of $150,000,000. Some group borrowings were linked to particular projects and properties, and most loans were relatively short term. It was that feature of the Group debt that became the focus of management in 2005, when external advisors identified a mismatch between the length of project life of schemes and associated debt, identifying the mismatch as a risk factor.

330 The plaintiff submitted that the Group's own documents were replete with acknowledgements of the Group's reliance on increasing debt and capital expenditure. One category of documents was those brought into existence as part of the Group's risk assessment and management process undertaken as a regular feature of management activity. The risk matrices, comprised of strengths, weaknesses, opportunities and threats (SWOT) recognised the catastrophic consequence to the Group if the treasury risks materialised. The plaintiff submitted that the treasury risks were associated with the Group's dependency on equity funding and debt and that the Group turned its mind constantly to the issue.

331 The plaintiff argued that Mr Hance had acknowledged in his evidence that the Timbercorp business model was unusual, and that if the risk eventuated – if Timbercorp collapsed – that could also adversely affect grower investments in schemes.

332 The plaintiff submitted that between 1992 and 1996, the Timbercorp Group had very little debt, as its business model involved no capital expenditure in developing schemes. At the time it only offered forestry schemes, and the Timbercorp Finance loan book was funded from operating and cash flows and shareholder loans. This opening proposition by the plaintiff, to explain the transformation of the business model from a conservative to high risk model, exposes one of the vices in the shift in the plaintiff's case. The evidence given by Mr Hance and others about the business models was not the subject of any attention, apart from background, until capital management issues arose in 2005. There was no comparative examination undertaken of the business model, either generally or on an industry basis. Importantly, the extent to which the model was a creation of the legislative regime was not explored. No expert was asked whether the business model was unusual, prone to particular risks or difficult to manage. Cross-examination of Mr Hance and Mr Rabinowicz, to establish that the Timbercorp business model was inherently fragile, was perfunctory. They were, of course, cross-examined in relation to their identification and management of particular business risks.

333 Mr Hance gave evidence about the establishment of Timbercorp Securities following the commencement of the Managed Investment Act 1998 (Cth) on 1 July 1998. The change brought about by the amending legislation, and the new regulatory regime introduced into the Corporations Law, and later the Corporations Act, had a defining

influence on the business models employed by participants in the industry and the Timbercorp business model. The Responsible Entity became the scheme manager.

334 Mr Hance explained the change that occurred following the Ralph Review into business tax. Prior to the changes introduced following the Ralph Review, it was not possible for a Responsible Entity to delay capital investment until after the scheme had commenced. The changes that occurred after 1 July 2000 included a requirement that Timbercorp provide management services referable to the management fees paid by an investor in the year of income, if the investor was to receive an immediate tax deduction for those fees. Thus, it became necessary for Timbercorp to complete the acquisition and planting of land in advance of soliciting investors.

335 Mr Hance said that following the Ralph Review, Timbercorp changed its long term strategy in relation to its forestry business. There were two principal reasons. First, prices for land appropriate for timber plantations had risen, making forestry schemes less attractive for both Timbercorp Ltd and investor growers. Second, he believed that the timber business could not continue to grow at its current rate, having nearly doubled the land area of its timber plantations each year from 1994 to 1999. Timbercorp's new strategy for forestry was to hold 100,000 hectares of timber plantations by 2008, with the expectation that in the long term, an average of around 10,000 hectares would be harvested each year and then on a 10 year rotation. To implement that strategy, in 2001 Timbercorp capped its short to medium term development rate of forestry schemes at between 6,000 to 8,000 hectares to take account of the large plantings in 1998 to 2001. Mr Hance said that Timbercorp successfully implemented this strategy until the appointment of administrators.

336 Mr Hance said that in February 2002 there was a change to the law so that investors in forestry schemes could once again obtain an immediate tax deduction on funds paid in a financial year for forestry activities undertaken in the following 12 months. Thus, Timbercorp Securities was again able to offer forestry schemes without incurring all of the capital expenditure prior to commencement. In 2004 Timbercorp introduced a new model for forestry schemes. Under the previous model, investors had paid upfront establishment fees, rent and annual maintenance for the life of the scheme, with an additional fee paid from the proceeds of the sale of timber. In 2004, Timbercorp Securities offered single payment forestry lots, called timberlots. Each investor only paid an upfront fee, and all subsequent management fees and rent were paid by Timbercorp and eventually deducted from the proceeds of the sale of the harvested timber at the end of the scheme. After 2004, Timbercorp Securities only offered timberlots in relation to its forestry schemes.

337 Mr Hance said that by 1999 Timbercorp had planted about 50,000 hectares of eucalypts, however land for timber plantations became scarce. As a consequence it investigated other agricultural business opportunities. In 2000, Timbercorp made a private offers to invest in 362 hectares of olive groves. Thereafter, it made public offerings for olive and almond schemes. Mr Hance said that in relation to the horticultural schemes, the tax deductibility of payments by investors was regulated by the changes implemented following the Ralph Review. That is, for expenditure by investors to be tax deductible in any given year, the services to which the expenditure related must have been provided in the same tax year. While there was a change in 2002 in relation to forestry schemes, the same change did not apply to horticultural schemes. Mr Hance said that the impact of the Ralph Review changes, when applied to horticultural schemes, was not as significant as in its immediate application to forestry schemes. This was because there was never an expectation among investors in horticultural projects that they would be able to claim an upfront deduction in one financial year for expenditure to be incurred in undertaking establishment works in the next financial year.

338 Mr Hance said that it was part of Timbercorp's long term strategy in relation to horticulture to hold an interest in the service providers to the schemes so as to diversify away from managed investment schemes and to share in the capital growth of its business partners. Thus, Timbercorp procured interests in various entities such as Select Harvests, Kosta Exchange and Boundary Bend. Mr Hance gave the following overview of Timbercorp's business model.

Timbercorp's business model since 1996 involved the acquisition of an asset (such as a parcel of land), the development of that asset and sale of that asset (or part of it) either into a trust or to a third party buyer. This model was adopted for forestry projects and for all horticulture projects.

Timbercorp acquired land using a combination of both debt and equity. Once the land had been acquired, it would then be developed into a plantation or orchard (as appropriate) with a view to generating a long term revenue stream from management fees and licence fees. Developing the land usually commenced 12 months before the project was offered for investment. Development typically involved obtaining the necessary permits to enable work to commence on the land, clearing the land, testing the soil, preparing the land for cultivation, arranging irrigation, planting seedlings and maintaining those seedlings. These development or capital expenditure costs were usually substantially greater than the cost of purchasing the land.

In the case of Timbercorp's horticulture projects, land was required to be substantially developed before it could be made available to potential investors. However, in the case of Timbercorp's forestry projects from 2002 following the Federal Government's changes to the tax deductibility rules for forestry schemes, investor growers could invest in the project prior to any significant development works being undertaken.

Once the land had been developed, it could then be marketed and sold to investors. At this stage, the land had not only increased in value as a result of the developments to the land but, in addition, the land also had long term leases in place to generate income.

The land and its developments including the infrastructure and water rights would then be sold either into a property trust where Timbercorp would retain some of the equity in the asset or it would be sold to a third party buyer, usually on a sale and leaseback arrangement. The funds raised from the sale of the land and any capital improvements would repay development finance and fund future projects.

In 2005, Timbercorp established the Timbercorp Orchard Trust and the Timbercorp Primary Infrastructure Fund for above purpose. Units in the trusts were sold to third party investors, with Timbercorp retaining a 45% interest.

A further feature of the Timbercorp business model was the provision of finance to growers. One of the methods by which Timbercorp raised funds to facilitate the sale of its projects and generate profits was via the provision of finance to growers and the securitisation of the resulting loan book, which first occurred around December 2000. In addition, Timbercorp was able to raise funds to facilitate the sale of its projects by using investor grower loans as security for finance bonds and bank facilities.

The process of securitisation involved TFL selling to a bank all or part of its loan book. The method by which this occurred, in general terms, was as follows:

TFL loaned money to an investor grower (on most occasions up to 90% of the value of an investor growers' investment would be lent);

once the first payment on the loan had been made by the investor grower, the loan qualified for securitisation;

the purchaser of the loan book (in later years, ANZ) would, subject to conditions imposed by it, then pay 75% of the value of the loan book to TFL. Notes were issued by ANZ to TFL in respect of the remaining 25% value of the loan book (these were known as 'unrated notes'). Notes were issued by ANZ in respect of the remaining 75% value of the loan books (these were known as 'rated' notes, because they were rated by agencies such as Standard & Poors, and were to be possibly on-sold to third parties);

throughout this process, TFL still managed and collected the loans despite the securitisation arrangements, and collected fees from ANZ for doing so.

TFL earned a finance margin, being the difference between the interest rates TFL's financiers charged TFL on its debts, and the interest rate that TFL charged the growers.

Timbercorp also earned revenues from a variety of additional sources, which included:

project revenue from managed investment schemes, being management fees and rent included in the application fees paid by investor growers in the first year of an investment in a scheme, and then management fees, rent and reimbursements of farm operating costs paid by investor growers in subsequent years. Management fees paid in subsequent years were sometimes deferred until the relevant crop was harvested, and included incentive fees

payable by investor growers where proceeds from crop sales exceeded benchmark amounts stipulated in the scheme documents;

industrial operations from forestry, being payments made by TSL to Timbercorp Forestry Pty Ltd for the provision of management services in respect of forestry projects. Although investor growers in Timberlot Projects were able to defer payment of management fees until harvest of the timber crop, the ATO and Deloitte Touche Tomatsu (***Deloitte***) (Timbercorp's external auditors) required Timbercorp Forestry Pty Ltd to make an accrual for the projected management fees payable by the investor growers in each year of the project. However, investor growers were not required to pay the accrued management fees until the crop was harvested.

asset management of property trusts, being payments made by the trustee of the Timbercorp Orchard Trust and the Timbercorp Primary Infrastructure Fund to manage the assets held in those trusts;

income from investments, including Timbercorp's investments in Costa Exchange Holdings, Select Harvests and Boundary Bend.

By 2005, the managed investments schemes promoted by TSL had (in addition to timber, olives and almonds) expanded into citrus, table grapes, avocado and mango projects. As at 30 September 2005, Timbercorp's total assets were approximately $825 million, with net assets of approximately $425 million. Timbercorp had cash at hand of over $71 million.

Bank support

339 An important limb of the plaintiff's case was the renewal risk. It was a risk that the Group's bankers may not continue their support. In some respects the risk identified by the plaintiff was no more than a recognition that the renewal of banking accommodation involved agreement between the parties. But the plaintiff's case on this aspect was a little more sophisticated. An element of the banking risk was the relatively short term of borrowings, which meant that significant amounts of debt required negotiation every few years. There was also an exposure to changing interest rates and renewal costs. Thus, argued the plaintiff, there was continuing uncertainty and risk associated with the Group's relationship with its bankers.

340 The plaintiff argued that the deferral of asset sales and the tightening of credit in late 2007, followed by the Global Financial Crisis, demonstrated the significance of the renewal risk to the Timbercorp business model. The plaintiff was not put off his stride by the fact that the directors had been able to manage the renewal risk by securing bank support until early 2009. According to the plaintiff's case, there was a risk that they might not have succeeded, with possible catastrophic consequences. That risk, associated with the fragile business model, was, according to the plaintiff, of such a character that it ought to have been disclosed to potential and existing investors.

341 The plaintiff was critical of the defendants for only calling one witness from the ANZ Bank. Timbercorp had other bankers – Westpac, the Commonwealth Bank and HBOS. The defendants responded by pointing out that the plaintiff had issued subpoenae to other banks and documents had been produced, but nothing had been relied upon by the plaintiff. There was also the fact that in some cases the banks operated as a consortium.

342 The plaintiff also relied upon the audit plan and audit reports prepared by Deloitte in 2007 and 2008 to emphasise the significance of the renewal risk. The role of Deloitte, as external auditors, was important and revealing.

343 The experts agreed that so long as Timbercorp had the support of the banks there was no significant risk that Timbercorp Securities would be unable to manage any of the schemes through to their completion. Bank support was evident in the continuing process of renegotiating facilities, extending repayment dates, increasing facility amounts and, when necessary, modifying covenants to avoid a breach. Nor could it be said that the banks were supporting Timbercorp merely to protect their existing investment. New facilities were approved and a new bank, Westpac, agreed to enter and participate in the HBOS syndicated loan.

344 Numerous presentations were made by Timbercorp to its bankers, when an adverse event occurred, or when new facilities were required or existing facilities required renegotiated. Timbercorp kept its bank informed of

important developments, such as the tax announcement and the cancellation of the asset purchases following the collapse of Lehman Brothers. Apart from the faint suggestion, in the cross-examination of Mr Lightfoot, an officer of the ANZ Bank, that some information had not been provided by Timbercorp, there was no suggestion that the bank was not fully acquainted with the business of the Group, including its business model and associated risks; at least sufficiently well informed to unable it to form a view about its exposure to potential loss.

345 Mr Lightfoot gave unchallenged evidence about how ANZ assessed the Group throughout the Relevant Period. His evidence establishes that, as well as the fact that the Group's bankers continued to support the Group until the appointment of administrators, the Group's bankers had a positive view of the Group until late 2008.

346 Mr Lightfoot said that ANZ undertook annual and interim six monthly reviews of all credit relationships, as well as when a customer sought an increased facility. He gave evidence about each such review that ANZ undertook after February 2007.

347 Mr Lightfoot was involved in the annual review of the Group in March 2007. The review took place after the tax announcement, but before the moratorium for 12 months. At that time the ANZ was also considering a request from the Group to participate in a new $200 million HBOS Syndicated Facility and to increase the existing $28 million grower loan facility by $17 million. At the time HBOS had already signed an indicative term sheet. The ANZ was under no compulsion to join the syndicate.

348 Mr Lightfoot said:

> The government announcement caused the bank to consider the Timbercorp Group's business model at this time carefully. However, my analysis in early 2007 was that this was an 'originate and distribute' model that had been in operation since the early 1990s and had built up a diverse portfolio of high quality assets. I believed that the natural development of the business at that time suggested a movement towards a model that relied more on annuity style income produced by Timbercorp's high quality assets rather than on new sales. Consequently, while I considered the government's announcement of its intentions in relation to non-forestry schemes would have a reasonable material effect on new sales of such schemes going forward, I had no heightened concerns at this time about Timbercorp's credit quality.
> ...
>
> In summary, my assessment was that the Group's debt would peak in FY2007 due to the need to fund capital expenditure for existing projects whilst looking at a material contraction in earnings due to the loss of new non-forestry sales in FY2008. However, I considered that the position would adjust in FY2009. Accordingly, despite the government's foreshadowed regulatory changes, I considered that Timbercorp Group's credit profile remained sound.

349 The ANZ became a member of the Syndicated Facility and increased the grower loan facility. It also changed the Group's credit rating from CCR3- to CCR4+, to reflect the regulatory risk, but also to recognise that the Group remained an acceptable credit risk. CCR3- denoted a credit worthiness of Quite Good. CCR4+ denotes a credit worthiness of Acceptable, which meant:

> Customers demonstrate medium to long-term operational and financial stability and consistency but they are clearly susceptible to cyclical trends or variability in earnings.
> Key characteristics:

Customers present an identifiable degree of generally acceptable risk, possibly expressing itself as variability in financial and/or operating performance
Debt servicing capacity is fair but adverse changes in circumstances and economic conditions are likely to impair this capacity

Access to alternative sources of funds is tenuous

350 As a member of the syndicate the ANZ undertook an exposure for $62.5 million, and for grower loan facility increased to $45 million.

351 The plaintiff suggested to Mr Lightfoot in cross examination that the Group had not disclosed relevant information about the sale of the Boort olive grove in the financial forecasts, namely that it had been delayed in April 2007. The basis for that is doubtful, because at the time, the ANZ was to be the senior lender to Primary Infrastructure Fund, which was seeking ANZ funding to purchase the Boort property. In any case, Mr Lightfoot gave evidence that the sale of the Boort olive grove was not material to the bank's decision to offer new finance to and to refinance the Group until the end of 2008. This is consistent with the ANZ increasing the Grower Loan Facility to $150 million, after the sale of the Boort and Carina properties had again been deferred in December 2007. In May 2007, after the delay of the Boort olive grove sale originally set for April 2007, Westpac took on its first exposure to the Group as a member of the syndicate. The fact that Westpac took an exposure to the Group at this time would indicate that Westpac had satisfied itself about the risks presented by the Group.

352 The evidence does not support the contention, advanced by the plaintiff that the tax announcement had a negative material impact upon bank support for the Group. I am not satisfied that the announcement had such an impact.

353 In August 2007, Timbercorp Finance sought approval from the ANZ to increase the limit under the grower loan facility from $45 million to $60 million. The ANZ approved the facility increase, and maintained the Group's credit rating at CCR4+.

354 In February of March 2008, the Group sought approval from the ANZ to increase the grower loan facilities by $90 million to $150 million, and to extend the HBOS syndicated facility of $200 million. Mr Lightfoot said:

> I considered that the Timbercorp Group continued to hold a strong portfolio of diverse and high quality assets which were performing and generating sufficient cash flow to support the Group's financial obligations. In December 2007, the Timbercorp Group had successfully completed a private placement raising $56.4 million, which confirmed the customer's ability to access equity markets. In this context I was comfortable to approve an extension of the facility for a further 12 months.

The ANZ agreed to increase the grower loan facility and extended the HBOS facility.

355 In February 2008, Mr Murray's report noted initial discussions with the ANZ about refinancing all of the Group's debt. He stated, we have agreed with the ANZ that the extensions we have sought to our short term debt facilities will not impact our take up of anything attractive in relation to a complete debt restructure.

356 The risk-grade review undertaken in July 2008 was triggered by an adverse movement in the Group's share price. Mr Lightfoot said that he considered that the Group was likely to reduce its capital requirements going forward and that its high quality annuity style cash flows would enable it to normalise its earnings over the short to medium term. His assessment was that the Group's underlying credit position remained sound. The ANZ resolved to change the Group's credit rating to CCR4= and to carry out another full risk-grade review upon receipt of the Group's full year audited accounts in November. CCR4= denotes a credit worthiness of 'Satisfactory', which meant:

> Customers demonstrate medium term operational and financial stability and consistency but they are clearly susceptible to cyclical trends or variability in earnings.
> Key characteristics:

Customers present an identifiable degree of acceptable risk, that may have expressed itself as variability in financial and/or operating performance
Debt servicing capacity is satisfactory but adverse changes in circumstances and economic conditions are more likely to impair this capacity
Access to alternative sources of funds cannot be relied upon

The CCR4= rating indicated that the ANZ had assessed the probability of the Group defaulting on the loan within the next 12 months as 0. 4600%.

357 In September 2008, a further risk review was carried out by the bank after the Group requested a waiver of the interest cover covenant and the leverage ratio covenant. Timbercorp had informed the bank that if the proposed sale of its forestry plantation land to Harvard proceeded, it would be in breach of these covenants because the land was being sold for less than its book value. Timbercorp was also forecasting lower than anticipated results for the 2009 financial year, but still with a net profit after tax of $15 million. Mr Lightfoot explained the bank's position thus:

> The customer's 'originate to distribute' business model was exposed to the seizure affecting capital markets at this time, as it had no alternative source of capital in the absence of asset sales ... On the other hand ANZ still expected that the customer's EBITDA margins would normalise as its capital requirements diminished over the next two years and its annuity earnings profile (underpinned by good quality, strategically placed assets and state-of-the-art technology and production techniques) gave cause for confidence.

358 The ANZ approved the request for waiver of covenants for financial year ended 30 September 2008, and resolved to carry out a full credit-grade review upon receipt of the customer's audited financial statements in November.

359 In late November 2008, the ANZ undertook the full risk-grade review. Since the September review, the Harvard transaction had fallen through. Mr Lightfoot said that although the Group still had high quality income-producing assets, he recognised that it was very difficult to assess the probability of the necessary asset sales to third parties proceeding to execution in the then current market. Notwithstanding, on 21 November the bank approved refinancing the HBOS facility, but changed the Group's credit rating to CCR7+, signifying that the Group presented significant risks that were unlikely to be mitigated over the short term, and that its debt servicing capacity was weak. CCR7+ denotes a credit worthiness of Weak, which meant:

> Customers demonstrate sustained operational and financial instability.
> Key characteristics:

Customers present significant risks that are unlikely to be mitigated over the short term
Debt servicing capacity is weak
Often under strong, sustained competitive pressure
Variability and uncertainty in profitability and liquidity is projected to continue over the short and possibly medium term
Significant changes and instability in senior management may be observed
Customer's financial performance consistently fails to meet projections
One or more unauthorised covenant breaches may have taken place
Access to alternative sources of funds is likely to be non-existent

> However,

A clearly defined and measurable recovery strategy has been agreed
Some progress towards achieving the recovery strategy's targets is being made
An external review may be warranted
The rating of CCR7+ indicated that the bank had assessed the probability of the Group defaulting on the loan within the next 12 months as 3.9840%. Thus, the evidence supports the conclusion that, according to their assessment, the Group banker had assessed the probability of failure even as late as November 2008 as very low.

360 Each director gave evidence of his belief that there was no meaningful risk that the Group's bankers would withdraw their support for the Group by not extending credit or refinancing existing facilities until late 2008. Mr Rabinowicz said that he did not think that withdrawal of bank support posed a real risk to the company until

November 2008. Mr Hance said that he was very confident that the banks would continue to refinance all Timbercorp debt until the end of 2008. Mr Liddell said that the Group had always been able to borrow. It should be noted that the Group did not have any actual knowledge about the banks' internal assessment of the Group, only what the banks communicated to the Group. There is no evidence that the banks communicated any reservations about ongoing support before late 2008.

361 One assumption underpinning the bank support was, of course, the sale of assets and in particular, the Boort and Carina properties, into the Primary Infrastructure Fund. The plaintiff suggested that the assumption was unreasonable, and that the ANZ had been misled about the prospects. There is a basis to contend that the ANZ was aware of the nature of the delay because it was directly involved in the proposed transaction with the Primary Infrastructure Fund as a financier. More importantly, Mr Lightfoot said that the delayed sale of these assets, which would have netted the Group only $20 million, was not a relevant matter for the ANZ in its decision to provide finance to the Group until late 2008.

362 Mr Hance gave evidence that at this time he had little doubt that the Group could have sold the assets. The basis for his belief was that the Group intended to sell the olive and almond assets into the Primary Infrastructure Fund, which by late 2006 had raised $200 million and was oversubscribed. He said that there was no reason to doubt that the same could not have occurred in February 2007. There was banker commitment to finance the transaction.

Asset Sales

363 One element of the plaintiff's case for a fragile business model was the dependency of the Group on asset sales. There was no doubt that asset sales were an integral part of the business model. Planned sales of major assets into the Primary Infrastructure Fund and to third parties did not eventuate as planned, or at all. This was due, for the most part, to the tightening credit market in late 2007 and the Global Financial Crisis. It was the susceptibility of the business model to such forces that the plaintiff argued made the model a significant risk that should have been disclosed.

364 According to the plaintiff, evidence of the fragility of the business model was demonstrated by the Group's declining financial position between 2006 and 2008. He submitted that the cash available to the Group decreased from $148.9 million in 2006 to $42.3 million in 2008. It should be noted that the 2006 cash position had been inflated by a recent notes issue by Timbercorp. The plaintiff pointed to the negative operating cash flow which was, to some extent, a feature of a change in accounting treatment that took place in 2006, removing the proceeds from securitisation from operating cash flow. Total debt level increased over those years. Following the tax announcement there was a downturn in new business revenue. The plaintiff pointed out that the Group's appetite for cash became largely funded by debt when asset sales were deferred.

365 Forecasts after April 2007 had included the assumption that the Group would sell and lease back the Boort and Carina properties. The sales were subject to the unit price rising to a more acceptable level.

366 As at June 2007, cash flow forecasts disclosed that if the sales were deferred until December 2007, the cash at bank would be $44 million in November 2007. On 21 September 2007, Mr Rabinowicz reported that the sale of the Boort and Carina properties would not proceed in December 2007. The proposed sale was moved to April 2008. The sale did not proceed.

367 The board may have anticipated a potential problems with the sale of the Boort and Carina properties. It took steps to explore a capital raising in December 2007. On 26 July 2007, the board had resolved that the Group should investigate a hybrid capital raising to provide funds for future development and for liquidity purposes to safeguard the company in the event that a planned asset sale or other capital management activity is delayed or is unable to be completed on acceptable terms. Eventually Timbercorp resolved to issue ordinary shares and raised $56.4 million from institutional investors in December 2007. It seemed to have little difficulty raising the equity.

368 Timbercorp's financial position presented as relatively robust in the latter half of calendar year 2007. As at August 2007, the report for budget versus actuals showed the Group was operating better than budget. In late

September 2007, the Group prepared a monthly forecast and a 10-year forecast; both showing an apparently sound outlook. The forecasts disclose annuity income rising steadily from $239 million in 2007 to $423 million in 2009 to $580 million in 2016. EBITDA was forecast to be $161 million in 2007, $209 million in 2008, and $175 million in both 2009 and 2010. EBIT was forecast to be $150 million in 2007, $195 in 2008, before dipping to $154 million in 2011 and rising until 2015. NPAT was forecast to be $64 million in 2007, $87 million in 2008, $62 million in 2009, and rising to $86 million in 2015. And cash flow from operating (not including securitisation) was forecast to be negative $34 million in 2007, negative $29 million in 2008, then $28 million in 2009, growing to $165 million in 2014.

369 Two issues arose concerning the 30 September 2007 audited accounts, but neither suggests that the Group was facing any financial difficulty. The first related to a potential breach of loan covenant. On 26 September 2007, while preparing its year end and results, management reviewed compliance with loan covenants. They considered that it would comply with its shareholder funds, gearing and interest cover covenants, but that it might exceed its leverage ratio covenant. That covenant required a Total Interest Bearing Debt to EBITDA ratio of less than 3.6, whereas the Group's provisional figures estimated a likely ratio of around 3.7 to 4. The issue arose because the Group drew down a large portion of debt in the final week of September 2007.

370 On 27 September 2007, Rabinowicz reported to the board about the potential breach of the leverage ratio. The minutes record:

> we have approached HBoS and via them the syndicate members to seek a variation for 2007 only, such that the TIBD is done as an average. HBoS advised that it would not be an issue for them and that they thought that Westpac would be fine, subject to some review of pricing.

On 30 October 2007, the Group gave a presentation to the syndicate banks titled *Syndicated Loan Facility Presentation* in relation to a proposed covenant waiver.

371 The second issue, concerning the year and accounts, was a shortfall of current assets to current liabilities of $83 million. On 12 November 2007, Deloitte provided a report to the ARCC stating:

> **Working Capital Deficiency**: Based on our initial review of the draft Appendix 4E there is a working capital deficit as at 30 September 2007 of $82.8 million. Prima facie, this is a going concern risk that management will need to mitigate by demonstrating how the working capital deficiency will be managed in the short to medium term to enable the consolidated entity to pay its debts as and when they fall due.
> **Funding**: Management will need to demonstrate the continued support of financiers sufficient to fund expected cash requirements in the medium term (no less than 15 months) based on the strategic direction adopted by the entity and based on the cashflow needs as outlined in the point above.

372 This matter was addressed by Messrs Rabinowicz and Murray in a memorandum dated 12 November 2007 to Deloitte. Their memorandum reviewed each of the Group's then current liability facilities, and their expectation that various facilities would be rolled over and others increased. All the facilities were rolled over and increased as anticipated.

373 Deloitte accepted the assurance from management and formed the view that the Group would have the support of its financiers for not less than fifteen months, and could fund its cash flow needs for that time was apparent from the absence of a going concern note to the 2007 accounts. Deloitte accepted that the Boort and Carina properties should be classified as current assets in the audited accounts. The Australian accounting standards provided that assets must be classified as current assets if they were held for sale in the next twelve months. Deloitte was apparently satisfied that there was a reasonable basis for management's prediction that they would sell the Boort and Carina properties within the following twelve months.

374 The defendants submitted that the audit opinions were of great significance, because they were unqualified. The validity of the audit opinions was not challenged.

375 On 15 November 2007, the Group released its audited results. The Group's annuity income was $243 million, its EBIT $156 million, and NPAT $66 million. Although the Group reported a negative operating cash flow of $45 million, that did not have regard to cash from securitisation. The Group also announced a dividend of 4c, a further strong indicator of the its own assessment of its financial strength.

376 On 20 November 2007, the 2008 budget was prepared. The budget forecast performance as at 30 September 2008 to be flat, compared to 2007, with NPAT forecast at $65 million in 2008 compared to $66 million in 2007. Net assets were forecast to increase to $628 million from $520 million. Annuity income was forecast to increase to $303 million from $243 million; EBITDA was forecast to increase to $176 million, from $167 million; and EBIT to increase to $162, from $156 million. Further, cash at bank was forecast as at 30 September 2008 to be $30 million.

377 One of the key assumptions in the 2008 budget was the sale of $186 million in horticultural assets into the Primary Infrastructure Fund in April 2008. The net result for the Group was to be a cash surplus of around $50 million, in addition to debt reduction.

378 On 14 February 2008, Hance and Rabinowicz reported the following to the board:

> Sale of Boort Olive Grove to TPIF
> ...
>
> The transaction requires a further issue of TPIF units. This is difficult in the current environment because the TPIF unit price remains substantially below net asset backing and we can only issue further units at a price that does not dilute the interests of existing TPIF holders.
>
> Our preferred position would be to issue the units at net asset backing then TIM would pay a 9-9.5% rental yield. But with a unit price trading around 94 cents, TPIF will need to issue units at a lower price and therefore will need a higher rental yield to avoid diluting existing holders. For example, if the units were issued at 94 cents, TIM would have to pay 10.75% CPI linked.

379 On 17 April 2008, shortly after securing bank facility extensions, including the CBA facility linked to the Boort property until 8 March 2010, the Group deferred the sale of the Boort and Carina properties to December 2008. A Corporate Development Report dated 17 April 2008 explained that, although the Group had funding from CBA for the transaction, the unit price was depressed. As the Group was unwilling to pay a higher rent, the transaction simply did not stack up. CBA had already advanced funds against the asset, and so funding for the acquisition of the asset by the Primary Infrastructure Fund could simply be viewed as a change of borrower.

380 The decision to defer the sale was made in consultation with the banks. The transaction was a related party transaction. Timbercorp was not, at this time, seeking to sell these assets on the open market. There was no suggestion that if the assets had been offered for sale on the open market, they could not have been sold. The position changed, however, when Timbercorp started to look outside its group for a sale. Even then, prospects seemed good until the collapse of Lehmann Brothers.

381 In or about February 2008, the Group started to investigate the sale of its forestry land, either to a single institutional investor or through a retail type structure. In early April 2008, the board decided to sell the forestry assets and engaged David Brand from New Forests. In late April 2008, Harvard Management Company, a wholly owned subsidiary of Harvard University that managed the Harvard University endowment fund, expressed interest in purchasing all Timbercorp's forestry assets. In May 2008, Harvard advised that it wanted to purchase all Timbercorp's forestry assets, and a term sheet was signed, and due diligence commenced. As at 25 June 2008, the Harvard transaction involved a proposed $225 million sale and lease back at 7.5% rent, with settlement after due diligence expected around October 2008. The transaction would generate a cash surplus of approximately $125.2

million. On 31 July 2008, a heads of agreement was signed on these terms, with a likely completion date in October or November 2008.

382 A twelve month cash flow forecast was prepared in 15 May 2008 that assumed no sale of the Boort and Carina properties or the forestry land during the financial year. It showed cash at bank as at 30 September 2008 of $20 million. The original budget had shown cash at bank as at 30 September 2009 to be $31 million. On the assumption that the sale of the Boort and Carina properties did proceed in the following financial year, cash at bank, as at 30 September 2009, was forecast at $8 million.

383 The experts agreed that the collapse of Lehman Brothers was a significant event in that it affected asset sales and credit markets. Even Mr Dicks agreed that the collapse crystallised the impact of the Global Financial Crisis from an Australian perspective. He said that the collapse naturally resulted in Australian banks re-assessing their position, particularly in relation to lending additional monies to companies that were negotiating the acquisition of an asset.

384 Mr Honey gave evidence that the impact of Lehman Brothers' collapse on Australia was that it:

> created some havoc in credit markets in the sense that it affected the confidence of lending between financial institutions. That's evidenced by the spike in margins in bank lending rates between banks, and that had ramifications for the Australian banks because the Australian banks actually borrowed considerable sums from overseas, so we are not isolated from what happens on international credit markets. That in turn had implications for borrowers in the sense that banks were becoming more cautious about new deals and were a little bit more sceptical about the deals they had on their desks.

385 A further indicator of the Group's financial position was that on 25 October 2007, the Board considered, and rejected, an indicative takeover offer from Macquarie at the prevailing market share price of $1.40 per ordinary share. On 12 December 2007, Macquarie made an indicative offer for 100% of Timbercorp shares, at a price of up to $1.60, which was again rejected. This would suggest that the board thought that the Group was worth more than Macquarie's offer. It also provides an objective assessment. Macquarie apparently viewed the Group's business as sound and undervalued by the market at its then share price.

Adverse matters as risks

386 Before undertaking an excursion into a chronology of relevant events, which put the plaintiff's case into perspective, something should be said about the plaintiff's reliance at trial on the adverse matters. They became a little lost in his analysis of the financing risk. The relevance of the tax announcement was that any negative impact on the Group was not made known to existing and potential investors. The plaintiff submitted that the event exposed the weakness of the fragile business model. The plaintiff pointed to the internal response to the announcement as evidence of an awareness of its significance. For example, Mr Rabinowicz had said of the announcement, 'it's bad'. The plaintiff argued that the internal reaction revealed a recognition that survival of the Group was threatened.

387 The plaintiff's case was that by reason of the tax announcement there was a significant risk that the Group would fail. A basis for this allegation was that the Group's business depended on continually generating new projects. The plaintiff also alleged that the tax announcement increased the renewal risk, the likelihood that bankers would refuse to renew or extend facilities. The plaintiff submitted that the tax announcement led to a substantial reduction in the Group's share price, damaging its credibility and adversely affecting its ability to raise equity. He submitted that the directors were aware of the impact of a falling share price on the Group's ability to raise equity.

388 The plaintiff further relied on the conduct of the board in managing the fall out from that event. New and updated cash flow analyses were required and prepared, financing arrangements with the banks were reviewed, and presentations made to bankers to explain the significance of the event. A strategic review of the business was undertaken. The response by the board and management was as might be expected. The event was managed in such a way that the board, the bankers and the auditors all appeared satisfied with the outcome. But, according to the plaintiff, the successful outcome did not diminish the significance of the risk that ought to have been disclosed.

This approach by the plaintiff, and his reliance on the declining financial position of Timbercorp, as evidence of a fragile business model, revealed a tension in his case, if not a schizophrenic approach. While it was acceptable to look at the outcome of events, and employ hindsight, to assess the magnitude of a risk that existed at a point in time, it was not permissible to have regard to the fact that risks and events were managed to the satisfaction of the board, the bankers and the auditors.

389 The plaintiff submitted that the event of the tax announcement was a manifestation of the regulatory risk identified as part of the Group's risk management process. He submitted that the Group went into survival mode and was required to consider new options for its business. He submitted that the tax announcement demonstrated the extent to which the Group depended upon its financiers to maintain cash flow.

390 The defendants submitted that the tax announcement did not give rise to a meaningful risk that the Group would fail because,

> (a) the financial forecasts prepared before and after the *tax announcement* show that the impact of the *tax announcement* upon the Group was a short term dip in profit and a short term increase in cash flow, followed by a medium to long term growth in profit and cash flow;
> (b) the reason stopping new sales was not fatal to the Group was because as the existing projects reached maturity, the Group's annuity income stream increased rapidly;
>
> (c) on that basis, there was no meaningful risk that the banks would not continue to support the Group by increasing or refinancing facilities;
>
> (d) the banks did in fact continued to support the Group; and
>
> (e) the *tax announcement* did not materially affect asset sales or limit the Group's ability to raise equity.

391 It would appear that for some time prior to the tax announcement, Timbercorp was aware that a change in the tax law was likely, and that the consequence of such a change would be that the Group would not be able to offer new schemes. Financial models were prepared to test the impact of the change. The modelling demonstrated to ceasing to promote new business would be detrimental to the short-term profits, but posed no meaningful risk to continued financial viability. One reason was that the Group did not need to invest in new projects. As annuity income from the existing projects grew, the forecasts showed only a short-term dip from the loss of new business revenue.

392 As to the immediate effect of the tax announcement, Mr Rabinowicz's said that he 'did not at any time after hearing the announcement of the Tax Decision consider that there was even a remote possibility that Timbercorp would fail as a result.' The market reaction to the tax announcement did not suggest any risk to the survival of the Group.

393 Following the tax announcement, Timbercorp negotiated a transitional period for the implementation of the proposed change. On 27 March, the Commonwealth Government announced that the implementation of the tax announcement would be delayed for 12 months, commencing on 1 July 2008. Even then Timbercorp held the view that the ATO position was incorrect, and proposed an appeal. It had received advice to that effect from Allens Arthur Robinson and senior counsel. The appeal was ultimately successful.

394 The plaintiffs argued that there was a significant risk following the tax announcement that bankers would withdraw support – the renewal risk. In fact, the bankers did not withdraw support. On the contrary, there was a substantial increase in the level of support.

395 Of the experts, only Mr Dicks placed any significance on the tax announcement to the Group, linking it in cross-examination to the decline in new business which he described as 'particularly of concern' and 'ought to have been a concern to the Group in the early part of 2007.' Mr Dicks accepted, however, that he had not taken into account the 2006 business plan, although he was aware of it by the time of his second report. Nor was he familiar with

forecasts prepared in May 2005. It was apparent from his cross-examination that Mr Dicks was not acquainted with a large body of financial information prepared within Timbercorp for management purposes. Mr Dicks accepted that had income profit and cash forecasts, prepared in May 2005, been brought to his attention at the time of his report it may have made a difference to the opinions he expressed.

396 Mr Dicks was also referred in cross-examination to the 2007 Goldman Sachs report, which he had not previously seen, but which he accepted would have been useful to know about for the purpose of forming his opinions. Based on the report, he agreed that if Timbercorp was in the process of winding down new business revenue, and increasing its reliance on annuity revenue, then all else being equal this would provide a more stable cashflow for the business medium to long term. Mr Dicks acknowledged that by the time of the joint report he was aware that the reduction in new business meant that there was a requirement for less capital expenditure and grower loan funding facilities.

397 Putting to one side the unfortunate questions posed for Mr Dicks, his evidence suffered from a failure to become acquainted with important material before making judgments and expressing opinions about the impact on the Group of the various events and the risks associated with its business. He was all too willing to accept a limited body of material made available to him by the plaintiff's solicitors, as the basis for expressing opinions that were demonstrated, in the course of his cross-examination, to be unfounded. Unfortunately, he became the plaintiff's advocate, too willing to accept the plaintiff's thesis. He set out to justify the thesis rather than to investigate and express properly grounded opinions.

398 The only other adverse matter which attracted individual attention in the final submissions, was the tightening of the credit and financial markets in mid to late 2007, otherwise known as the Global Financial Crisis. The plaintiff submitted that this event resulted in a decline in the value of assets and made it more difficult for Timbercorp to obtain debt finance and to sell assets. There was no doubt that from late 2007 the financial market did not support the value of units in the Primary Infrastructure Fund at a level to support the sale of at which the board the Boort Olive Grove and the Carina Almond Orchards into the fund to the satisfaction of the board. The collapse of Lehman Brothers on 15 September 2008 resulted in the failure of the proposed sale of forestry assets to Harvard. The Group did not recover from that event.

399 The near insolvency allegation is too vague and uncertain to be meaningful. In any event, the evidence did not support the allegation the Group was nearing insolvency in the legal sense, or that there was a significant risk that it did not have the financial capacity to manage the projects through to the point where they were no longer reliant upon the Group or even to completion. There was no credible evidence that the Group was exposed to a meaningful risk that it would fail in the foreseeable future until late in 2008. None of the experts supported such a proposition.

400 The loan covenants risk was all but overlooked by the plaintiff in his final submissions. That is understandable because the event post-dated the sale of the last interest in a scheme and the last use of a product disclosure statement. As an event it was addressed by the auditors who were satisfied of its resolution. The auditors expressed an unqualified audit opinion report. The same may be said for the going concern risk, dealt with in the 2008 Annual Report. It too hardly rated a mention in final submissions except by the generic reference to adverse matters.

Chronology

401 On 5 July 2005, Mr Rabinowicz sent a memorandum to the directors concerning asset funding. He advised that Timbercorp had engaged in an expression of interest process in relation to the funding of horticultural assets over the next three to five years. A detailed briefing document had been provided to parties calling for initial funding proposals. A briefing paper was attached, which asked each of the prospective funding groups to consider the existing trust structure and any alternatives that would meet Timbercorp's corporate objectives, and to advise of their interest in assisting with the raising of funds. The prospective participants were Citigroup, Austock, Rothchild, ANZ Investment Bank, Goldman Sachs and ABN AMRO Morgans.

402 A memorandum from Mr Rabinowicz summarised the response from each group. His report to directors stated that Citigroup did not comment on the efficacy of the structure, with initial views that Timbercorp should move along the lines of the Centro structure and spread all assets into a trust and then hold 45% of the units in the trust.

Austock suggested an alternate structure to meet Timbercorp's corporate objectives. Mr Rabinowicz said, in summary, Austock suggested that Timbercorp position the assets as infrastructure assets in order to achieve benefits that included access to long term debt funding (up to 20 years), which removes refinancing risk every five to six years; and access to deep market demand for infrastructure assets that would provide increased certainty of raising funds. Austock apparently suggested that infrastructure investors would be less sensitive than banks to market forces, noting that banks were more likely to stand back from the sector at the first sign of trouble.

403 Rothchild apparently endorsed the existing structure and indicated a strong interest in providing subordinate debt funding. ANZ endorsed the structure and offered a best endeavours facility to provide senior debt of up to $500,000,000. Goldman Sachs expressed strong interest in working with the Group and said they would be interested in structuring and distributing the Orchard Trust. They advised that they would provide a written proposal. Morgans had not yet responded.

404 The briefing paper to the various institutions, attached to the memorandum, outlined the Timbercorp business model in the following terms:

> Timbercorp is an active investment manager specialising in agribusiness. Our core business is to structure, market and manage agribusiness projects for investor growers, thereby generating highly profitable initial sales and establishing long term annuity-style revenues. We also provide associated services in asset management, finance and forestry industrial operations described later in this paper.
> Increasingly, we are being approached by agribusiness companies to establish, purchase and/or manage assets to assist expansion or increased profitability of a sector. This can be achieved through the benefits of using scale at the establishment, operating and product sales stages and it invariably involves significant industry rationalisation. These increasing opportunities require us to streamline our asset funding techniques.
>
> Our business model is based on the following key components:
>
> **Source:** source large-scale agribusiness developments whether by lease or purchase or a mix of the two (in the case of the Timbercorp Orchard Trust).
>
> **Manage:** structure, distribute and manage a project that offers leasehold interests in the agribusiness assets. Investors agree to pay rent and management fees for the life of the project (between 10 and 23 years) in return for an entitlement to crop proceeds.
>
> **Fund:** to the extent that we purchase an asset, we then raise debt against the asset. Alternatively, the asset may be funded via the Timbercorp Orchard Trust which is itself internally geared. We also need to fund the loan book we create by lending to our grower investors.
>
> In the past, the majority of assets used in our projects have been funded on the Timbercorp balance sheet. Since 2001, these assets have been funded by a mix of equity (sourced from operating cash flow and equity raisings) and debt. More recently, certain horticultural assets have been funded off balance sheet via the Timbercorp Orchard Trust.

In the briefing paper Timbercorp stated as an objective the closer alignment of net profit to operating cash flows.

405 Austock made a presentation to Timbercorp in June 2005. The plaintiff pointed to parts of the Austock presentation as informing Timbercorp of financing risks. In its presentation, Austock noted the following issues:

(a) the absence of permanent and long term funding;

(b) the funding was costly and inefficient;

(c) maturity of funding, in particular debt, was mismatched to assets;

(d) perception by some institutional investors that Timbercorp was constrained by its dependency on capital and had a poor cash flow;

(e) a review of market behaviour by banks in adverse market or client specific adverse conditions, revealed that banks had habitually withdrawn support.

406 In November 2005, the Group conducted a review of its risks to identify those which may impact on the business and the delivery of its strategic objectives. The treasury risks, which included access to capital, ability to service existing debt and inappropriate cash flow planning, was attributed a risk rating of 10 and priority of 4. There was no change in the key actions in response to the treasury risks when compared with the previous analysis.

407 On 10 November 2005, Inteq Ltd prepared a capital management review report. The purpose of the report was to provide a review of Timbercorp's capital management program, with a focus on debt, in the context of the company's overall short, medium and long term strategy. The purpose of the review was to ascertain if there were sufficient and correct financial resources, and whether there was a correct strategy in place to match the growth of the company. As with other reports and reviews carried out by consultants, banks and the auditor, there was no suggestion that the information provided by Timbercorp was other than accurate and complete.

408 Inteq discussed three possible scenarios as part of the company's growth in the context of cash inflows versus total capital requirements. The first two scenarios assumed that Timbercorp ceased to sell schemes after 2005 and 2006 respectively, but continued to invest in associated new assets as if the projects were still pending. Thus, Timbercorp would continue to incur capital expenditure, and would be forced to hold assets with associated primary agricultural risk. Inteq described these as clearly disaster-type scenarios due to an unforseen catastrophic event, but recognised that the scenario would also test whether Timbercorp must continue to sell new schemes in order to remain viable, or even cover existing capital and operating cash commitments.'

409 The third scenario presented by Inteq represented the current Three Year Group Model, which assumed that the company would continue to invest in new assets and maintain its ability to raise debt funding as currently planned. The report noted that management had only taken the model out to 2008, and that following 2008 it was impossible to predict which new projects would be commissioned, if any. Therefore, the model extrapolated forward to 2017 assuming annuity revenue only with no new business revenue forecast.

410 Scenario 1 (no new projects sold after 2005) saw the cumulative cash position of Timbercorp deteriorate in the 2006 year to negative cash of $13 million, steadily climbing thereafter. From 2007, annuity income was predicted to exceed the cash required for the ongoing years. Scenario 1 assumed a downsizing of the business and no dividends. It was considered a worst-case scenario. It assumed that in addition to operating revenues, certain assets would be sold to the Timbercorp Orchard Trust, an entity in which members of the public invested, with the consequence that the asset and any liability was removed from the Timbercorp balance sheet.

411 Scenario 2 (no new projects sold after 2006) involved softer downsizing than in scenario 1. For example, it was assumed that a dividend would be paid in 2006 but not thereafter. Inteq concluded that the cash required to manage the business exceeded cash inflows until 2008 when the annuity income would reach $364 million. In 2006 there was a predicted shortfall in cash of $54 million and cash outflow exceeded the annuity income in 2007 by $10.4 million. The cumulative net cash position was not predicted to fall below $3.125 million in 2007.

412 Scenario 3 assumed no new projects after 2008, although it was noted that this was unlikely to be the case. Scenario 3 also assumed the payment of dividends and continuation of existing overhead costs.

413 The Inteq reviewed the future position of Timbercorp. It noted that, based on discussions with management, they envisaged that the future structure of Timbercorp would focus on its activity as a fund manager and financier, involved in managing, selling and to a lesser extent operating agribusinesses. It was proposed that Timbercorp's horticultural assets would be owned through a master trust, Timbercorp Agribusiness Trust, which had apparently been established but not yet listed, with a number of individual sub-trusts styled after the Timbercorp Orchard Trust. Inteq assumed that the Agribusiness Trust would be listed on the stock exchange and once listed would make a public takeover bid for the Timbercorp Orchard Trust No 1. The Agribusiness Trust was currently owned as to 45%

by Timbercorp and 55% by third party investors. Inteq recommended that Timbercorp seek to make funding arrangements for the Agribusiness Trust with the Commonwealth Bank, as it already had in place some existing assets.

414 Inteq also reviewed a proposal for a new structure, styled the Primary Industry Fund to hold assets which did not fulfil minimum project requirements for a tax effective MIS project. The proposal did not assume that Timbercorp would acquire or own assets held in the Primary Industry Fund. While these would be standalone projects, Timbercorp would provide management services, although Timbercorp Finance may provide some funding to growers.

415 Inteq identified some critical factors concerning Timbercorp's capital management requirements, and its ability to achieve transition to its targeted future position. The first was the floating interest rate applicable to approximately $130 million of Timbercorp's current debt. Inteq recommended close management of the cost of financing, including the mix between fixed and floating rates, to ensure financing costs did not detrimentally affect current or future projects by reducing the minimum rate of return to growers to uneconomic levels. It recommended that the Audit Risk and Compliance Committee urgently implement a detailed interest rate hedging policy. Inteq recommended a simplification of funding structures, for ease of administration as well as to ensure that they were understood by the investment community. The plaintiff emphasised the following observation by Inteq:

> There is an apparent mismatch between the length of project life and associated debt. This mismatch is well understood by management.
> ***Recommendation:*** continue to review the ability to extend the leverage for greater lengths of time. There may be a trade off between interest rates for longer date of debt and security of that debt facility for the term of the project. However, a mix may well be prudent.

416 Inteq pointed to the possibility of an economic slowdown, noting that a reduction in investment uptake by growers could take place if there was a general slowdown in the economy or a catastrophic event such as occurred in the United States on 11 September 2001. The risk, identified by Inteq, was the migration of growers during an economic slowdown to more traditional lower risk investments. Thus, it advised, Timbercorp should be in a position to postpone financing of projects if the need arose. Inteq noted that when annuity income exceeded outgoing capital expenditure on a sustainable basis the economic slowdown risk was diminished. It recommended that a system be implemented whereby key indicators were identified that would provide early signs of an economic slowdown to assist the business to effectively manage that eventuality.

417 By the end of 2005 Timbercorp already had a number of financing options in place. In 2001 it had raised $11 million through the issue of indexed annuity bonds. In 2003 it increased its forestry facility with the CBA to $21.5 million. Expiry dates were in 2008 and 2009. Also in 2003, Timbercorp had arranged for a $60 million securitisation facility with Permanent Trustee Company. In 2004 the ANZ took over that facility and provided $100 million as a securitisation facility, and an additional $20 million under which Timbercorp could borrow against grower loans.

418 There was a significant amount of capital raising activity in 2005, primarily through debt. It was a recognition of the increasing need for capital, and the attendant risks, that Timbercorp approached the various investment groups in mid-2005.

419 There was a small equity raising in January 2005 through a dividend reinvestment plan. In March, Timbercorp negotiated a facility with the CBA for $35 million to fund olive assets. The term was for three years. In August, the securitisation limit was increased to $110 million. In September, there was another small capital raising through dividend reinvestment and by November, almost $26 million had been raised through the issue of finance bonds. In December 2005 a second grower loan facility of $28 million had been negotiated with the ANZ, and a new loan facility for $75 million negotiated with the Halifax Bank of Scotland (HBOS). Also in December, $50 million had been raised through the issue of listed bonds.

420 The growing, but anticipated, demand for capital continued. In January 2006, Timbercorp raised around $3 million through its dividend reinvestment scheme. In March, the CBA forestry facility was increased from $29.5 million to $52 million. In August, the securitisation facility was further extended to $125 million and in September, the olive facility was increased to $50 million. Also in September there was a capital raising through the dividend reinvestment plan of about $3.5 million.

421 On 22 September 2006, Timbercorp raised $83 million by the issue of subordinated unsecured reset convertible notes. This capital raising had the effect of increasing its available cash at the end of its financial year (30 September 2006) which appeared to distort a comparison of closing cash positions from year to year. On 26 September 2006, Timbercorp negotiated a new facility with the ANZ for investment in almond projects in the sum of $45 million. As with other loan facilities, whether tied to specific projects or for general funding, the maturity dates were generally around three years. These facilities were often extended within that period or as the end of the term approached. Nevertheless, the short term of most facilities exposed Timbercorp to a renewal risk.

422 On 15 December 2006 the HBOS facility was increased to $110 million. It was syndicated. In January 2007 there was another small equity raising of a little over $5 million through the dividend reinvestment plan and a further equity raising by the issue of ordinary shares of $20 million. In May 2007, Timbercorp negotiated a new facility with HBOS for $35 million to fund its purchase of a shareholding in Costa Exchange Holdings Pty Ltd. On 16 May 2007 the HBOS syndicated loan was increased to $200 million, with the participation of Westpac and ANZ. The introduction of Westpac into the syndicated loan was significant. It occurred after the tax announcement and consequential presentation to banks. The plaintiffs relied upon the presentations as evidence a financial consequence to the Group that ought to have been disclosed to existing and potential investors.

423 On 13 July 2007, the grower loan facility, first negotiated in late 2005 with the ANZ, for $28 million, was increased to $45 million. In September 2007 there was a further equity raising of almost $4 million pursuant to the dividend reinvestment scheme. In October 2007, the 2005 grower loan facility provided by the ANZ was increased to $60 million. Also in October, the forestry facility provided by the CBA was increased from $52 million to $69 million.

424 In December 2007, the CBA forestry facility was further increased to $89 million and importantly, there was an equity raising by Timbercorp, through the issue of ordinary shares, in the sum of $56.4 million.

425 There was a further small equity raising by the issue of ordinary shares on 7 January 2008, yielding around $3.4 million of capital. Also in January, Timbercorp's dividend reinvestment scheme injected almost $6 million into the business. In March 2008, the grower loan facilities, provided by the ANZ were merged and the limit increased to $150 million. These were the facilities that could be drawn down by Timbercorp against the security of grower loans. They are to be distinguished from the securitisation facility. The last capital raising was a modest $1.5 million raised in September 2008 through the dividend reinvestment scheme.

426 In April 2006 there was a strategic planning workshop attended by the directors and senior management. One matter discussed was an analysis and update of strengths and weakness and an assessment of business objectives and strategy. Mr Rabinowicz gave a detailed account of that and other planning workshops, the preparation of business plans, and presentations to banks and board meetings. It was a detailed and thorough chronology of the important events in the management and planning activity of the board and senior executives from 2004 until the appointment of the administrators. The purpose of his analysis, which was contained in a witness statement of 325 pages, 1,234 paragraphs and 56 Lever Arch volumes of attachments, was directed in part to meet the plaintiff's case that there existed certain risks requiring disclosure, to the directors' knowledge of risks, and to make good the statutory defences relied upon by the directors. The material presented through Mr Rabinowicz, assisted by his explanation of events went largely unchallenged. There were some notable exceptions. This evidence presented a well organised, if not over-regulated, and management business environment in which the business of the Group was reviewed, analysed and managed with apparent rigour.

427 There is no suggestion that, apart from the non-disclosure and corresponding allegations made in the statement of claim, that Timbercorp Securities did not comply with its statutory obligations and those imposed under its Australian Financial Securities Licence. There was no allegation that, but for the pleaded case, Timbercorp failed to

comply with its statutory obligations and those imposed by the ASX. There was no allegation that the directors acted on breach of any duty of care or diligence or that they were dishonest or misused their position. The evidence supports the conclusion that the directors and senior management performed their duties in good faith, with a genuine desire to comply with their statutory obligations and preserve and enhance the value of the Group to all stakeholders.

428 Returning to the strategic planning workshop, in April 2006, it had significance to the plaintiff's case because those present considered a SWOT analysis. The weaknesses and threats included reliance on capital expenditure with increasing debt levels; ongoing cash requirements; and, under-performing projects. The workshop papers made reference to 5 Strategic Elephants, which were:

1. Maintain current MIS tax structure and develop alternate offerings
2. Access to capital
3. Acquisitions/diversification
4. Project management
5. Distribution network

An action plan was attached which identified the headline Access to Capital, the following actions:

The funding plan is driven by the Capital Management Plan, which is linked to the 3 year plan that is analysed by Corp Finance & Accounting
...
Analyse the opportunity of introducing a big brother partner (eg Challenger)
...
The plaintiff relied on this document as recognition by Timbercorp of the *financing risk*, because of the need to manage the risk and the *big brother* solution by which it recognised that its capital risk exposure was growing and needed a major shift in strategy.

429 The Capital Management Plan was contained in the strategic workshop papers. It identified five capital-raising projects for the financial year ended 30 September 2006 and four projects for the year ended 30 September 2007. For the 2006 year, the plan included the sale of almond assets, a multi-bond raising, additional bank funding, an equity raising and some debt repayment. For the 2007 year, the plan included increasing bank funding, the conversion of debt instruments into ordinary shares and importantly, the sale of the Boort Olive Groves and the Carina Olive Orchards. It was proposed that these assets would be sold into the Timbercorp Orchard Trust, or a similar trust structure so as to reduce debt and generate additional capital. The sale of these particular assets became an important part of the Group's planning as time passed, but was never achieved. Delay in the sale was attributed to the less than adequate value of units in the listed entity. That factor apparently inhibited a further capital raising by the trust to fund the purchase.

430 The plaintiff pointed to the continued deferral of the sale of those assets as an indicator of financial stress, and the nature of the structural weakness in the business model, that made the financing risk or fragile business model risk significant. The treasury risk was identified, and remained unchanged, with a risk rating of 10 and priority of 4. The action plan was dated as at 1 May 2006. The treasury risk was to be reviewed again by 30 June 2006. The action plan also noted that:

> this area will also be subject to review by internal auditor. Cash flow forecasting and capital management planning procedures are subject to ongoing review. Procedure for quarterly updates needs to be formulated'.

431 By the end of May 2006 the Yungara Almond Orchard had been sold into the Timbercorp Agribusiness Trust after a successful capital raising by the trust to acquire the asset.

432 In its Annual Report for the 2006 year (ended 30 September 2006), Timbercorp reported an increase in operating revenues by 27.4% to $393.2 million. It reported that new business sales revenue had increased by about

the same percentage to $162.1 million, while annuity income was up 33.7% to $174.9 million. EBIT was $159.7 million, up from $126 million in the previous year. Net assets were $444 million. The net cash position at the end of the financial year was $148.9 million, although the successful fund raising through the issue of unsecured notes had inflated that amount. A change in the accounting standard applied by Timbercorp resulted in the removal from operating activities of the proceeds from securitisation. The impact was explained in the notes to the accounts. The immediate effect was to remove approximately $73 million from operating cash flow.

433 At a board meeting on 12 September 2006, Mr Rabinowicz made a presentation concerning the effect of a potential government announcement that preventing or limiting up front deductions for investors in managed investment schemes. One scenario presented by him included the possibility of no horticulture schemes after 2007. The presentation revealed a reduction in new sales revenue, and a corresponding reduction in overall revenue and profit, although that was partially offset by increases in profits from annuity-style revenues which were anticipated to increase rapidly in the following years. The significance of this presentation is obvious. It confirmed that which was apparent from earlier cash flows. Timbercorp was anticipating a disruption to its business through changes to the tax laws affecting the deductibility of investments.

434 On 16 November 2006, Timbercorp announced the declaration of a fully franked dividend to 5.5 cents per share payable on 16 January 2007. Timbercorp's full year accounts and reports were published to the ASX on 30 November 2006.

435 In November 2006, the board was updated on with cash flow forecasts and a three year plan, which made reference to anticipated growth in new business revenue from $166 million in 2006 to $182 million in 2009. The plan included continuing sales of forestry and non-forestry schemes, although a decline was forecast for 2009, with the elimination of sales in olive and citrus schemes. Asset sales were anticipated, assumed and planned.

436 When preparing Product Disclosure Statements, Timbercorp Securities used a Due Diligence Committee as a mechanism to ensure compliance with relevant legislation. The chairman of the committee was Norm Taylor, an external solicitor. Mr Metzler, Timbercorp's General Counsel and Company Secretary was a member. For each Product Disclosure Statement, the committee would develop a work plan for the due diligence process which required the agreement of Timbercorp Securities and each member of the committee. The committee sought verification of information from directors and management, including formal signed representations.

437 The committee was first formed in November 2006, when its first meeting was held. Once the Due Diligence Committee had completed its investigations it would report to the board which had ultimate responsibility for approval of each Product Disclosure Statement. A function of the Due Diligence Committee was to continuously monitor events and circumstances relevant to each Statement and, if required, recommend the issue of a supplementary Statement. Supplementary Statements were issued in relation to a number of schemes.

438 The plaintiff submitted that the Due Diligence Committee was isolated from the board, because no member of the committee was also a member of the board or of the Audit Risk Committee. In my view, the Due Diligence Committee was not relevantly isolated, if regard is had to the membership of Mr Metzler who, as Corporate Counsel, regularly attended board meetings. There was also interaction between the committee and the board involving representations by the board and recommendations by the committee. The plaintiff submitted, in effect, that the Due Diligence Committee had been isolated from particular information available to the board, concerning the identification of the treasury risk, the Austock presentation, the Goldman Sachs presentation in November 2007 and the concerns expressed by PM Capital that Timbercorp's financial position was risky. This argument assumed that had the committee been so informed it would not have permitted a Product Disclosure Statement to be issued thereafter without alerting the reader to the financing risk and the adverse matters.

439 If, however, the board was aware of a risk requiring disclosure, and failed to disclose the risk, it would not escape liability merely because it had established a Due Diligence Committee. The existence and function of the Due Diligence Committee is no doubt relevant to the statutory defences, although a failure to inform the Due Diligence Committee of a matter known to the board, but not known to the committee, would significantly undermine any reliance on the committee.

440 The cross-examination of Mr Hance by the plaintiff, to establish that he did not inform the committee of certain matters, does not leave the evidence on this topic in a very satisfactory state. As the plaintiff pointed out, no member of the Due Diligence Committee was called to give evidence. But that also presupposes that the matters which the plaintiff would have had Mr Hance, or others, communicate to the committee, were pertinent to the discharge by the committee of its function.

441 On 14 December 2006, the Timbercorp Primary Infrastructure Fund was listed on the ASX. This fund was designed as the vehicle to purchase the Boort Olive Grove and the Carina Almond Orchard properties.

442 The mercurial nature of the taxation laws applicable to investments in managed investment schemes was evident in an announcement made by the federal government on 21 December 2006, introducing a new regime under which upfront tax deductions would be allowed for investment in forestry schemes.

443 On 3 January 2007, Mark Pryn, Company Secretary for Timbercorp, prepared a memorandum to the executive committee as part of a budget presentation. A key assumption was profit from assets sales to the trust. The planned asset sales included the Boort Olive Grove and the Carina Almond Orchard properties as well as avocado assets.

444 On 17 January 2007, Mr Rabinowicz made a presentation to the ANZ and Westpac Banks with a view to their participation in the HBOS syndicated loan facility. The presentation outlined the Timbercorp business model and included financial forecasts and cash flows on two scenarios. The first scenario assumed that Timbercorp would not offer horticultural schemes beyond 2008, and in the second scenario, it would not offer such schemes after 2007.

445 The first of the adverse matters was an event that occurred on 6 February 2007, when the Minister for Revenue and Assistant Treasurer, Peter Dutton MP, informed the public that the Australian Tax Office had reconsidered its interpretation of the current taxation law and was preparing a draft Taxation Ruling, to take effect after 30 June 2007. His press release continued:

> The effect of this change of interpretation of the current law is that investors in MIS will no longer be able to claim upfront deductions for their contributions to the MIS on the basis that the investor is ‘carrying on a business’.
> Investments in MIS that are covered by existing product rulings that allow immediate deductibility for the investor’s initial contribution, and for contributions in subsequent years, will be protected (provided the MIS continues to operate in the manner described in the application for the product ruling).
>
> As a result of this change of view by the ATO, the government took its decision in relation to forestry MIS. With effect from 1 July 2007, investors in forestry MIS will be entitled to an upfront statutory deduction for all expenditure, provided that at least 70% of the expenditure is directly related to developing forestry. Under the new legislation, it will not be necessary for investors in forestry to demonstrate that they are carrying on a business in order to claim the statutory deduction.
>
> This decision will ensure the continued expansion of our plantation forestry estate and lend support to the industries 20/20 vision.
>
> The effect of the likely change in interpretation by the ATO will be to place investments in non-forestry agribusiness MIS on the same footing as other ‘passive’ investments in agriculture.

446 The plaintiff argued that Timbercorp was caught by surprise, and, in effect, scrambled to manage a difficult situation as best it could. There were some comments made by Timbercorp directors, immediately following the announcement, that would support such construction of events. However, the press release by the Minister referred to ‘extensive discussions in recent months over the future tax treatment of investments’ between the government, the ATO and the forestry and non-forestry agribusiness MIS industry.

447 The defendants argued that the presentation, and earlier cash flow forecasts and board discussions, demonstrated a recognition that the sale of horticulture schemes may not continue. If that was so, the expressions of apparent surprise or alarm at the tax announcement seem out of place. On 6 February 2007, Mr Rabinowicz sent an email to the directors and the Company Secretary, copied to the executive committee in which he said:

> The government decision has been announced including all of the details of the ATO position – see attached.
> It's bad!
>
> **Immediate Steps**
>
> (1) We have already spoken to a journalist...
>
> (2) I have discussed with Robert and Kevin next steps.
>
> (3) We are putting together a communications matrix to properly channel our messages.
>
> (4) Earlier today, we spoke to two out of three banks (and left a message for the third) before the release came out.
>
> (5) We are drafting an ASX release which I will circulate for your review tonight. It will need to be lodged before the market opens tomorrow.
>
> (6) Matt and I have cancelled our trips to Canberra tomorrow. I will be on the phones all day to try to calm down the market and to ensure that we communicate with our financial advisors to protect our sales.

448 Assuming the correctness of the Minister's press release, in which he mentioned 'extensive discussions in recent months', and the presentation to the banks made by Mr Rabinowicz in January, the element of surprise was most probably in the timing of the announcement. That is what Mr Hance said. Timbercorp responded by making an announcement to the ASX on the following day. It would appear from the announcement that Timbercorp had assumed or understood that the government would undertake 'a full scale enquiry into non-forestry managed investment schemes and consider traditional arrangements until the ATO's position had been tested in the courts.' Timbercorp's announcement to the ASX continued:

> Timbercorp does not accept does not accept the new view of the Australian Taxation Office (ATO) regarding carrying on a business. For more than 10 years, the ATO had been ruling that investors were carrying on a business. Given that there has been no change in legislation or any new cases to support its position, the decision is arbitrary and untested. The High Court has previously found that investors in an MIS-type project were indeed carrying on a business.
> It would be unacceptable to create this sort of damage to the industry in circumstances where the ATO may be proven wrong. At the very least, Timbercorp will urgently be requesting the ATO to fast-track a test case or mediation process to resolve its views.
>
> Mr Hance said that in the absence of resolving a test case, the decision was likely to substantially reduce horticulture new sales from 2008. Nevertheless, Timbercorp has built a strong foundation of annuity-style revenues from past projects, which will exceed $220 million per annum from 2007. The government announcement confirmed that 2007 product rulings will continue to apply so expected sales from 2007 projects will further increase annuity-style revenues to in excess of $300 million from 2008 onward.
>
> He said the company also expected continued growth in forestry new sales, industrial operations and agri-funds management and would bring forward its investigation of other investment structures.

449 In the following month the government or ATO changed its position, extending the previous tax deductibility status of horticulture schemes to the end of the 2007/2008 income tax year. The foreshadowed test case was commenced by Timbercorp and eventually succeeded in establishing the deductibility of upfront fees in horticulture schemes, on the basis that investors were carrying on a business.[75] In the short term, however, there was no concealing the concern of the board at the announcement.

450 Prior to the tax announcement on 6 February 2007, there had been a meeting of the board at Timbercorp at which Mr Rabinowicz informed the members that the ATO was considering a change in the tax arrangements for horticultural schemes. At that time, Timbercorp had committed approximately $50 million in expenditure for 2008 projects. New financial modelling was proposed on the basis that there would not be any horticultural projects sold after 1 July 2007.

451 At the board meeting held on Monday 12 February 2007, Mr Rabinowicz informed the members of new cash flow projections through to September 2010, with corresponding annual profit forecasts, the impact on bank covenants and changed funding arrangements. Further detail concerning cash flow and funding arrangements was contained in a report from the monthly report prepared by the Chief Financial Officer dated 16 February 2007. The CFO was Mr Murray. The report noted that the 6 February announcement had put negotiations over a syndicated loan from HBOS on hold; and 'from a Westpac perspective, however, we hope to brief Westpac after we have completed the round of presentations to the existing bankers.' The report noted a request to the ANZ to increase the grower loan facilities and that the Group had been proactively keeping all the banks up to speed with regulatory developments. Arrangements had been made to make presentations to all banks during the week commencing 19 February.

452 On 19 February 2007, Mr Hance gave a strategic report to directors. He told them:

> Industry participants, their service providers and a large number of government back benchers were shocked and outraged by the sudden and ruthless nature of the announcement and by the absence of consultation prior to the Dutton statement.

453 Mr Hance noted that Timbercorp market capitalisation had fallen by $250 million and that it had immediately ceased work on 2008 projects and beyond, dramatically impacting contractors and sub-contractors involved in those projects. Under the heading Business Impact on Timbercorp as of the 9 (sic) February Announcement, Mr Hance told directors:

> Monthly Cash Flows and Annual Profit and Loss and Balance Sheets are attached for the years ended 30 September 07, 08, 09, 10. They assume no new non-forestry projects, ongoing forestry projects, substantial expenditure cuts and continuing support from our bankers. (Meeting with our bankers are scheduled over the next few days – an updated report on those meetings will be discussed at the board meeting.)

454 Under the heading 'Challenges', Mr Hance continued:

> Our short term challenge is to arrange our cash flows to ensure we stay in business. Once we are confident we have achieved that, our priority is to formulate and implement a well thought out long term strategy. At the same time we need to avoid a short term fix that could thwart our long term aims.
> It is likely that we can best achieve our aims in conjunction with a 'big brother' investment partner. Since the Dutton announcement we have received calls from several parties seeking to explore opportunities to work with us.

455 The plaintiff seized on this report as a document which evidenced a consciousness of dependency on and thus vulnerability to bankers, a threat to continuing business and a need to find a big brother. This awareness, submitted the plaintiff, made it imperative that prospective and existing investors be informed of the consequence of the tax announcement. The plaintiff construed the first of the challenges expressed by Mr Hance – our short term challenge

is to arrange our cash flows to ensure we stay in business – as if he meant to ensure the Groups survival. He submitted that the directors understood that the announcement had caused significant uncertainty with the Group's financiers, which would affect Timbercorp's ability to achieve desired banking arrangements. The plaintiff submitted that the announcement also put pressure on short term cash flow, caused the Group to focus on monthly cash flows and to undertake a strategic review of its business. He submitted that within a few days of the tax announcement, Mr Rabinowicz made a list of options in relation to raising or conserving cash.

456 The financial forecasts attached to the strategic report prepared by Mr Hance, which assume no horticultural scheme sales after 30 June 2007, record an increase in total income from a projected $472 million in 2007 to $581 million in 2010. Total gross profit was projected at $186 million in 2007, reducing to $144 million in 2008, then increasing to $158 million in 2009, and back to $147 million in 2010. Net profit after tax rose and fell in line with gross profit. Those were not forecasts of a business about to fail. Indeed, net assets were forecast to reach $553 million in 2007 and $806 million in 2010. The ability of the Group to maintain its income streams and improve its net asset position depended on the anticipated growth in annuity income, as well as its ability to reduce capital expenditure on new projects. Although it was plain that some additional cash resources would be required, the projections forecast a secure cash position at the end of each relevant period, with cash improving from 2008.

457 The response of the board and senior management to the tax announcement, as an appropriate strategy to deal with its impact on the business, was not criticised by the plaintiff. The steps taken by the board, of communicating with the banks, and adjusting cash flow forecasts was what might reasonably be expected of a competent board of directors and management team. Timbercorp had obviously planned for such an event, but seemed not to have anticipated its occurrence in early February 2007. When the event happened in February 2007 the board responded swiftly and effectively to plan and manage the associated risks. It is a separate question, however, as to whether they were required to disclose the impact of the event on prospective and existing investors as the plaintiff contended.

458 On 20 February 2007, Timbercorp made a presentation to its bankers following the tax announcement. The bankers were presented with cash flow forecasts and a raft of other information. Timbercorp was predicting net cash at the end of the financial years 2007 to 2010 of approximately $68 million, $62 million, $76 million and $105 million respectively. It told the bank that the proposed changes announced by the ATO were out of the blue but that it would be business as usual with very strong cash flows after asset construction was completed. It would need the support of all stakeholders. It told the banks that more debt funding was required.

459 At the board meeting the following day (21 February 2007) Mr Rabinowicz informed the members that monthly cash flows and annual profit and loss and balance sheets had been reviewed out to 2010. Presumably these were the same as those shown to the banks. He told the board that the review assumed no new horticultural projects but ongoing forestry projects, substantial cuts in capital expenditure and continuing support from bankers. He told the board that the bankers were supportive but understandably keen for transitional arrangements to be settled. The transitional arrangements were those under negotiation with the ATO. He told the board that the banks understood the importance of the funding requirements.

460 The impact of the tax announcement on the business was summarised in minutes of the board meeting. The minutes reported the following as the impact on the business:

> Monthly cash flows and annual profit and loss balance sheets out to 2010 were reviewed. The financials assume no new horticulture projects (no transitional arrangements), ongoing forestry projects, substantial expenditure cuts and continued support from our bankers.
> In summary the financials show that the company remain profitable (profits increasing from 2008 onwards), and in line with strengthening operating cash flows and significantly reduced capital commitments debt starts amortising at an increasing rate from 2007 onwards.

461 On 22 February 2007, Timbercorp held its annual general meeting at which Mr Hance announced that Timbercorp's 2007 projects were unaffected by the tax announcement and its plans for future growth. Mr Hance announced that Timbercorp was confident that it would succeed in its test case against the ATO and was planning strategic diversification as part of a three year plan.

462 On 15 March 2007, Mr Murray prepared a memorandum for the board concerning the cash flow forecasts. The report mentioned that the tax announcement made on 6 February 2007 had 'created significant uncertainty with all our financiers' and could have the effect of delaying proposed funding arrangements which were set out in the memorandum. He continued:

> Although we have been actively updating our financiers on the regulatory position, and our financiers are 'comfortable' with the current position, the completion of the above transactions will remain difficult until there is an announcement on the *transitional arrangement*. This uncertainty and delay has created significant pressure on the short term cash flow. (Emphasis added)

The 'transitional arrangement' was an arrangement eventually negotiated with the government, which resulted in a deferral by the ATO of its announced position on the deductibility of upfront fees in horticulture projects, until 1 July 2008. There was to be an effective moratorium for one year. The particular projects mentioned in the memorandum included the sale of horticultural assets to the Primary Infrastructure Fund, grower loan finance from the ANZ, an increase in the HBOS syndicated facility from $110 million to $200 million and other financing arrangements.

463 In the report Mr Murray noted that there was a continued focus on monthly cash flow projections through to September 2010, which had been prepared with corresponding annual profit forecasts, impact on covenants and changed funding requirements. He said that the cash flows would be tabled at the board meeting and used in presentations to debt providers. Mr Murray said that in line with the cash flow analysis, the three year plan had been updated to deal with the possibility of a one year transition period. This indicated a level of expectation that agreement to a transition period had been made with the ATO. Mr Murray's report contained an analysis of assets, the HBOS and ANZ facilities and other matters such as the proposed Primary Infrastructure Fund, loan arrears, grower management reports, revenue models for 2006 projects, an interest rate hedging summary and a range of other matters, too many to mention, concerning the financial administration of the business for which Mr Murray was responsible. He noted that there had been no material changes to the Capital Management Plan which had been presented to the board in November. He attached a summary of financing facilities and assets pledged to September 2009.

464 Mr Murray's memorandum was circulated to board members on 16 March 2007. Attached were forecast and actual cash flows and a copy of the capital management plan. The financial forecasts assumed a one year transition and extended out to 2016. The forecasts indicated that net assets were projected to increase from $551 million in 2007 to $1.5 billion by 2016, with a cash at end of period position in 2007 at $43 million, rising to $74 million in 2010, declining to $50 million in 2011 and then rising to $95 million in 2012, $170 million in 2013, $239 million in 2014, $355 million in 2015 and $474 million in 2016. The improving cash position was a reflex of the growing annuity income.

465 Also on 16 March 2007 Mr Hance prepared another strategic report to directors in which he addressed the business impact on Timbercorp 'during the period of uncertainty'. From the memorandum it seemed plain that the uncertainty was the expected, but not yet announced, transitional arrangement which would extend the existing deductibility of horticulture scheme investments through to 30 June 2008. Mr Hance noted:

> Whilst clearly concerned by the current uncertainty they (bankers) continue to support the retention of all existing facilities but would not welcome any approach to expand our banking arrangements.
> They understand the importance of an extension of transitional arrangements to our business (and the proposed test case) and like us, are anxiously awaiting an announcement by the ATO.

Short Term Cash Flow Position

The month of April shows cash shortfalls which must be corrected during this month. An update on this urgent situation will be presented to the meeting.

Medium Term Cash Flow Position

The April, cash flows show significant improvement but are dependent on successful project sales, timely asset sales and new borrowings. The possible introduction of the Smorgon group into the Glasshouse Tomatoes Project and Costa's into Australian garlic producers would further improve liquidity.

If the expected transitional arrangements eventuate as expected the result in Capex spend will create a further necessity for substantial funding. In the long term, cash flows are expected to be very strong.

466 Mr Hance noted that Goldman Sachs JBWere had been engaged to undertake a detailed analysis of 'our business and its future cash flows and profitability. An update on their preliminary findings and recommendations will be presented to the board.' The board meeting took place on 22 March 2007, and the minutes record that the board was informed in substantially the same terms as the memoranda prepared by Mr Hance and Mr Murray.

467 As part of the regular risk management strategy undertaken by the Group the Audit Risk and Compliance Officer prepared a report to the Audit Risk and Compliance Committee dated 23 March 2007. The report was copied to Mr Hance; Mr Vaughan, an Executive Director; Mr Rabinowicz; Mr Murray; Mark Pryn, Company Secretary; and, Gideon Meltzer. There was nothing unusual about the report. Indeed, it demonstrated a systematic approach to risk management and included risk profiles, assessments and ascribed responsibility to particular individuals. The treasury risks remained unchanged, although key actions were amended with additions highlighted. In relation to the treasury risk, there was reference to regular monthly cash flow forecasts, bi-weekly revisions and monthly capital expenditure updates.

468 On 27 March 2007, Timbercorp announced to the ASX the decision by the ATO to defer the implementation of its new tax ruling relating to agricultural managed investment schemes until 1 July 2008.

469 On 30 March 2007, Goldman Sachs JBWere produced a strategic review update. The report noted that the review had been undertaken following the tax announcement, and presumably as a consequence. The review was described as 'a high level review of Timbercorp's evaluation as a listed company as well as alternative ownership models'. Key conclusions were set out in the executive summary and were as follows:

In its current form, Timbercorp's earnings (EBITDA and NPAT) profile would be broadly negative for three years, assuming horticulture schemes were no longer sold after 2008, although net cash generation would increase overall during that period.
By reference to a bar chart found later in the report, what the author meant by *broadly negative* was a negative earning trend until about 2011.

Timbercorp shares appeared to be undervalued in the public market on a sum-of-the-parts basis
Sentiment towards the sector and the expected negative earnings trend was likely to weigh on the share price in the medium term, implying that undervaluation was likely to persist
A traditional LBO (leveraged buy out) supported by private equity was unlikely to deliver an attractive outcome for Timbercorp shareholders at present
Timbercorp's earning/cash flow profile did not suite a highly leveraged case over the timeframe typically considered by financial sponsors (3-5 years)
Medium term (3-5 years) exit options for the financial sponsor were unclear
Analysis of potential returns to a wholesale institutional investor indicated that a private ownership model of this type could generate an attractive outcome for Timbercorp shareholders, and was worthy of further investigation

Business restructuring options, such as a buy out of the TPIF/TOT entities, or the acquisition of grower lots, had some impact on Timbercorp's financial profile, but did not alter the overall conclusions materially
A merger with Great Southern Plantations could be EPS accretive for Timbercorp due to Great Southern Plantations lower relative P/E ratio, but would not address the underlying issues of Timbercorp's undervaluation in the market and negative earnings trend in the medium term
470 As already mentioned, the report indicated a negative earnings trend until 2011, with income levelling and then rising with an increased contribution from annuity income. A similar pattern emerged for net profit after tax. As far as the operating and investing cash flow profile was concerned, key observations included significant negative cash flow from new horticultural projects until 2012, due to pay out of investment cost, primarily water. However, Timbercorp was expected to be cash flow negative in only 2007 and 2008. Cash flows were predicted to be broadly stable to growing from 2010. Goldman Sachs gave a standalone valuation of $3.11 per share for Timbercorp compared with a current share price of $1.85.

471 Mr Murray prepared the March 2007 CFO report to Mr Rabinowicz on 24 August 2007. The report followed the same format as the previous reports. Mr Murray noted the Goldman Sachs report, the reactivation of discussions with HBOS following the announcements of the transition, that Timbercorp was in advanced stages in finalising a new facility with HBOS for a specific project, and that ANZ had given initial credit approval to increase the existing grower loan facility from $28 million to $45 million.

472 The risk assessment management process, undertaken by Timbercorp, resulted in a new set of risk profiles prepared as at 10 May 2007. The treasury risks remained as they were, but with a priority of 5.

473 On 10 May 2007 Deloitte, the external auditors for Timbercorp, wrote to the Audit Risk and Compliance Committee, providing its report arising from the audit of Timbercorp and its controlled entities for the half years ended 31 March 2007. Deloitte stated:

> Our audit procedures were focussed on those areas of Timbercorp's activities that are considered to represent the most significant audit risks.
> The risk areas were identified as a result of the risk assessment process undertaken during the planning phase of our engagement.
>
> We are satisfied that all areas of significant audit risk have been addressed appropriately and are properly reflected in Timbercorp's consolidated financial report for the half year ended 31 March 2007.

474 The first matter of significance, identified by Deloitte was 'Future Business Strategy' 'including funding. The report in this part was divided between the identification of business issues and the auditor's comment. Under the heading just mentioned, Deloitte referred to the tax announcement and the fact that Timbercorp management had recently completed an assessment of the strategic direction of the business, including detailed financial forecasts across a number of scenarios, which were presented to Deloitte. The authors continued:

> We note that of the financial forecasts prepared by management, the most conservative scenario indicated that Timbercorp will continue to be profitable, albeit at lower levels, and that Timbercorp will continue to increase its borrowings from the existing funding facility with HBOS.
> We understand that Timbercorp management and the board are currently actively engaged in assessing all the various strategic options available to them and in particular the effect of any extension in the transitional arrangements offered by the government in the application of the interpretation.

475 The Deloitte response to the business issue, after noting the extension of the transitional arrangements to 30 June 2008, was to identify areas of potential impact which included:

1. *Funding*: management will need to demonstrate their continued support of financiers sufficient to fund expected cash requirements in the medium term (no less than 15 months, based on the strategic direction adopted by the entity...
2. *Potential Asset Impairment*: identification of any non-current assets which may no longer produce revenue sufficient to cover their carrying costs. No issues have been identified at this stage.

100. *Fair Value Assessment*: determination of whether the value of investment properties carried at fair value, including land used for non-forestry MIS schemes, has been adversely impacted by the changes. No issues have been identified at this stage.

4. *Onerous Contracts*: identification of any onerous contracts arising due to commitments or expenditure (ie long term land lease agreements) on projects where future revenues no longer exceed costs. No issues have been identified at this stage.

476 Under the heading, 'Other matters noted – assets classified as held for sale', the auditors noted the board's approval of the sale of the Boort Olive Grove and the Carina Almond Orchard as part of the 2006 strategic plan. The proposed sale to the Primary Infrastructure Fund was scheduled for 22 June 2007. Deloitte noted that management were actively working on the sale. Deloitte also noted that expected sale proceeds, based on external valuations, exceeded the carrying value of the assets as at 31 March 2007. In the events that occurred, those assets were never sold.

477 The plaintiff relied upon a further announcement by Timbercorp to the ASX on 17 May 2007. The headline was 'Diversified Revenues Continue to Grow'. Timbercorp introduced itself as:

> Leading agribusiness investment manager, Timbercorp Ltd... has continue to grow its diversified revenue streams during the first six months to 31 March 2007.
> ...
>
> The 2007 sale season has experienced interruptions due to regulatory uncertainty and the drought. However, a more positive weather outlook and autumn break combined with greater certainty in the taxation treatment of managed investment schemes, have subsequently improved new business sales. Historically the majority of new project sales and profits are generated in the second half of the year.

478 In his report dated 17 May 2007, Mr Murray noted that the HBOS syndicated facility had been finalised, increasing the commitment from $110 million to $200 million. Syndicate members were HBOS, the ANZ and Westpac. The report further noted that the bridging facility with HBOS had been finalised in the sum of $35 million and that ANZ had given initial credit approval to increase the existing grower loans facility from $28 million to $45 million.

479 By 18 May 2007 Timbercorp's half yearly review had been prepared, indicating indicated that revenues and net profit after tax were lower than expected, reflecting lower new business and higher borrowing costs. Gearing was at 144.7%, compared with 117.6% in September 2006. Operating cash flows were down.

480 In preparation for the board meeting to be held on 24 May 2007, Mr Rabinowicz prepared and circulated his strategic report, which included a report on the half yearly results. He noted that as a consequence of a presentation of the half year report, presumably to the market, the share price had been marked down to below $2. He noted that sales inflow remained slow when compared with 2005, and said that he continued to hold the view that sales would fall short. He proposed a number of initiatives to lift sales.

481 On 13 June 2007, Timbercorp made a presentation to its bankers, informing them that the capital management plan had been adjusted by delaying the transfer of the Boort Olive Groves and the Carina Almond Orchard to the Primary Infrastructure Fund until March 2008. It proposed to reduce debt levels as assets were divested.

482 In about June 2007, Timbercorp management prepared a confidential internal strategic plan entitled Grow to 2012. Board objectives stated in the plan included achieving a 65% LVR gearing, and the alignment of profit and cash flow. From the presentation material it would seem that the desire to align profit and cash flow was to enable Timbercorp to pay dividends. The plan forecast a likely fall in profit in 2009 and, having identified objectives, considered how to meet them. Among '7 things to ponder', in the course of the strategic review, were two matters which the plaintiff considered important. They were:

Is retail investment into agribusiness dead?
Is forestry MIS going to remain under threat?
483 Under the heading 'Where to from here', were four possibilities:

Do nothing – wind down business
Build on what we have – i.e. evolve structures, look at new types of transactions
Slice and dice – cease in some areas, build on others
Complete change of direction – review risk profile
The strategic plan reviewed business weaknesses, including reliance on capital funding and under performing projects. Threats to the business were listed, including negative perceptions of 'tax effective investments and large corporate farming; tough and unpredictable regulatory environment – ASIC/ATO (rulings, commissions, structure etc); and ability to raise funds through equity/debt markets'. There were other threats.

484 On 29 June 2007, the board declared an interim dividend of 3 cents per share.

485 On 9 August 2010, the Audit Risk and Compliance Officer made a further report to the Audit Risk and Compliance Committee, which included an updated risk analysis and key action plan, including an assessment of the treasury risk, and the three sub-risks – inappropriate cash planning, ability to service existing debt and access to debt/capital. The key actions to manage the risks remained unchanged, as did the risk rating and priority.

486 At the July board meeting, Mr Hance sought and obtained board approval to investigate different forms of capital raising. In early August the Audit Risk and Compliance Committee undertook a further review of risks. Its attention to the risk profile assessment process appears to have been regular, perhaps on a monthly basis or even more frequently. The treasury risk profile and priority remained unchanged. The August board meeting was informed by Mr Hance that a presentation would be made concerning funding requirements and that Austock was likely to be recommended as the broker.

487 On 17 September 2007 Mr Murray presented his monthly report to Mr Rabinowicz. The report noted a continuing focus on monthly cash projections and associated funding requirements. A cash flow report was attached. Mr Murray noted that cash flows were tight following a delay in the sale of a property. He said, 'we look like we need to look at ways of plugging a gap that could be in the vicinity of $20 m after repayment of M-Deb'.

488 By 18 September 2007, Mr Cameron had prepared a cash flow report, including August 2007 actuals, for Mr Murray. The report noted that, 'early drafts (presumably cash flows for 2008) suggest that we need some additional funding in 2008, either through equity raising, additional debt or through a sale & leaseback transaction.' Some capital management items were noted for attention, including the status of loan facilities and the sale of the Boort and Carina properties. Mr Wallace noted that the expected sale of those properties to the Primary Infrastructure Fund was expected to take place in 2007 for around $93 million, 'subject to the unit price rising to a more acceptable level, and a few remaining property issues to be resolved.'

489 On 18 September 2007, Macquarie Bank expressed an interest in the acquisition of Timbercorp. The proposal was known as Project Taipei.

490 On 21 September 2007, Mr Rabinowicz prepared and sent his report to directors in advance of the monthly board meeting. He dealt with cash flow, capital raising and asset sales, amongst other things. His report dealt with components of the plaintiff's financing risk. He stated:

> Cash Flow and Capital Raising

> At the 26 July meeting it was resolved to investigate a hybrid capital raising to provide funds for future development and for liquidity purposes to safeguard the company in the event that a planned asset sale or other capital management activity is delayed or is unable to be completed on acceptable terms.
>
> It is now clear that the Boort raising has been deferred into FY2008 (probably March 2008 HY). Further, the proposed Annuello raising with Orchard Funds is unlikely to proceed due to their concerns over water. I have addressed these matters later in this memorandum. We are also progressing new business initiatives including: a dairy project, olives in Argentina and repositioning within funds management with board proposals likely to be submitted in the coming months.
>
> At the board meeting we will present an update of forecast cash flows for discussion. It is clear that cash flows are tight with little margin for error (following the repayment of the TIMHA debentures) and given the substantial level of uncertainty as to the timing of Capex (particularly relating to water).
>
> Asset Sales
>
> Our proposed sale and lease back of Annuello to Orchard Funds Management (1,911 ha - $57 m spend to date) has been stalled following their concerns over water.

491 On 24 September 2007, a confidentiality agreement was signed with Macquarie Bank and due diligence commenced, with an indicative price of $2.40 per share. On the following day, Messrs Murray and Rabinowicz made a finance presentation as part of the Macquarie due diligence. On 26 September 2007, Canterbury Partners, who were advising Timbercorp on the Macquarie proposal, informed Mr Rabinowicz that even if Timbercorp raised an additional $50 million in capital it may not adversely affect the share price under negotiation with Macquarie.

492 Also on 26 September 2007, Mr Beaton, senior manager, corporate finance, at Timbercorp sent an email to Mr Chapman of HBOS in which he foreshadowed a possible breach of the leverage ratio covenant. He proposed a possible resolution.

493 At the September board meeting, Mr Rabinowicz reported that the overall position of the Group had changed due to the external environment, including drought and the fact that assets had not been sold as expected. A draft outline in relation to strategy and future opportunities was tabled by Mr Rabinowicz. He also reported the possibility of a breach of the leverage ratio and that an approach had been made to HBOS and other syndicate members for a variation to avoid breach.

494 On 10 October 2007 Deloitte presented the Audit Risk and Compliance Committee with the audit service plan for the financial year ended 30 September 2007. Under the heading Key Areas of Audit Focus, Deloitte mentioned the tax announcement and the test case, and made reference to the reliability of future cash flows. It stated:

> As Timbercorp continues to work through the various scenarios for the strategic direction of the business, the financial forecasts will continue to evolve and any additional funding requirements highlighted. This forecasting may prove a challenge to Timbercorp as with a new direction comes possible greater uncertainty regarding the reliability of future cash flows and an ability to secure additional funding.

Deloitte's response to the risk was as follows:

> We do not anticipate spending significant time on this issue during the audit for the year ended 30 September 2007. However, we will continue to obtain updates from Timbercorp management on the developments in this area in order to form a view on the potential impact, if any, on the financial statements presented to Deloitte.
> Areas of potential impact include:

> (a) potential asset impairment...
>
> (b) fair value assessment...
>
> (c) onerous contracts...
>
> (d) funding: management will need to demonstrate the continued support of financiers sufficient of fund expected cash requirements in the medium term (not less than 15 months), based on the strategic direction adopted by the entity. Deloitte will review the financial forecasts and the funding agreements in place at 30 September 2007. Where additional funding requirements within 15 months of year end have been identified in these financial forecasts we will discuss with Timbercorp management the progress made to secure this funding prior to signing of the 30 September 2007 financial report.

495 Another key risk identified by Deloitte was the program for the sale into trusts of assets including the Boort and Carina properties. Deloitte recommenced that management continue to assess whether the assets met the requirement of AASB5 in order to continue to classify them as Current Assets. Deloitte responded to the risk in the following terms:

> Deloitte will order Timbercorp management's assessment of the classification of these olive and almond assets as at 30 September 2007 in light of the requirement of AASB5 'non-current assets held for sale and discontinued operations'.
> Our audit procedures will include holding discussions with Timbercorp management and a review of board documents and external communications with potential buyers to understand the status of and expected time frame for this potential transaction.

496 At the meeting of directors of Timbercorp on 25 August 2007, the board considered Macquarie's indicative offer of $1.40 per share, but regarded the offer as too low. The board decided to recommend an offer price of $1.60 per share, together with short term funding from Macquarie of $75 million by 15 November 2008.

497 On 30 October 2007 Timbercorp made a presentation to the syndicated loan bankers, predicting an EBIT of $156 - $160 million and a net profit after tax of between $62 million and $64 million. Timbercorp said that its 2007 sales had been adversely affected by superannuation changes, regulatory uncertainty, drought, the amount of product on offer, and competition from structured projects. It said that it did not expect these matters to be problematic in 2008, noting strong interest in 2008 sales. Timbercorp noted that the 2007 result had been adversely affected by its inability to sell and lease back a $95 million asset during the year, which had been expected to make an initial EBIT contribution of approximately $5 million. The asset was the combination of the Boort and the Carina properties. The presentation included Timbercorp's repositioning strategy, equity raising activity and a review of the base case assumptions, which included $75 million equity raising in December 2007, as well as the proposed sale of Boort, Carina and Nenandi assets to the Primary Infrastructure Fund in April 2008.

498 On 31 October 2007, Timbercorp wrote to Macquarie advising that the board would be prepared to recommend an offer of $1.60 per ordinary share.

499 On 12 November 2007 Deloitte wrote to the Audit Risk and Compliance Committee attaching a report of the more important matters arising from the audit of Timbercorp and its controlled entities for the year ended 30 September 2007. In the covering letter Deloitte stated that the matters had been discussed with management and their comments had been included where appropriate. There was a planned meeting between Deloitte personnel and the Audit Risk and Compliance Committee scheduled for 14 November 2007 to discuss the report. The plaintiff relied upon the identification of some matters of significance as highlighting funding risks. An issue raised by Deloitte, consequent upon the impact of the tax announcement was in the following terms:

> We note that of the financial forecasts prepared by management, the most conservative scenario indicates that Timbercorp will continue to be profitable, albeit at lower levels

> post 30 June 2008, and that Timbercorp will need to increase its borrowings under the existing funding facility with HBOS.
> We understand the majority of this additional funding was secured with HBOS in May 2007, with the remainder expecting to be secured with HBOS on an 'as required basis', depending on the future direction of the business.

After making reference to the ATO test case, the outcome of which was not expected prior to the signing of the Annual Report, Deloitte continued:

> As Timbercorp continue to work through the various scenarios for the strategic direction of the business, the financial forecasts will continue to evolve and any additional funding requirements highlighted. This forecasting may prove a challenged to Timbercorp as with a new direction comes possible *greater uncertainty regarding the reliability of future cash flows and an ability to secure additional funding*.[76]

500 The recognition by Deloitte of this uncertainty was not new, but it fed into some comments in connection with the going concern assumption in the financial report. Deloitte commented:

> At the date of this report our audit of the going concern assumption inherent in the financial report remains outstanding and is to be completed as part of the audit of the 30 September 2007 consolidated financial report disclosure.
> Our audit of the going concern assumption centres on *obtaining an understanding of the financial forecasts prepared by management and assessing their reasonableness based on the audit evidence obtained during the audit. Based on our audit work completed to date we have identified the following potential areas of focus when we come to reviewing management's financial forecasts*:

Working Capital Deficiency: based on our initial review of the draft Appendix 4E *there is a working capital deficiency as at 30 September 2007 of $82.8 million. Prima facie, this is a going concern risk that management will need to mitigate by demonstrating how the working capital efficiency will be managed in the short to medium term to enable the consolidated entity to pay its debts as and when they fall due*.
Funding: *management will need to demonstrate the continued support of financiers sufficient to fund expected cash requirements in the medium term (no less than 15 months) based on the strategic direction adopted by the entity and based on the cash flow needs as outlined in the point above.*
Drought: we will need to discuss the extent to which the impact of the drought, especially in relation to the need to require temporary water, has been included within the financial forecasts...
Potential Asset Impairment: identification of any non-current assets which may no longer produce revenue sufficient to recover their carrying value. No issues have been identified at this stage.
Fair Value Assessment: ... no issues...
Onerous Contracts: ... no issues...[77]
501 The approach taken by the auditors to the identified risks was to consider the ability of management to respond. That was a matter which the plaintiff has argued should be disregarded when deciding whether a risk required disclosure.

502 Also, on 12 November 2007, Mr Pryn sent a memorandum to Mr Murray entitled Management Report for the Audit Committee – FY2007 Results. In his memorandum Mr Pryn sought to address some of the cash flow issues raised by the auditors in connection with Appendix 4E which gave rise to the going concern comments. A significant matter was the inclusion in the balance sheet of the Boort and Carina properties as current assets held for sale, which had the effect of bringing into current liabilities additional debt which resulted in current liabilities, exceeding the current assets as at 30 September 2007.

503 On 12 November 2007 Goldman Sachs made a presentation to Timbercorp concerning the $75 million capital raising proposal. The proposal commenced with the following propositions:

Timbercorp requires A$75 m by 1 Dec 07 to fund ongoing projects and development opportunities
The company's ability to raise funding from the Australian Public Markets has been hampered by a falling share price resulting from adverse tax changes for the sector and continuing drought conditions throughout rural Australia.
The timing of this financing is crucial – Timbercorp will release results on 15 Nov 07 and wish to be able to communicate certainty of funding to investors.
Funds are sought from a small group of private offshore sources as onshore Australian demand is viewed as relatively saturated, and not accessible in the timeframe.

504 On 13 November 2007, the Audit Risk and Compliance Committee, compliance officer, Angela Granter, sent a memorandum to Messrs Liddell, Hayes, Fitzroy, Hance, Rabinowicz, Vaughan, Pryn, Murray and Meltzer containing additional material for a meeting of the Committee scheduled for the following day. One inclusion was a memorandum from Messrs Murray and Rabinowicz to the board dated 12 November 2007, concerning the shortfall of current assets to current liabilities and financial covenants. He said:

> Current Asset Shortfall
> Timbercorp has employed an intensive capital management plan to achieve its goals over the last eight years. This has involved staff from both corporate finance and accounting & treasury working constantly towards execution of the plan.
>
> The full year result for 2007 will show that Timbercorp has an excess of current liabilities to current assets of $80.6 m. The majority of this increase comes from a number of debt facilities being classified as current at 30 September 2007 ($280 m versus $88 m last year).
>
> This paper discusses are expectations in relation to the major debt facilities that make up the $280 m and should be read in conjunction with the monthly cash flows that are regularly provided to the board.

There followed a review of the major debt facilities. Also included in the package of material was a letter dated 5 November 2007 from Mr Rabinowicz to HBOS in relation to a potential breach of the leverage ratio covenant.

505 On 15 November 2007, Mr Murray provided his November report to Mr Rabinowicz. The report, in short form, addressed each of the topics usually addressed in his monthly reports. Also, on 15 November 2007, Timbercorp announced to the ASX a profit of $65.7 million and declared a 4 cent final dividend. The announcement noted:

> New business revenue for the year to 30 September 2007 was $143.0 m, the second highest on record, but 11.8% lower than $162.1 m reported in the previous year. This reflects a sales season interrupted by regulatory uncertainty, drought and the one off superannuation opportunity.

The announcement continued:

> New sales revenue in 2008 will be supported by the retention of existing rules relating to non-forestry Managed Investment Schemes until 1 July 2008, irrespective of the outcome of the test case between the Australian Tax Office and the industry body, agriculture investment managers Australia. The case seeks to clarify the taxation treatment of non-forestry MIS and is expected to be heard in the Federal Court in 2008.

506 The discussions between Timbercorp and Macquarie for the acquisition of all shares in Timbercorp which commenced around September 2007, involved an agreement drawing Macquarie an exclusive bargaining period. By the time of the board meeting on 22 November 2007 the period of exclusive negotiation had expired. Mr Hance noted at the meeting that there were other interested parties. Macquarie apparently remained interested in acquiring Timbercorp, and so advised Canterbury Partners in mid December 2007. The indicative price at that point was $1.60 per share.

507 The share price of Timbercorp in early December 2007 was $1.60, but it fell to as low as $1.05 by mid January 2008. That fall in share price no doubt had an impact on any proposal that Macquarie might be inclined to advance. By mid January 2008, when Timbercorp management was confronting a cash flow challenge, Mike Symons of Canterbury Partners informed Mr Rabinowicz that Macquarie had left a message concerning the proposed acquisition. He sought approval to contact Macquarie. Mr Rabinowicz responded:

> Symo
> All MacBank did was insult us (when we were on the back foot).
>
> Now that we are on our knees they are likely to be more insulting.
>
> Don't mind engaging again but no more DD and be ready to walk quickly if necessary.
>
> Suggest u also confer with Kevin and Robert
>
> Sol

508 It was apparent from the emails passing between Mr Rabinowicz and Mr Symons that Mr Symons had been authorised to contact Macquarie and that Macquarie proposed to respond by the following week. As to what transpired thereafter, the material is less than clear, although by late July 2008 representatives of Macquarie had informed Mr Rabinowicz that they could not get the deal to work.

509 Timbercorp's Annual Report for the financial year ended 30 September 2007 was published on 21 January 2008. The content of that report justifies some close analysis. The company reported net profit after tax of $65.7 million and earnings per share of 22.75 cents. Total revenue increased by 15.4% to $453.7 million with a growth trend in annuity income up by 39.2% to $243.4 million. New business revenue was $143 million, below that which had been earned in the previous year - $162.1 million. A dividend of 7 cents per share was declared.

510 The Chairman and Chief Executive Officer said the following in their report to shareholders:

> **Issues**
> In December 2006 the Federal Government announced it would provide a statutory provision to entitle investors in forestry managed investment schemes (MIS) to claim an upfront deduction for all direct forestry expenditure. This announcement provides certainty to the forest industry and will help underpin the Government's support for the Plantation 2020 policy, which seeks to expand the area under plantation over the next 13 years.
>
> Unfortunately, a detailed review was not afforded to the non-forestry MIS sector and in February the Government announced that the Australian Taxation Office (ATO) would reinterpret the taxation treatment of non-forestry schemes.
>
> The announcement was made with little warning or consultation with industry and caused much angst in rural and regional Australia. Subsequently, the Government announced that the ATO would conduct a test case in the Federal Court to examine its new interpretation and that the existing arrangements would be maintained until 30 June 2008. Industry is supportive of a test case and we have a positive outlook on the outcome.
>
> These activities negatively impacted the sales environment for agribusiness MIS, a situation that was exacerbated by drought and the one off opportunity for individuals to make large undeducted contributions to superannuation. This opportunity held the focus of much of the financial planning and investment market during May and June 2007. Despite this, Timbercorp achieved new sales of $102.3 million for horticulture and $40.7 million for forestry.

> The past year has also been marked by substantially below average rainfall in the Murray-Darling Basin, where Timbercorp's almond, olive, citrus and table grape projects are located.
>
> **The Future**
>
> Timbercorp's twentieth year marks a turning point for the company as we move into a phase of consolidation followed by growth into the medium term.
>
> The company's business model moving forward is to consolidate our substantial horticulture and forestry assets, investment interests, existing loan book and network of investor relationships, while bringing to market a suite of new innovative agribusiness investment opportunities.
>
> We are excited about the long term growth of the agribusiness sector and the opportunities we have identified for the future.
>
> We would like to thank our staff for their wonderful contribution during the year and look forward to working together to take our company forward for the next twenty years.

511 The plaintiff relied upon statements made in the Annual Report concerning sales and marketing. The report stated:

> Timbercorp has built a leading marketing and distribution network with a presence in all States and Territories of Australia, as well as internationally. The network provides services to the investment industry, including major fund managers, financial planners and accountants.
> ...
>
> For investors, these projects involve forming significant and long term financial relationships with Timbercorp. Our marketing network communicates with grower investors on project finances, taxation, superannuation and project performance throughout the life of their investment.

512 In the directors' report, under the heading Review of Operations, the directors noted:

> New business revenue for the year to 30 September 2007 was $143.029 million, the second highest on record, but 11.8% lower than $162.077 million reported in the previous tax year. This reflects a sales season interrupted by regulatory uncertainty, drought and the one off superannuation opportunity.
> Gearing levels were higher at 157.5% (net debt/equity) or 62.4% (debt/(debt+equity)), partly due to delays in the planned sale of assets to the Timbercorp Primary Infrastructure Fund. The sale of these assets is now scheduled for 2008. Gearing levels are expected to reduce gradually over the medium term, with a reduction in capital expenditure and the sale of further assets freeing up cash flows available to retire debt.
>
> The maturity dates for some of the bank facilities fall within the 2008 financial year and this, together with the repayment of the $40 million listed debenture in October 2007 debt associated with assets held for resale and other scheduled debt retirements, has resulted in $280.105 million of debt being classified as current liabilities. This also provides the opportunity to consolidate some of the smaller debt facilities and refinance available assets into larger long term facilities.

513 In the notes to the financial accounts, borrowings were detailed and explained in the adjoining notes. The Annual Report included the independent audit report from Deloitte dated 21 December 2007 in which Deloitte stated that in its opinion the financial reports of Timbercorp have in accordance with the Act, gave a true and fair view of

the company and consolidated entities' financial positions as at 30 September 2007 and complied with Australian Accounting Standards. The audit report was unqualified.

514 On 31 January 2008, Thomas Rice, of PM Capital Ltd, sent an email to Mr Rabinowicz dealing with an internal view by PM Capital of the Timbercorp business. PM Capital was a shareholder. He said:

> When we look at businesses such as Timbercorp, our focus tends to be very much on two things – the level of debt and the underlying cash flow of the business (which we see as operating cash flow minus Capex excluding asset sales) – and we pretty much ignore the income statement.
> So when Miles looks at the business today, he looks at the negative operating cash flow and the Capex requirement as still putting the business in a reasonable risky position, given the reliance on bankers and debt markets to fund your obligations. Being able to do asset sales and convert the hybrids also doesn't offer us a lot of comfort. For us to gain more confidence in the business, we'd really need to see this core cash flow number turned positive, though it looks like that is at least few years away.
>
> Is there anything else you can think we should be looking at? In particular, what gives you confidence in the debt levels? What happens if your bankers do decide to act irrationally?

515 Mr Thomas went on to seek clarification in relation to a number of matters. Mr Rabinowicz responded to the questions, but also addressed cash flow and debt. He referred to a meeting, at which he had explained the positive underlying cash flow, noting that after 2008 the overall cash flow would move quickly towards a cash flow positive direction because annuity revenues would continue to build and capital expenditure would ease off. He said he was not sure it would take a few years till the cash flow turned positive, as Mr Rice had suggested, predicting a positive cash flow in 2009 with strong growth into 2010/2011. Mr Rabinowicz continued:

> On bank debt, I covered the issue as best I can at the meeting to demonstrate our confidence in the debt levels. Since 2006 we have consistently targeted a debt/debt plus eq (LVR) level around 60-65% so we are not out of step with our 3 year business plan. I do, however, acknowledge that to some extent the world around us has changed so we need to pay close attention to this issue.
> ...
>
> In terms of bankers acting irrationally, I have not seen any evidence or inclination for them to do so in relation to our current facilities. We chose to stick with the major banks for this reason.
>
> ...

516 On 14 February 2008, Messrs Hance and Rabinowicz prepared and circulated a memorandum to directors entitled CEO & Deputy CEO's Strategic Report. Key issues included bank facilities. Under that heading they noted:

> The directors will note from the Corporate Finance report that we are currently working on extending a number of our bank facilities in order to reduce current liabilities. It goes without saying that these are critically important:

Messrs Hance and Rabinowicz then dealt with each of the facilities. The first was the ANZ loan facility of approximately $80 million which was due to expire in July/August 2008. They noted that they had asked the ANZ to increase the size of the facility (up to $150 million) to fund grower loans for the 2008 sales season, as well as to fund October 2008 invoices, presumably to investor growers. They noted that their request had been submitted *to credit so we should know the answer soon*. They warned the directors of a likely further erosion in finance margins due to increased interest rates and bank margins that could not be passed on to prospective grower investors. Messrs Hance and Rabinowicz further noted that the HBOS $200 million syndicated facility was due to expire in December

2008, but they had requested a 12 month extension to December 2009 to allow more time to restructure the facility. HBOS and ANZ had apparently agreed to the extension while Westpac was 'going through the process at the moment.'

517 Further detail in relation to the management of the finance facilities was set out by Mr Murray in his January 2008 report. The report contained a reference to a proposal to sell forestry land to a single institutional or retail-type structure. He noted that HBOS had approved an extension of the $200 million facility to December 2009, and was expected to approve the extension of the $35 million facility.

At a board meeting held on 20 February 2008, Mr Rabinowicz reported that the $80 million ANZ facility and the $200 million HBOS facility were expected to be extended for two to three years. On 21 February 2008, the ANZ approved the consolidation of two existing grower loan facilities, one for $20 million and the other for $60 million into a single facility and increased the facility to $150 million. By the time of the board meeting on 30 April 2008, Timbercorp had successfully extended the maturity date of facilities that were due for repayment during that year until 2009, 2010 and 2011. The HBOS $200 million facility was due to expire in December 2009, the CBA forestry facility ($89.3 million) was due to expire in March 2010, the CBA Olive facility ($49.6 million) was due to expire in May 2009, the ANZ Almond facility ($45 million) was due to expire in September 2009, the ANZ securitisation trust ($125 million) was due to expire in November 2011 and the HBOS short term bridging facility of $35 million was due to expire in 2009. Many of the extensions had been negotiated over the previous few months.

518 On 15 May 2008, Timbercorp published to the ASX its half year profit result:

HALF YEAR PROFIT RESULT
Melbourne, 15 May 2008:

Leading agribusiness investment manager, Timbercorp Limited (ASX:TIM), has recorded a net profit for the half year ended 31 March 2008 of $3.5 million (2007:$5.6m).

Total revenue for the period continued to grow, increasing almost 18% to $189.8 million (2007: 161.0m). This growth in revenue was led by the ever-strengthening annuity-style revenues, which grew 37.7% to $147.9 million. Annuity EBIT also grew and was up 21.3% to $42.9 million.

New business revenue increased slightly to $15.5 million (2007: $15.3m). The majority of revenue derived from new business sales is traditionally received in the April to June quarter. Sales to date are currently on target.

...

Chief Executive Officer, Robert Hance, said that despite the growth in total revenue, the lower net profit of $3.5 million was affected by a total of $11.4 million in write offs...

...

Mr Hance said Timbercorp's ongoing capital management program had seen a 41% reduction in current liabilities to $242.5 million. Current borrowings have reduced from $280.1 million to $110.5 million with the majority of current debt facilities being refinanced or rolled into non-current borrowings in the ordinary course of business.

...

519 At the same time Timbercorp published its interim report for the half year ended 31 March 2008. The report was provided to the ASX under listing rule 4.2A. A summary of the results indicated that new business revenue was up 1.3%, annuity-style revenue was up 37.7%, industrial operations revenue – asset development was down 86.2% and net profit before tax was down 42.2%. In their report, the directors noted:

Director's Report

Review Of Operations

...

The cash position at 31 March 2008 was $42.256 million compared to $45.123 million as at 30 September 2007. The cash flow from operating activities increased to $21.910 million (2007: $7.631 million). The funds together with net cash inflows from financing activities of $50.732 million were applied to net investing activities of $75.509 million including $64.086 million for capital expenditure. Net financing cash flows include $59.816 million share placement and dividend pay out of $6.390 million.

...

520 In early June 2008, Munchmeyer Petersen Capital AG, a German investment house, expressed interest in purchasing the Boort and Carina properties. A due diligence process commenced in mid June, and a confidentiality agreement was executed on 20 June.

521 At the board meeting on 6 June 2008, there was some discussion concerning an approach for the purchase of forestry assets by Harvard Management Company. By 25 June 2008, Mr Rabinowicz had formulated the terms of a potential transaction with Harvard which included a price of $225 million and leaseback at 7.5%. Such a transaction, if completed, was expected to release a cash surplus of approximately $125 million, but would in an accounting loss of $13.3 million, due to a write-down in the value of the assets sold. The proposal to be discussed at the board meeting on 30 June 2008.

522 By 29 June 2008, the available cash of Timbercorp was so tight that it was not in a position to pay some outstanding amounts due to contractors.

523 After 30 June 2008, Timbercorp did not accept any application moneys or investments in new management investment schemes. In a sales update announced to the ASX on 1 July 2008 Timbercorp stated that they expected total project revenues to increase to around $425 million for the year ended 30 September 2008.

524 Notwithstanding volatility in Timbercorp shares, the ANZ Bank undertook a full risk rate review which was completed by 15 July 2008 maintaining Timbercorp’s credit rating of CCR4+. The significance of the bank and rating system is discussed below.

525 On 17 July 2008 MPC made an offer of $89 million for the Boort and Carina properties with an annual rental of 8.9% to increase with CPI from the second year. On 22 July 2008, Timbercorp counter-offered, accepting the purchase price but rejecting the CPI increase on rental. On 24 July MPC proposed that CPI would only commence from the fifth year. On 24 July 2008 the board resolved to reject MPC’s offer and explore alternatives while MPC continued its due diligence examination and analysis.

526 An important event in the capital management of Timbercorp was the execution of heads of agreement with Harvard on 31 July 2008, for the purchase of the forestry assets. There would seem little doubt that the board of Timbercorp, and Harvard were proceeding on the premise that the transaction would be completed. The target date for completion was October 2008. The purchase price was $225 million with a leaseback rate of 7.5% per annum with CPI increases.

527 On 12 August 2008, MPC advanced another proposal for the purchase and leaseback of the Boort Olive Grove at a price of $70 million with a leaseback at 9.5% rent. On 8 September 2008, a representative from MPC came to Australia to inspect the olive grove and undertake an on-site due diligence. Discussions continued thereafter between Timbercorp and MPC for a number of days.

528 On 11 September 2008, Timbercorp made a presentation to Westpac on the basis of key assumptions which included $190 million in planned asset sales to the Primary Infrastructure Fund. The assets to be sold were the Boort and Carina properties and an avocado asset. Other key assumptions presented to the bank included a net profit after tax for the 2008 financial year of $62 million and for the 2009 financial years $67 million.

529 The bank was told that the planned sale to the Primary Infrastructure Fund had not been possible because of the collapse of the market price for units due to general market conditions. It had become difficult to raise funds in the current climate and the transaction would only work at above market lease rates. The bank was told that Timbercorp was now working on two significant alternative transactions to sell forestry land and the olive grove. The bank was told that despite strong sales of new business in 2008 there was still a shortfall in olive scheme sales. The bank was told of the effect of the drought and the cost of water which put pressure on project returns and affected investor sentiment. There was also some defaults on investor loans and arrears. That factors made planned assets sales more difficult. The bank was advised of the proposed sale and leaseback of forestry land to Harvard, and that heads of agreement had been signed. The bank was informed that the due diligence process was underway and draft documentation was being negotiated. It was informed that, once completed, would result in repayment of approximately $90 million of bank debt. It was on target to be completed by 30 September or early October 2008, with settlement likely by the end of October. The bank was told that if the sale proceeded it would trigger an asset write-down of $15 million.

530 The bank was also told of negotiations for the sale and leaseback of the Boort Olive Grove and that terms had been agreed with a European investment house. Completion of that transaction would result in repayment of $40 million of bank debt but would trigger a further asset write-down of $1.2 million. There was a target completion date of 15 November 2008, with two fall back options if the transaction did not proceed.

531 The bank was informed that if both transactions proceeded it would release approximately $295 million in gross cash. After $130 million was used to repay bank debt and other liabilities, approximately $130 million would be available to fund the 2009/2010 capital expenditure program. No additional debt would be required, apart from debt associated with grower loans. Proceeds from further sale assets would be used to continue to repay debt. The bank was also told that there was a potential breach of the leverage ratio covenant, and the interest cover covenant, on the sale of forestry assets due to the write-down. Timbercorp sought an extension of the syndicated loan (HBOS, ANZ and Westpac - $200 million) for 12 months and the amendment of interest cover and leverage ratio to accommodate the threatened breaches of covenant.

532 On 15 September 2008, Lehman Brothers collapsed in the United States. On the following day MPC terminated negotiations to acquire the Boort Olive Grove. For a little time thereafter, the sale of the forestry assets to Harvard appeared to remain on track. By 30 September 2008, the banks had agreed verbally to waive the covenants, which were susceptible to breach should the Harvard transaction proceed to conclusion. Mr Murray met with representatives of the ANZ bank on 8 October 2008 and sent an email to Mr Rabinowicz reporting on his discussions with the ANZ. He noted in particular that the bank had agreed to vary the facilities to achieve what Timbercorp wanted, but it would be expensive. He said that the ANZ wanted to know where the CBA stood, and what its attitude would be to participating in the syndicated facility. The ANZ was not happy that the CBA would be repaid from the asset sales. Mr Murray said that the ANZ would not extend the syndicated facility passed December 2009. He assumed that the ANZ was looking for control of refinancing. Mr Murray said that the ANZ was:

> struggling to understand our growth strategy going forward as ‘it doesn’t provide anything substantial that they can use in discussions with credit about where Timbercorp will be in the future’. Expect an almost non-negotiable pitch for their advisors to come in and sort things out strategy-wise and also from an execution perspective.

533 Mr Rabinowicz replied:

> At least this hasn’t shaken my view as to the extent to which banks can fuck you over and why bank debt should always be the least preferred option.

534 In his September 2008 report, Mr Murray told Mr Rabinowicz that MPC had informed Timbercorp that it did not wish to proceed with the Boort acquisition. The investment bank apparently gave two main reasons – their perception of the water situation and their inability to make it work from a financial perspective. In his executive

summary, Mr Murray attributed the withdrawal by MPC to their exposure to Lehmann Brothers. At this time the Harvard transaction was still alive.

535 Mr Murray also gave an update on the position of the bankers and the presentations that had been made. His report stated that in relation to the HBOS $200 million syndicated facility, an indicative term sheet had been negotiated with the syndicate, which was to be tabled at the board meeting. He said that approval of the term sheet was expected within the next two weeks. Mr Murray said that he had received letters from the CBA consenting to the proposed covenant reset for the 12 months to 30 September 2008, although there would be additional fees.

536 On 20 October 2008, Mr Rabinowicz made a presentation to the banks concerning the proposed Harvard transaction and its impact on the Timbercorp business. At that stage, negotiations over final documentation were progressing, with transaction documents under review by solicitors acting for Timbercorp and Harvard. At a board meeting on 23 October 2008, Mr Rabinowicz expressed some concern at the prospect of Harvard not proceeding with the transaction, or attempting to negotiate a reduction in price. On the following day, Mr Rabinowicz was advised by Harvard that as a result the collapse of Lehman Brothers and the rapid deterioration in financial conditions, Harvard was cancelling all transactions globally in order to reprice assets and consider its risk position. The banks were advised of the situation on 25 October.

537 Following the collapse of the asset sales, the board of Timbercorp was confronted with the failure of critical assumptions underlying its bank support. Even so, on 19 November 2008, Mr Murray incorporated within his October report information to the effect that he had negotiated an indicative term sheet in relation to the $200 million facility (post-Harvard) which he expected would be approved prior to the release of results on 29 November 2008. His report noted that HBOS would be putting forward a submission to extend the term of the $35 million facility until after June 2010, and that the CBA had consented to an interest covenant variation in respect of the olive and forestry facilities.

538 On 21 November 2008, Deloitte wrote to the Audit Risk and Compliance Committee with their findings on important matters arising from the external audit conducted for the financial year ended 30 September 2008. Deloitte noted that as at 30 September 2007, Timbercorp had a deficiency of current assets to current liabilities of $74 million, negative operating cash flow of $44.7 million and borrowings of $280 million that would expire within the financial year ended 30 September 2008. Its report continued:

Issue Summary	Since the ATO amended its interpretation of taxation legislation pertaining to non-forestry Managed Investment Scheme's, Timbercorp management have been actively assessing and reviewing the strategic direction of the business, including compiling detailed financial forecasts across a number of scenarios. With the transitional arrangements for the non-forestry MIS ending as at 30 June 2008, this now becomes an area of further audit focus, in particular as it relates to the cashflow forecasts for the years ending 30 September 2009 and 2010 and the strategic assumptions underpinning them. At 30 September 2007 Timbercorp had a deficiency of current assets to current liabilities of $74 million, negative operating cash flows of 44.7 million and borrowings expiring within 12 months of 30 September 2007 of $280 million. The updated cashflow forecasts that we reviewed as part of the 31 March 2008 half year review highlighted that: Future capital spending requirements were expected to be met from the sale of land; an equity raising may be required to purchase the Plantation Land Limited land holdings; and

	cessation of non forestry management investment schemes was expected following 30 June 2008 which results in significantly lower new business revenue than in 2008. We understand that the test case in relation to the ATO amendment of its interpretation of tax legislation pertaining to non-forestry MIS has been heard in court with a decision expected early in December 2008. ... Our audit focus will be primarily around the following key areas: 1. **Funding:** Management will need to demonstrate the continued support of financiers sufficient to fund expected cash requirements in the medium term (no less than 15 months), based on the strategic direction adopted by the entity... ...
Deloitte comment	At the date of drafting this report we have only just received managements' position paper with respect to funding and future cash flows. As such we re currently working through this position paper, including our review of the 2009 cash flow budge position and any resultant financial statement disclosure implications. We will update the ARC Committee on the status of this issue on 25 November 2008. With respect to potential assets Impairments, fair value assessment and onerous contracts we discuss the adjustments made in each of these areas in detail below.

539 In about November 2008, the board and senior management undertook a strategic review of the Timbercorp business. The context of the review included a recognition of a serious financial situation. There was a recognition of a sharp decline in cash flows, and an inability to sell assets, with a large capital expenditure tail from previous projects. The draft discussion paper noted that the cost base for the business reflected the old business model and that the company was a few years away from a revenue upturn from maturing projects. It needed $90 million by March 2009 for a change in bank arrangements or there would be a breach, presumably of covenants or repayment obligations. The paper recognised the debt and equity markets were effectively closed. Options under consideration were (1) work through the difficulties for the next 12 to 18 months; (2) sell forestry assets and focus on horticulture; (3) become a focussed and integrated horticulture or forestry company; (4) find a 'big brother'; (5) wind down the business.

540 The first-cut recommendation included a recognition that a breach of covenance was likely, if not inevitable. Therefore, immediate action was required. The next one to three years was about survival. The review paper recognised that relationships with the banks was critical and the banks would need a plan that they believed.

541 Even in late November 2008, the banks were supportive. The CBA agreed to vary covenants and extend expiry dates of the forestry and olive facilities to 31 May 2009 and 31 March 2009 respectively.

542 The strategic review was presented to the board on 25 November 2008 by Mr Rabinowicz. He described a serious financial situation, brought about by a sharp decline in future cash flows. There was a large and committed Capex trail for previous projects and a cost base that reflected the old business model. He noted that Timbercorp was a few years away from an improvement in cash flow from maturing projects and that it may be difficult to sell schemes in 2009. Mr Rabinowicz acknowledged that Timbercorp was unable to sell assets into trusts and would require additional cash by April/May 2009 if no assets were sold or capital raised. It needed $90 million by March 2009 or a change in its banking arrangements. He acknowledged that debt and equity markets were effectively closed.

543 Because Deloitte had raised a question over the business as a going concern, the board received a 'going concern pack' prepared by Mr Rabinowicz. The pack contained a draft going concern paper, cash flow forecast, draft syndicated term sheet, going concern wording extract and sample audit report which had been reviewed by committee members. A going concern note to the accounts was discussed and amended, and eventually provided to the auditor. Mr Rabinowicz said that he and Mr Murray had carefully reviewed the terms of the note and reported to the board that they were comfortable that Timbercorp could achieve the cash flows set out in the forecasts. He summarised the current processes being undertaken to sell the Boort and Carina properties and the forestry land and had assumed that this could be achieved by 31 May 2009. Two days later Goldman Sachs JBWere were engaged to undertake a process to sell the assets.

544 At about the same time the preliminary results for the financial year ended 30 September 2008 were released. While new business revenue was down 16.3%, annuity revenue had increased 32.1%. EBIT was down from $155.9 million to $141.7 million and net profit after tax down from $65.7 million to $44.6 million. Net assets were reported at $595 million and cash at $36.63 million. Thus, notwithstanding the downturn in results, for so long as Timbercorp could maintain the support of its banks through the various banking facilities, there was still 'no significant risk that the Group would not have had the financial capacity to manage any of the schemes through to their contemplated completion.' So opined all three experts who gave evidence.

545 By early January 2009, a new strategy was under consideration, involving deferral of new schemes which were both capital and debt intensive, focussing on asset sales and finding alternative sources of debt. Once achieved, the business could then be transformed into an integrated agribusiness company, as a foundation to seek additional equity and grow.

546 At a meeting of the board on 19 February 2009, Mr Rabinowicz updated the members on the progress of forestry and horticulture sales, banking strategy and other matters. In relation to assets sales, he noted that the sale process was progressing well, with an aim to settle unconditional terms in mid-April, although this was ambitious. Mr Rabinowicz informed the meeting that the company strategy to deal with the banks was to approach them following receipt of indicative bids for the forestry assets, with the object of having them waive or defer certain covenants. Following the completion of the sale he would secure a longer term restructure of the facilities. His strategy had been formulated with the assistance of Goldman Sachs JBWere.

547 There was a presentation to the ANZ Bank on 5 March 2009, with the object of having it waive covenants, defer principal and amortization payments and capitalise interest payments until September 2009. The proposal also included the retention of some cash from assets sales and the extensions to grace periods.

548 At a special meeting of the board on 2 April 2009, the directors were informed by Mr Rabinowicz that all banks had agreed to extend repayment dates, although the CBA indicated that it would not extend beyond 15 April 2009.

549 On 14 April 2009 there was another special meeting of the board at which Mr Rabinowicz indicated that none of the indicative bids for assets were satisfactory and that the timetable for completion was longer than Timbercorp could afford without risk. There was discussion concerning solvency and the appointment of an administrator. Mark Corder, Mark Mentha, Leanne Chesser, Craig Sheppard and Clifford Rocke were appointed administrators of the various entities in the Timbercorp Group on 23 April 2009.

CONCLUSION – Structural risks and adverse matters

550 The plaintiff's formulation of the financial structure risk, as pleaded, turns upon the ability of the Timbercorp Group to manage its cash. The risk, as formulated by the plaintiff, requiring disclosure, was the grower's exposure to risks associated with the ability of Timbercorp to maintain a sufficient cash flow to enable Timbercorp Securities to meet scheme costs and expenses. That is an element of the performance risk or institution risk. I have found that information about the performance risk was disclosed in the Product Disclosure Statements employed by the Group throughout the Relevant Period. I am not persuaded that the information about that risk as formulated by the plaintiff was required to be disclosed by Timbercorp Securities, whether as a significant risk, under s 1013E or pursuant to its continuing disclosure obligation. Further, information about the financial circumstances of the Group, bearing upon its ability to maintain a sufficient cash flow, was generally available. That information was not required to be included

within Product Disclosure Statements or otherwise provided to potential or existing investors by reason of a statutory obligation imposed on Timbercorp Securities.

551 Putting those findings to one side for the moment, the cash flow risk as pleaded was said to be susceptible to grower defaults, the capacity of the Group to obtain and service external funding and its ability to securitise loans. The evidence demonstrated that, even during the more difficult financial period in 2008, grower defaults did not expose the Group to any material risk. Ultimately, the cash flow risk, such at it was, faded to insignificance or did not rise to the level of a material risk for so long as the Group maintained its relationship with its bankers who were providing the majority of its capital requirements. The experts agreed on that issue. The evidence demonstrated that bank support continued and indeed increased throughout 2008. It was not until the end of that year and early 2009 that the willingness of Timbercorp's bankers to continue to provide support became uncertain because fundamental assumptions for their continue support could no longer be reasonably met.

552 The defendants submitted that disclosure of the tax announcement as an event was not required, but if it was, the event was widely disclosed, in the media, on the Timbercorp website, in ASX releases and in subsequent product disclosure statements. What was not disclosed, in terms, was the information concerning the alleged effect of the tax announcement on Timbercorp's cash flows, revenues and profits and the risk that posed to the ability of Timbercorp Securities to manage the projects through to completion. The evidence demonstrated that while the tax announcement may have had a negative impact on the Timbercorp share price, and on forecast performance in the short term, the actual impact did not threaten the ability of Timbercorp Securities to continue to discharges its contractual responsibilities to scheme investors. Furthermore, the nature and extent of the impact on the business of the Group was the subject of reports made to the ASX and the Annual Reports of the Group. In my opinion, Timbercorp Securities was not required to disclose the generalised information of the kind suggested by the plaintiff so as to qualify its disclosure of the performance risk. That information was not in relation to a significant risk to the ability of Timbercorp Securities to discharge its contractual obligations to scheme investors. It was not information that would be reasonably required by a retail client for the purpose of making an investment decision. It was not information that might reasonably be expected to have a material influence on the decision of a reasonable retail client to invest. Because of financial information about the Group available on its website, Annual Reports, ASX announcements and the material prepared by analysts, the information the plaintiff would have had provided to potential and existing investors was not required because of the operation of s 1013F. Finally, the evidence did not support the contention that the directors had actual knowledge of a risk posed by the tax announcement to scheme investors.

553 The information concerning the Global Financial Crisis or, as defined by the plaintiff, the credit deterioration information, falls into the same category, and was not required to be provided to prospective and existing investors for the same reasons.

554 The events in 2007 and 2008 leading to and constituting the Global Financial Crisis were disclosed to all in the media and elsewhere. It was the subject of everyday conversation and would plainly be characterised as generally available information. The plaintiff, however, sought to link those events to the impact which they might have on the Group by reference to its ability to raise capital, its access to credit and banking facilities, the value of assets and its ability to sell assets. There is no doubt that in hindsight the Global Financial Crisis, and in particular the collapse of Lehman Brothers, had those negative impacts on the Timbercorp Group. But the significance or materiality of the events giving rise to a statutory duty of disclosure in a product disclosure statement or otherwise, is a different matter. At what point was disclosure of a material change to the performance risk required to be made?

555 A deteriorating financial market is easy to identify in hindsight, but inherently difficult to predict. It was not suggested that the directors of the Group were aware of the potential impact of the crisis for the Group until the collapse of Lehman Brothers brought about the termination of plans to sell assets. Once again, the materiality of the events as they occurred, insofar as they posed a risk to scheme investors, was not apparent to the directors until late 2008, just as it was not apparent to the banks, the auditors, Macquarie and the market generally.

556 It was not suggested by the plaintiff that the Timbercorp Group failed in its obligations to disclose to the market information required to be disclosed under the ASX Listing Rules or by reason of the Group's continuing disclosure

obligations under Chapter 6CA. It was not until it became apparent to the directors that assets could not be sold at a reasonable price, so as to replace bank funding and to maintain bank support, that they were aware of a material risk of failure that was likely to impact on scheme investors. That was long after of publication of the last Product Disclosure Statement. That is not to suggest, however, that there was not a point in late 2008 or early 2009 when the directors of Timbercorp Securities were obliged to inform the existing investors of a material change in the performance risk. In my opinion, that point arrived when it became apparent to them that there were no acceptable offers for the assets and that Timbercorp Securities may, as a consequence of the withdrawal of bank support, fail.

557 The other adverse matters did not feature prominently, if at all, in final submissions. The near insolvency event said to have occurred in early 2008 was too vague and indefinite as to require disclosure. The plaintiff submitted that Timbercorp Securities should have issues Supplementary Product Disclosure Statements, or included in subsequent Product Disclosure Statements, information to the effect or substance that since early 2008 the Group had been in significant financial difficulty and that there was a risk that it would not be able to perform its management obligations. Insofar as the performance risk was addressed by the continuing and apparently sound relationship between Timbercorp and its bankers, any financial difficulty, whatever that may mean, was not relevantly material to the performance risk. In any event, the evidence does not support the proposition that, prior to the collapse of Lehman Brothers, the Group's financial position was such as to give rise to a discernible risk that Timbercorp Securities would be unable to perform its management functions.

558 The breach of loan covenants event in September 2008 was resolved by agreement between Timbercorp and its bankers. The fact of a potential breach was disclosed by Timbercorp in ASX announcement on 27 November 2008 in relation to its 2008 full year results. It was not an event which posed a risk to scheme investors, because its resolution was dependent upon the continuing support of the bankers. They gave that support. The waivers that were forthcoming contradict the assertion that the potential breach was a material event requiring disclosure to investors.

559 Finally, the going concern issue was resolved between Timbercorp and its auditors. It was disclosed in the ASX announcement lodged on 27 November 2008 and in the Annual Report. The circumstances in which the going concern issue arose and was resolved, was supervised by the auditors, and depended upon their satisfaction that the forecasts and asset sale plans advanced by the board were reasonable and achievable. There was no suggestion that these forecasts and plans were not genuinely, or that the board did not hold the view that they were reasonably based, or that the financial modelling was unsound. Taken at face value, the going concern issue, once resolved, did not present to the board circumstances in which Timbercorp Securities was required to make disclosure of a going concern risk to scheme investors because it threatened its ability to perform its contractual obligations.

560 As mentioned above, s 1013C(2) provides that information required to be disclosed in a product disclosure statement is that which is actually known to the responsible entities. The defendant submitted that actual knowledge included knowledge of the information about the significant risks identified by the plaintiff. What is apparent from the review of the facts is that the evidence of board consideration of the events as they occurred in and after 2007, and their management of those events, is inconsistent with the requisite knowledge namely, that the events and circumstances highlighted by the plaintiff posed a risk that Timbercorp Securities would be unable to perform its contractual obligations. It was not until the directors realised that bank support was equivocal, because it depended upon asset sales that were unlikely to take place, that it may be concluded that the board must have realised that there was a significant risk that Timbercorp Securities would fail and be unable to continue to manage the scheme.

RELIANCE AND CAUSATION

561 It is well established that in proceedings under s 52 of the Trades Practices Act (now the Australian Competition and Consumer Law), an applicant for relief has a remedy if the loss or damage is suffered 'by' the contravening conduct. The word 'by' in the former ss 82 and 87 expressed clearly the notion of causation as a common law practical or commonsense concept.

562 The authorities make clear that the actionable conduct need not be the only cause of the loss or damage. It is sufficient if it played a part in the loss or damage, even if it was only a minor part. Recovery under s 52 is based on an applicant's actual reliance upon the conduct, although that conduct may not be the only factor activating a relevant decision. There are occasions where, by reason of the nature of a transaction and the conduct relied upon, an inference may readily be drawn linking the conduct, be it a representation or silence, and the decision to enter into the transaction.

563 In Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd,[78] Giles JA held that the approach to causation under s 1005(1) in respect of claims for contraventions of s 996 (the predecessor to the present s 1022A) and s 995 (the predecessor to the present s 1041H) should be the same as under the Trade Practices Act. His Honour also approved the approach of Handley AJA in Gardiner v Agricultural & Rural Finance Pty Ltd,[79] in which his Honour, referring to s 996 as well as s 995, stated that a Plaintiff relying on a contravention:

> must establish that he relied on the misleading or deceptive conduct, or the false or misleading statement, or that he would have acted differently if the material omission had been disclosed.

564 In relation to the allegations of a defective Product Disclosure Statement, s 1022B(2)(c) provides:

> if a person suffers loss or damage ... because the disclosure document or statement the client was given or sent was defective ... the person may recover the amount of the loss or damage by action against the, or a, liable person.

The causal requirement is similar to that under the former s 1005. It may be more rigorous, with the use of the word *because* requiring a direct nexus between the contravention and the alleged loss.

565 The present provision dealing with liability for misleading or deceptive conduct in contravention of s 1041H, is s 1041I(1) of the Corporations Act, which provides:

> (1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

This adopts the language of the former s 82 of the *Trade Practices Act*.

566 This case concerns representations made in Product Disclosure Statements or information omitted from such documents, or information that was required to be given because of what was said in such a document. In such circumstances, the document should be read and considered as a whole.[80]

567 In Gardner v Agricultural and Rural Finance, Spigelman CJ expressed scepticism about ex post facto protestations of reliance on financial representations with an investment in a tax driven scheme.[81] While each case must be assessed on its own facts the evidence advanced by the plaintiff and Mr Van Hoff was such as to excite like scepticism.

568 The evidence prepared for the plaintiff and Mr Van Hoff, in the form of witness statements, had striking similarities. That may be in part a reflection of overworked witness statements. Where issues such as reliance are raised, witness statements are often an unsatisfactory form of evidence in chief. The witness statements shared close similarities in content, such as the identical ranking of the three reasons why each invested in the Timbercorp schemes. They also shared an incorrect assertion, that each witness had actually read each Product Disclosure Statement. There was a common assertion that the long term returns being forecast by Timbercorp were the primary catalyst for the investment when the evidence showed that there were no such forecasts.

569 Important parts of the witness statements were expressed in virtually identical terms. For example, the plaintiff said in his witness statement:

> When I read each PDS, my impression of Timbercorp and the Recent Projects in which I invested was that Timbercorp was a well run company with substantial assets backing them up and that they would be able to see through the Projects to completion. This was a very important consideration for me and was one of the key reasons why I decided to invest (see paragraph 15 above). I also believed that all significant risks in relation to each Recent Project had been identified and disclosed in the PDS.

570 Mr Van Hoff said in his witness statement:

> When I read each PDS, my impression of Timbercorp and the Recent Projects in which I invested was that Timbercorp was a strong and viable company financially and they would be able to see through the Projects to completion. This was a very important consideration for me and was one of the key reasons why I decided to invest (see paragraph 13 above). I also believed that all significant risks in relation to each Recent Project had been identified and disclosed in the PDS.

571 Overworked witness statements discredit the witness, embarrass legal practitioners involved in their preparation and undermine the trial process. I place little reliance on these formulaic passages.

572 The plaintiff presented, for the most part, as a witness endeavouring to be truthful, recalling matters to the best of his ability. He obviously perceived an injustice in the ultimate failure of his investments, and attributed fault to others. He seemed unwilling to assume any responsibility for his own actions. He refused to concede that his primary motivation, when investing in Timbercorp schemes, was to secure tax relief.

573 The plaintiff and his wife, Roslyn, invested in Timbercorp managed investment schemes shortly before the close of the 2007 and 2008 income tax years. On 15 June 2007 they invested $140,000 in the 2007 Almond project. On 22 May 2008 they invested $114,000 in the 2008 Olive project, and $92,400 in a Timberlot Project. Both projects were part of a Multi-choice Project. Mr Woodcroft-Brown said that he was unaware that the Olive and Timberlot Projects were part of a Multi-choice Project.

574 Mrs Woodcroft-Brown did not give evidence, although it was plain that she was involved in important meetings and the decision-making process leading up to their investments. The Woodcroft-Browns had appointed the firm of Hopley Bone & Associates as their accountants in 1997. Brian Hopley and Carol Bone, were partners in the firm. Both had a role in the management of the Woodcroft-Brown affairs, although Ms Bone appears to have taken the leading role as the relationship partner.

575 The plaintiff should not be regarded as an unsophisticated investor. He was a successful businessman engaged primarily in property development. He is a qualified civil engineer, and controls a number of companies in a group which carry on a variety of business activities. Woodcroft Trading Company Pty Ltd was engaged in construction and steel work, developing shopping centres and other large-scale projects throughout Australia. There were other companies in which he directly or through another entity participated. His principal activity was property development.

576 The plaintiff was familiar with the share market. He was computer literate. He invested in listed and private shares. He said that he would monitor his shares on a weekly basis. He interrogated the ASX website to gain information concerning stock movements, and would sometimes gain access to the website for the investment entity, including Timbercorp. The Woodcroft-Browns did not own shares in Timbercorp.

577 The plaintiff conceded an understanding of accounting and a fair understanding of balance sheets and profit and loss statements. He understood the distinction between current and non-current assets, current and non-current liabilities and the difference between an accounting profit and a cash-flow.

578 The plaintiff was trustee of his self-managed superannuation fund which, as at May 2007, held $140,000 to $150,000 in shares and some cash. He gave directions to a stockbroking firm, Bell Potter, in respect of the share

portfolio. Bell Potter provided him with information about market conditions through a monthly newsletter. The plaintiff also followed stock prices in the newspapers.

579 The plaintiff became aware of an equity raising by Timbercorp in late 2007. He was uncertain of about how he became aware. It may have been through the ASX or Timbercorp websites. He also said that he tracked the Timbercorp share price two or three times in the second half of 2007. What he observed caused him no concern about the Group's ability to sustain the schemes. He agreed that when he invested in the schemes he understood that if he wanted information about the Group or an entity in the Group he could go to the Timbercorp website.

580 The plaintiff was aware that with a listed company he could use the ASX website to gain access to ASX announcements. He did so from time to time. He said that he downloaded the 2008 Annual Report and recalled looking at the 2007 Annual Report. The plaintiff accepted that, had he wanted to, he could gain access to a range of financial information about the Group from the ASX website or the Timbercorp website for any particular year that involved one of his schemes.

581 The defendants submitted that, when considered as a whole, the evidence of the plaintiff compelled the following conclusions:

> (a) he did not read the project PDSs prior to signing his application to invest and the loan application for the loans and, at most, gave them a cursory glance - they were irrelevant to his decision to invest, in that:
>
> > (i) he was content to be, and in fact was, provided with the PDSs for the first time immediately before signing his applications to invest and take out loans; and
> > (ii) his primary interest was in the tax deductions he wanted to achieve from the investment;
>
> (b) even if he read any of the PDSs subsequent to investing in the projects and entering into the loans (which must be doubted), it was not undertaken in any great detail or with close attention, as he:
>
> > (i) did not appear to have read or understood matters dealt with in the PDSs concerning the lack of a cooling off period, the absence of financial projections, the fact that application monies were not held on trust but released to TSL and the ability to call meetings to wind up the schemes;
> > (ii) asserted a mistaken understanding about his ownership of the trees which cannot be found in any PDS;
>
> (c) any erroneous understanding he obtained about the structure of the projects could not be traced back to any PDS or other material generated by the Timbercorp entities identified in any pleaded claim prior to or subsequent to each of his investments;
> (d) in fact, each PDS contained relevant warnings and he was aware of and had access to other information which would have disclosed to him in substance what he complains was not disclosed to him, in that:
>
> > (i) each PDS contained warnings concerning the possible effect of grower defaults and identification of the risk that anything that affects TSL's ability to meet its obligations under the scheme documents, and the ability of the land-owning Group entity to meet its obligations under the relevant sub-lease, '*could also constitute a risk to Growers*' ;

(ii) he was well aware of matters he claimed were not disclosed to him, including that the failure of the responsible entity could impair his investment, and knew where he could easily obtain other detailed information;

(e) he would not have been deterred had the PDSs included the types of warnings it is alleged should have been included in the PDSs, in that:

(i) his evidence showed he took a dismissive approach to warnings and disclaimers;
(ii) he was generally content to invest in whatever was recommended to him;

(iii) he was not deterred from investing in scheme promoted by a competitor (FEA):

(A) in which a risk disclosure was set out in the PDS that there was a risk that those operating the project '*may not be sufficiently financially sound to see the Project through to completion*' and that the ability of the responsible entity to manage the Project '*is dependent upon a secure financial position and liquidity*';

(B) which he had been advised should be considered '*speculative*'.

582 In about April 2007, the plaintiff became aware of an impending tax liability that would arise at the close of the 2007 financial year, if remedial steps were not taken. From discussions with his accountant, Ms Bone, he came to understand that there would be a taxable profit of around $500,000.

583 One step taken by the plaintiff to alleviate his tax position was to establish the superannuation fund, but contribution limits meant that only around $150,000 could be contributed to the fund in that year. The superannuation fund was established in around May 2007. Contributions made to the fund were invested in listed securities.

584 The plaintiff first met Peter Larkin, a financial adviser employed by Aspire, when he went to the Bronco Leagues Club for a seminar concerning superannuation. It was conducted by Mr Larkin. Ms Bone had invited the plaintiff to the seminar because she had indicated to me Mr Larkin would be at that seminar and that she would be introducing me to him at that seminar and he had products which were tax effective.

585 After he was introduced to Mr Larkin at the seminar, the plaintiff completed a form in which he asked Mr Larkin to contact him. Ms Bone had suggested that he investigate making an investment into a product which would result in an upfront tax deduction. He agreed that there was a pressing need to find a tax effective investment.

586 At a meeting with Mr Larkin, the plaintiff told him that he wanted tax effective investments for approximately $375,000 to $400,000. There was a sense of urgency. On 14 June 2007, Mr Larkin telephoned the plaintiff and told him of the impending closure of various schemes and that if he wanted to invest in the Timbercorp Almond scheme he must move quickly. The plaintiff accepted that prior to that call, he had been given nothing in writing about the schemes. The 2007 Almond scheme was to close on 15 June 2007.

587 At 9:17pm on the evening of 14 June that night, Mr Larkin sent to the plaintiff by email a lengthy Statement of Advice, and a cash flow spreadsheet, which recommended investments in an FEA project, a Gunns project and the 2007 Almond project. When asked whether he read a disclaimer in the statement, the plaintiff responded, 'the famous disclaimer, yes.'

588 The Statement of Advice recorded that the plaintiff had declined to provide a significant amount of personal information, and had specifically requested Mr Larkin to limit his advice to 'tax effective investments'.

589 At 9:38pm the same evening, Mr Larkin sent a further email, with information about Timbercorp, FEA and Gunns, including website addresses. The plaintiff accepted that the first occasion on which Mr Larkin had recommended the 2007 Almond project as a suitable investment was late in the evening of 14 June 2007.

Discussions prior to that time were generic, concerning types of products. The plaintiff accepted that he may not have looked at the emails until the following day, possibly while he was at work, although he said that he read them prior to signing his application form.

590 The email sent at 9:17pm referred to the impending closure of the Timbercorp non-timber and plantation projects on Friday, 15 June 2007 and continued:

> If the Almond Project interests you then I would have to catch up with you, even by fax to get the Application forms for this project signed by you and / or Rosalyn as well as a few other bits of information.

Thus, the plaintiff knew that it was only if he was to purchase an interest in the 2007 Almond project that he would need to meet Mr Larkin the following day.

591 Mr Larkin attended at the Woodcroft-Brown home for a meeting late on the evening of Friday, 15 June 2007. He gave the plaintiff copies of the various Product Disclosure Statements. The plaintiff estimated that the meeting went for one and a half to two hours. Following are extracts from the plaintiff's evidence concerning the attention given by him to the documents.

> How long was the meeting that you had late on 15 June with Mr Larkin? --- If I recall, it was in the evening and it was about hour and a half to two hours long.
> Late on Friday evening? --- That's correct.
>
> Was a bottle of wine opened or a glass of beer or something like that? --- Not that I recall.
>
> And your wife was present at that meeting? --- She was.
>
> Limited opportunity to read the PDS at that meeting? --- That's correct.
>
> And up until that meeting, that was the first time that you had actually received a copy of that product disclosure statement? --- That's correct.
>
> ...
>
> the documents I have given you." Is it the position you signed the authority to proceed but you hadn't quite performed that task? --- I would have read the documents. I read the documents but I certainly didn't dissect them or - - -
>
> ...
>
> An hour and a quarter's meeting is not really adequate time, is it, to digest the PDS? --- Well, not to drill down into it in great detail.
>
> There were also other investments that Mr Larkin was recommending, was there not? --- There was.
>
> So he was also recommending, if you go back to the statement of advice on page 3, the FEA Plantations Project 2007? --- Yes.
>
> And he was also recommending the Gunns Plantations Project 2007? --- Yes.
>
> And each of those had PDSs associated with them? --- Yes.
>
> So just to give me some form of idea, the volume of material that he was bringing to this meeting late on 15 June which was about an hour and a quarter was several hundreds of pages of material? --- Yes.
>
> You certainly didn't have time to properly analyse that in the timeframe that was given for that meeting of about an hour and a quarter? --- Not in minute detail, no.

I take it Mr Larkin was speaking to his statement of advice, taking you through it? --- Yes.

That would have taken some time, did it? --- I don't recall how long it took.

You had questions of him about various matters in relation to his statement of advice? --- I would have been asking him questions, yes.

Did you also discuss applying for loans to enter into some of these investments? --- As I recall it, Mr Larkin offered to me the fact that I could have a 12 month interest free. I had the funds available and could have paid them in full at that point. However, when he recommended that I actually take the 12 month interest free, he pointed out to me I could keep my funds invested and as I paid monthly, I would be evening interest on the balance.

So part of this hour and a quarter discussion also involved a discussion about the financing arrangements for how these investments would be subscribed for? --- He purely indicated in my case as to the 12 month interest free and if I recall, it wasn't on the document, he actually had to change it to say that it was 12 months interest free on the loan document.

Did he give you a loan finance application package? --- Not at that point, he gave that to me later.

But you signed documents dealing with applying for loan finance, did you not? --- As the application for it, yes, I signed them, and he then said it would go off and if I was approved that it would come back and I would then have to sign the loan documents.

Before you signed the loan application form, did you read that carefully? --- I read it.

That's the sort of thing you would want to read carefully, wouldn't it, before committing yourself to take out a loan? --- Well, I had the funds so it was simply a question of getting the 12 month interest free.

Let me ask you this, when did you write out the cheques that were necessary for subscription for these investments? Did you write them out on the evening of 15 June? --- I don't recall but I'm sure there's copies of the cheques with the date on it.

I want to show you a loan application form that was produced by Macpherson & Kelley, your solicitors, to the defendants. This is under tab 25. This is a document but it only has the front page and pages 2, 4, 5, 8 and 9, do you see that? --- Sorry, under 25 I've only got two pages. Sorry, I should have said tab 30. This was discovered as F1.25 by the plaintiff. If I could just take you to page 8, you will see there signatures. They are you and your wife's signatures? --- They are.

It's dated 15 June 2007? --- It is.

So when do you say that you would have signed this? --- I don't recall but if it's dated the 15th, I would assume I signed it on the 15th, but I don't have a memory of that.

But you don't engage in the practice of signing something on one day and dating it on another day? --- No.

So is this something that was likely to have been discussed between you and Mr Larkin on the evening of 15 June? --- Yes - there's where I remember where he had written the 12 months because it had just said the loan terms were 2-4, 5-6 and he had written in that it was interest free for the first 12 months.

This is page 4 of what you are looking at? --- That's correct.

> Are you able to explain why this version only has pages 2, 4, 5, 8 and 9? --- I assume that was what I was given at the time because I tend to take everything I've got and file it.
>
> The complete version that was actually sent through to Timbercorp Finance, you will find the version of that appearing at tab 31, do you have that? --- Yes.
>
> If you go to page 1 you will see up the top, "Application check". It says: "Before completing and signing this application form all parties should carefully read this application form", do you see that? --- Yes.
>
> Is that what you did? --- Yes.
>
> ...
>
> HIS HONOUR: It's getting a bit argumentative. How many PDSs did you have in front of you on the Friday evening? --- If I recall, Your Honour, I had three.
>
> Do you say you read each of them? --- I would have read through them, Your Honour. I wouldn't have sat down and read every word, I would have skimmed through them, reading them, understanding the gist, picking out important items in them and they very much appeared to be similar type of documents.
>
> You say the meeting was an hour an a quarter to an hour and a half? --- Your Honour, I'm sure it went much longer. I recall offering him a glass of wine, I doubt I would have done that if the meeting was only an hour. I really think it would have gone a lot longer.
>
> MR BEACH: You gave an estimate before lunch to read one PDS properly was three to four, multiple by that three you get nine to 12 hours? --- That's correct.
>
> If you've only got an hour and a quarter you only reading at most about 10 per cent of any one PDS? --- I'm reading through the PDSs, not in exact detail every word for word and probably skimming it because that was the time I had available, whether it was an hour or four hours, at this stage I can't tell you.

592 I am not persuaded that the plaintiff read any of the Product Disclosure Statements in any detail. He simply did not have the time to do so. He had a loan application form to complete and there were discussions. All of this is consistent with the proposition that the plaintiff acted on the recommendation of Mr Larkin, motivated by his anxious desire to obtain a tax deduction, after selecting the offering that required urgent attention that evening. The actual content of the Product Disclosure Statement or the absence of information, was not what induced the plaintiff to invest in the project or actuated him in any meaningful way. It was a matter of selecting a project to provide him with the required tax relief. I have no doubt that the financing option – 12 month free interest – was an inducement.

593 Even a cursory glance at the Timbercorp statements would have presented the reader with a picture of the Group as a large, experienced and financially sound enterprise. That much is clear enough, and no doubt intended by Timbercorp Securities. But even the limited financial information provided in the Statement indicated that the Group was deriving income from scheme investors, adding to its profitability. A review of the content of the statement, and in particular the summaries of relevant agreements, would have undermined fundamental assumptions advanced by the plaintiff as the basis for his investment.

594 The plaintiff was cross-examined about the disclosure of what I have described as the performance risk in the statements.

> If you go over to page 55, if I could take you to the second column under the heading, "Grower agreements", it says: "Anything that affects our ability to meet our obligations", is that something that you appreciated on the evening of 15 June? --- No.

> Is that because you didn't read this in any detail or - - -? --- No, because I understood they were the responsible entity and that I could replace them and I was really seeing this was a company run by a trust and it would have all its own stand alone documents, bank accounts, everything else and that they were merely looking after it.
>
> You didn't quite appreciate that, did you, Mr Woodcroft-Brown, because your evidence in your statement says that it was fundamental to your strategy that you had this larger group supporting the scheme rather than that the scheme was stand alone and could move from different RE to different RE on a stand alone basis? Your whole reason for focusing on the strength of the group is that you knew that that was part of the necessary support that was needed for each particular scheme? --- That was the appeal, that you had a very efficient company that had been around for a long time that was handling these projects.
>
> Just going back to page 55 for a moment under the heading, "Default by growers", first column, you also understood, did you not, that the scheme depended upon growers meeting their obligations, is that right, to pay various fees? --- That was portion of the cash flow so it would have been important and I did understand it.

595 The plaintiff's reaction to disclaimers in documents was to the point of being dismissive. When taken to the acknowledgments and disclaimers set out in the loan application, which he was prepared to make and accept, he replied, I'm used to seeing disclaimers. Later, when shown the disclaimers in the 2007 Almond project Product Disclosure Statement concerning project returns, he said:

> I saw that as the normal disclaimer given in these type of documents and tend to be found in most documents where someone's giving information on returns. It's a standard disclaimer.

The plaintiff later referred to 'the famous disclaimers'.

596 The Product Disclosure Statement contained no promise of attractive returns. The document expressly disavowed any such representation. The plaintiff accepted that the Statement informed him that there were major factors that might feed into a calculation as variables but it was a matter for the individual investor as to how they looked at those variables, how they assessed them and whether or not they went off and calculated their own project returns.

597 The following exchange then occurred:

> On the evening of 15 June, did you sit down and actually do your own calculations as you were being encouraged to do in the PDS? --- No, I had a professional, I had a financial planner who had run the schedules for me.
> A financial planner or advisor who was advising you, yes? --- That's correct.
>
> And you looked to him to properly advise you on those matters, is that right? --- And to do the calculations.
>
> And then to give you some representation about its accuracy or not? --- That's correct.
>
> You didn't look to the PDS for that purpose? --- I wouldn't have had time to look to the PDS and sit and do those intricate calculations.

598 Notwithstanding the plaintiff's refusal to accept that the Product Disclosure Statement disavowed representations or forecasts of likely returns, the following exchanges took place:

> Paragraph 16 of your statement says: 'What sold me to Timbercorp was the fact that they offered very good returns', can you point out anywhere in any of the documents issued

> by Timbercorp up to the time that you subscribed to your almond investment on 15 June 2007 where Timbercorp did that? --- I was relying on the financial advisor's calculation showing the growth and the cash flow.
>
> ...
>
> Yes, it's paragraph 38. The second sentence at paragraph 38: 'The tax benefits being offered by the investment were certainly attractive, however, I was more concerned with the returns that I could generate'? --- That's correct.
>
> Yet there was no return promised to you by the PDS or calculated by you, is that not so? --- I had the projected income stream as supplied by Mr Larkin that I was relying on and I assumed as a financial advisor he would have gone through all the details to ensure that was correct.

599 In both his witness statement and on oral evidence, the plaintiff sought to convey that as an objective, the tax deduction ranked third behind the promise of attractive returns and the strength of the company. The defendants submitted that this evidence demonstrated that what was actuating the plaintiff in making his investments was their tax effective nature and that he was indifferent to the content of the documents. I accept that submission as soundly based.

600 The plaintiff invested in two further schemes in mid 2008. In early May 2008, he had became aware that he was facing a tax liability for the 2008 financial year of approximately $1 million as a result of the sale of some shares for $2.2 million. The caps on superannuation contributions meant that he and his wife had a potential liability of $1 million, but only $100,000 to $150,000 could be dealt with by making superannuation contributions. It was in that context that the plaintiff contacted Mr Larkin, who emailed him on 6 May 2008, referring to their earlier discussion, and confirming a meeting to 'discuss/clarify the tax positions and the different strategies available to defer/mitigate some of that liability.'

601 There was a meeting between the plaintiff, Mr Larkin, Ms Bone and Mr Hopley on 9 May 2008. The plaintiff accepted that Mr Larkin's note of the meeting, signed by the plaintiff, was an accurate summary of what was discussed. There was mention of the impending $1 million tax liability and an expression of the plaintiff's desire to invest in projects which would reduce tax liability. The plaintiff accepted he had not been seeking full financial advice. The plaintiff said that at the meeting, he was given a spreadsheet of recommended investments, each of which was to provide a 100% tax deduction.

602 A few days later (13 May 2008), Mr Larkin sent an email to the plaintiff with various pre-tax and net cash flow estimates. The spreadsheets dealt with proposed investments in Timbercorp's 2007/2008 Timberlot and 2008 Olive projects, as well as a project offered by FEA, Gunns and Great Southern. The total cost of the recommended investments was to be $684,375, yielding a tax deduction of $596,636.

603 On 14 May 2008, the plaintiff, Mr Larkin, Ms Bone and Mr Hopley met again. By that time the spreadsheets were the only documents that the plaintiff had received. During the course of the meeting, Mr Larkin said that he would provide the plaintiff with a statement of advice about tax effective investments to deal with his capital gains tax problem.

604 On 19 May 2008, the plaintiff spoke to Mr Larkin by telephone and told him that he wanted to delete the proposed Gunns investment. Mr Larkin later emailed a Statement of Advice, which was expressly limited to tax effective investments. The email referred to a meeting scheduled for 10am on 22 May 2008. Prior to this email, the plaintiff had not received a Product Disclosure Statement for any of the proposed investments.

605 The plaintiff said in evidence that at the proposed meeting he was to sign all application forms and pay cheques for deposits and things of that nature for the schemes. He had told Mr Larkin during their earlier telephone conversation that he 'would be happy to proceed with executing the necessary paperwork and paying the fees for those schemes within the next few days.' He was 'prepared to accept his recommendation without making any further enquiry about each of these schemes.'

606 The Statement of Advice included spreadsheets with estimated cash flows. The plaintiff accepted that in giving those to him, Mr Larkin was not making any representations about returns on proposed investments, but had done some calculations to assist the plaintiff by giving him some idea of what his cash flow position might look like over time. The plaintiff also accepted that if there was any representation of a return, it had come from a combination of the research done by independent research groups or from Mr Larkin's indicative analysis of those research group documents.

607 The meeting at which the various application documents were signed took place on 22 May 2008. The plaintiff accepted that had he wished, he could have accessed information, such as Timbercorp's half-yearly results, before the meeting. The meeting took a couple of hours, during which all five proposed schemes were discussed. The plaintiff said that it was impossible to read all of the documents in the time available, but that he would have read them afterwards, when he had a chance over the next couple of days. Unlike the year before, in 2008 there was no time pressure to meet a closing date. The plaintiff had until 30 June 2008 to complete the documents, but said that, 'I certainly had every confidence in Mr Larkin and what he was advising.' It appears that he was not shown copies of the relevant Product Disclosure Statements until completing the application forms on 22 May 2008.

608 The plaintiff also said in evidence that when he came to make his 2008 investments, he was influenced by his understanding of how the projects worked from his reading of the 2007 Almond project Product Disclosure Statement. The following exchange occurred:

> HIS HONOUR: Mr Woodcroft-Brown, you said that you sat down when you had time after signing the application documents on 15 June and you read the PDS and other material; is that a correct understanding of your evidence? --- That's correct, Your Honour.
> Does that mean that you did not read them on the night of the 15th? --- Your Honour, I would have glanced through them. I wouldn't have time in that three, four hours that we were together there to have gone through them in detail.
>
> You've given evidence of an understanding you had about the nature of the transaction. When you read the documents at your leisure later, did there appear to you to be anything in those documents that was inconsistent with your understanding that you had on the evening you signed the application? --- Not really, Your Honour, and that's probably just me not drilling down into the depth that all the legal people have drilled down into. There was nothing in that document that jumped out and said to me, this is - just give us your money and we will do with it what we want to.
>
> MR BEACH: The alternative position, and I will put this to you, is you never read these documents at any stage? --- That's your opinion.
>
> I'm putting it to you? --- No.
>
> The reason you didn't bother reading any of these documents, whether for 2007 or 2008, is you were simply relying upon Mr Larkin's statement of advice for each of the two years? --- In my mind and in what I was doing, was securing for myself a long-term cash flow. That's what I was putting the money in. Why would anybody take money which they have got in a bank account, they either pay it to the tax man or they pay it to try and get a long-term - just throw it away, why would I do that? I don't think any reasonable person would.

609 The evidence given by the plaintiff about his attention to the detail contained in the Statements, and his having read them at all, does not persuade me that his review of the 2007 Almond scheme documents or the 2008 scheme documents was more than a perfunctory glance, if that. His real concern seemed to be that his investment had been thrown away, because Timbercorp Securities had not quarantined funds paid by him, as if held on trust to be applied to a particular project. Expressed in this way the plaintiff's complaint was based on assumptions about a business

relationship and structure that were inconsistent with the contract documents summarised in its Product Disclosure Statement, and the business model of the Timbercorp Group reflected in its financial information, some of which was included in the Statements. Even in relation to the loan documents, the plaintiff only said that he 'glossed over it, read it, it's part of the normal documentation.'

610 Had the plaintiff subsequently looked at all the documents in greater detail, whether after 15 June 2007 or 22 May 2008, his claimed assumptions would have been challenged. There was no evidence of his expressing any concern to Mr Larkin or anyone else until after the collapse of the Group. In my view, the content and detail of each Product Disclosure Statement was not an actuating factor in the plaintiff's decision-making process.

611 I note that the plaintiff was unable to produce copies of the 2008 Product Disclosure Statement in discovery. He explained in cross-examination that his inability to find the documents led him to assume that either he did not receive them, or they had been in an electronic version that he had not bothered to print. When it was put to him that he had not kept them because the tax benefit was the driving force for his investments, he replied, 'or else that it was very similar PDS to the previous ones that I had read, same terms and conditions.'

612 The defendants submitted that the evidence of the plaintiff leads to the following conclusions:

> (1) In so far as the claims relate to allegedly '*defective*' Product Disclosure Statements, then his case must fail on reliance and causation, because he did not read the documents, and it otherwise cannot be concluded that any defect had a causal role in his decision to invest.
> (2) In so far as the claims relate to misleading conduct whether by silence or otherwise, the plaintiff's case must fail on reliance and causation, because he did not give evidence with any cogency about any acts or conduct, or any expectation he had as a result of any silence by any of them, that gave rise to any incorrect perception on his part which caused him to act in a way which resulted in loss and damage.
>
> (3) In so far as the claims relate to a failure to make continuous disclosure, his case must fail on reliance and causation, because he did not give evidence with any cogency about anything he would or could have done differently had disclosure been made, and in at least one case, gave no evidence relating to reliance or causation at all.

613 There is force in the defendants' submission. There is a further problem for the plaintiff. The reformulation by him of the structural risk, into the financing risk, and the conversion of the adverse matters from stand alone significant risks into events which impacted adversely on the elements of the financing risk, meant that the formulaic evidence given by him in relation to reliance missed the point. The evidence contained in his witness statement was designed to support the pre-trial pleaded case. Even then, his oral evidence exposed an artificial case of reliance based upon after the fact assumptions about the manner in which his funds ought to have been quarantined from exposure to the collapse.

614 The defendants submitted that the case was reminiscent of Patrick v Capital Finance Corporation (Australasia) Pty Ltd,[82] a claim concerning investment in a stage production scheme. In that case, the applicant (Dr Patrick) said in evidence that he had had a good read of the prospectus but did not study it, that he relied on the advice given to him by his financial adviser and that he was not going to trust his own reading of the prospectus or the brochure (which was why he sought advice). Tamberlin J found that:[83]

> the only material and operative purpose in investing in the Crazy for You Fund, as evidenced by Dr Patrick's later inaction, and the strength of his desire to obtain tax relief, was to obtain a tax deduction. I am also satisfied that he would have invested in the Crazy for You Fund in any event, having regard to his discussions with his consultant and accountant. I find that he did not direct his attention, or attach any importance, to the question as to how the term bonds were to be financed. This is particularly so given the time at which he decided to invest and his urgent desire to minimise his income tax. I

> consider that if he had not invested in the Crazy For You Fund he would have most likely, in his eagerness to secure a taxation benefit, have entered into a similar fund.

615 Tamberlin J also said that:[84]

As noted above, I do not accept Dr Patrick's evidence that he relied in any way on representations that the investors' funds would not be used to purchase the term bonds in order to secure repayment of principal when he invested in the Crazy For You Fund. He agreed in evidence that he had to get some taxation relief for the financial year ended 30 June 1996. The timing of his investment, and the rush with which it was effected, are important to bear in mind when considering his likely reasons for the investment. In my view, the only significant operative reason for Dr Patrick's investment was his keen desire to get the immediate tax benefit. He entered into this scheme with a sense of imperative urgency, without giving the matter any real thought, except with respect to obtaining the tax advantage. He made the final decision to invest after speaking with his accountant and adviser. It is probable, in my view, given the history of his previous tax driven investment, that he would have invested in another scheme of a similar type in great haste if he had not invested in the Crazy For You Fund. It would not have been of any concern to him, in my view, if he were told (contrary to the fact) that the funds were to be used for the purchase of the term bonds. He simply gave the matter no thought. Given his strong belief in the attractiveness of the production and its likely success, it is possible that he believed there would be ample funding from the takings of the production and that it would not therefore be under-funded.

616 His Honour rejected[85] the argument that the applicant had relied on any representations as to the use of the investors' funds in relation to the source of payment for the term bonds, and held that any loss which the applicant claimed to have suffered was not caused by or did not flow from the conduct of any of the respondents. While each case will necessarily turn on its own facts, the present case gives off a familiar echo. I do not accept the plaintiff's evidence of reliance.

617 There was a striking internal inconsistency in the plaintiff's evidence. While asserting that he believed each scheme was a stand-alone scheme, he claimed that the financial strength and support of the Group to the schemes was an influential matter in his mind. If the schemes were stand alone, why was the strength of the Group a matter of any consequence?

618 As to his belief that the schemes were stand alone, the following revealing exchange occurred:

> You also knew even in relation to operating expenditures the group was funding those, did you not, from the mere fact that some of these schemes had deferred management fee structures? --- The assumption that I drew from that, this was a very good company with sufficient cash flow and income of other sources to run their business. I didn't get into their model of what dollar was going where and how. I simply looked at is it reasonable, $500 for a 2500 square metre lot with 250 trees, is that reasonable? That's the only information I was given that I could draw anything off.
> You are a sophisticated businessman and by the sound of it you would appreciate that all of deferred management fees would indicate the group was funding operating expenses until such time as there was harvesting and proceeds and those deferred management fees could be paid out of harvest proceeds? --- It obviously suited their model to do that.
>
> But you knew that that was part of the actuality of their model? --- There was an indication they were funding a portion of the process.
>
> For the Timberlot single payment scheme where you only ever paid an amount up front the group was funding any operating expenses right through until the, say, the 12 year mark before there would be the first harvest from the Timberlot, you knew that? --- I knew that, yes.

This exchange would seem to indicate that the plaintiff understood that the Group was financially responsible for the continued maintenance of the schemes although he was relatively indifferent to the financial strength and structure of the Group.

619 In respect of the tax announcement the plaintiff accepted that after he had invested in the 2007 Almond project, he had read an Adviser Edge report in respect of the project, given to him by Mr Larkin. The report referred to the announcement and said that any resulting material change may affect profit growth, 'although strong annuity style income would mitigate this over the short term.' He said that disclosure of that material was 'not particularly troubling' because he did not see that as something affecting his investment. Thus, he flip-flopped between reliance on the corporate strength when it suited and reliance on an assumption that his investment was ring fenced or quarantined when it suited.

620 It is clear enough from his dealings in the financial markets that the plaintiff was aware of the Global Financial Crisis. To the extent that he was actually interested in the financial circumstances of the Group, the plaintiff was well equipped to obtain relevant information from publicly available sources, and did so on numerous occasions.

621 The plaintiff said that he became aware of the bank covenant issue in December 2008, but nothing changed in his conduct as a result. His witness statement revealed that he knew of the potential for breach just before Christmas 2008, when he downloaded a report from the Timbercorp website which referred to this issue.

622 The plaintiff raised, as a course open to him had he been fully informed as he said he should have been, that he would have stopped making payments to Group companies. It is not clear how this was open to him, in the face of his otherwise valid contractual obligations. Putting that problem to one side, it cannot be concluded that he would have stopped making payments. On the one hand, he asserted that had he known that the company was on the brink of collapse in late 2008, he would have stopped making payments. But in his witness statement he said that he knew of the possible breach of bank covenants in December 2008, and yet he continued to make payments.

623 He said that when he became aware of a breach of loan covenants, his first impression was to stop making further payments to Timbercorp. The plaintiff said that the only reason he did not stop making payments was that Mr Larkin told him that everything was fine and he was not aware of any other options.

624 In his witness statement, the plaintiff did not identify any particular statement or representation made by any of the defendants, apart from his assumption or understanding of the financial strength of the Group; concluding that had he known the Group was inherently risky and that the funds he had invested were not necessarily being used for his specific projects, he would never have invested in the first place. In relation to the adverse matters, his evidence turned for the most part on his awareness of the related event. For example, in relation to the tax announcement, he said that had he been told that the announcement had impacted Timbercorp financially he would not have gone ahead with any of his investments. He was, however, aware of the tax announcement by the time of his 2008 investment. He was also aware of the possible impact on the profitability of the Group from the Advisor Edge report.

625 In relation to the substantial deterioration in credit and financial markets, said to have commenced in late 2007, the plaintiff said that Timbercorp never told him about the effect of the Global Financial Crisis on the Group. He said that if he had known about the effect of the Global Financial Crisis on Timbercorp he would not have made any new investments after that point, and would have stopped making any further payments to Timbercorp. As with much of his evidence on reliance, it was formulaic and without substance. It did not even descend to the degree of particularity, found in his particulars, when formulating the risks associated with the adverse matters. During his evidence in chief he disavowed one thread of his reliance evidence, in which he had proposed to assert that, had he been informed of his rights and been made aware of the impact of the Global Financial Crisis on Timbercorp, he would have taken steps to wind up the project.

626 In relation to the near insolvency adverse matter, he said that he was never made aware that Timbercorp was near insolvency (whatever that meant), but had he been so informed he would not have invested in the 2008 projects and would have stopped making payments in relation to existing projects.

627 The plaintiff's evidence in relation to the so-called financial representations was equally formulaic. He concluded his brief evidence with the assertion that, had he known that the Timbercorp Group was not sufficiently strong that investors could reasonably expect that Timbercorp could continue to manage each of the recent schemes throughout its term or that the principal risks associated with each of the recent projects were not fully disclosed in the relevant Product Disclosure Statement, he would not have invested in any of the projects in which he had invested in the first place. Quite frankly, this formulaic evidence does not make sense.

628 The plaintiff's evidence in relation to the scheme contribution representations, the financial reports representations and the representations by silence was similarly formulaic and perfunctory. There was no attempt to place the alleged failure to provide a particular piece of information, that might possibly resonate in relation to his particular position, into a context where he could credibly contend that he would have acted in a causally relevant way had he been so informed. The generality of his approach to this part of his evidence undermined his credibility as a whole.

629 In his oral evidence, the plaintiff said that he would not and could not have done anything by way of an attempt to wind up his schemes. His answers were generally to the effect that the reality of it was once I had given my money in, there was nothing I could do or any of the other investors could do, that was it and that if he had known that as at 1 December 2008, the Group was in financial difficulty and at a real risk of being placed into liquidation or administration, there was nothing I could have done.

630 He explained how his statement came to be amended as follows:

> with hindsight there was nothing I could have done, there was nothing any of the investors could have done and that was why I had asked Macpherson & Kelley, I really need to change that because there was nothing I could have done. I couldn't have taken steps, I couldn't have got enough growers together. When growers were got together they didn't want to wind it up because of all the uncertainties around the project. There was nothing I as an individual could have done.

631 The plaintiff voted against the winding up of the 2007 Almond project at the grower meeting held on 31 July 2009, through a proxy given to Chris Garnaut, a financial services advisor.

Mr Van Hoff

632 The witness statement of Mr Van Hoff, in relation to reliance and causation issues, suffered from many of the same defects as the witness statement of the plaintiff. Having adopted his witness statement as his evidence in chief, it was soon left behind under cross-examination, save for his attempt to diminish the significance of tax deductions as a factor actuating his investments. When it came to his evidence of reliance, it too was repetitive of the formulations found in the statement of claim, and unhelpful.

633 Mr Van Hoff specifically addressed the financial structure allegations and the adverse matters. Of course the components of the structural risk had changed during the course of the trial. This meant that his evidence no longer aligned with the plaintiff's new case. In relation to the financial structure of the Timbercorp Group, Mr Van Hoff said:

> I was not aware of the financial structure of Timbercorp or the way it was run. If I was aware of these matters, I would not have invested in the first place.

The generality of that proposition is breathtaking. What aspect of the financial structure concerned him? Had he not read the Product Disclosure Statements? If it was some particular risk to his investment that concerned him, he did not say so.

634 He continued:

> If there was the slightest inclination of danger, I would not have invested in Timbercorp. If I had become aware of the way that Timbercorp was structured and the risks associated with such a structure after I had invested, I would have sought advice from Marguglio,

> my financial planner and legal advisers, as to an exit strategy so that I could cut my losses and exit the Projects. Any chance that I had to get out, I would have taken advice from Marguglio on the most feasible way of doing so and would have cut losses and exited. If I knew there were risks at the outset to my Timbercorp investments because of the financial structure of Timbercorp, I wouldn't want to have any money in Timbercorp at all. This would have meant that I would never have invested in any new Projects and sought advice as to how to cut my losses at that point and get out of the Projects in which I had already invested.

635 In relation to the tax announcement Mr Van Hoff said that he was aware of the change that occurred, and contacted Mr Marguglio who told him not to worry because it won't affect your projects. He went on:

> If I had been told by anyone at Timbercorp as to how this had impacted on the Timbercorp Group as a whole, I would not have put anymore money into Timbercorp at all. It is as simple as that. I would never have invested in any of the projects that I invested in after 2007 ...

Again, the generality of the assertion makes the evidence of little value. He did not address any particular aspect of the impact of the *tax announcement* on Timbercorp.

636 In relation to the second adverse matter, the deterioration in credit and financial markets in late 2007, Mr Van Hoff said that he was generally aware of the financial crisis that hit markets worldwide, although he could not recall any discussions with any Timbercorp representatives about the issue and was certainly never told by anyone at Timbercorp as to how this had specifically impacted them. He went on:

> If I had been told about the impact the global financial crisis had had on Timbercorp, I would have spoken to Marguglio and my legal advisors and made a judgment to exit the projects.

637 In relation to the alleged near insolvency in early 2008, the alleged breach of loan covenants in September 2008 and the going concern issue arising under the 2008 Annual Report, Mr Van Hoff said that he was never told or notified of any of these matters by Timbercorp. He went on:

> In fact, Timbercorp had happily taken my fees and payments towards the Projects after this time to pay for supposed plantings and administrative costs without saying anything about their financial difficulties.
> If I had known about any of these matters, again I would never have invested in any new matters and for those projects that I already held, I would have sought advice from Marguglio and my legal advisors with a view to ceasing payments and trying to terminate and/or wind up each Project ...
>
> As a general proposition, if I was aware of any of the matters above, I would never have invested in Timbercorp. As far as I am concerned, if the company is already lost, why would I put money into it? It makes no sense to do so ... Even a rumbling or a sniff of any problem would have meant that I looked elsewhere for investment opportunities.
>
> In short, any negative rumblings about Timbercorp would have caused me not to invest in Timbercorp in the first place. If I had found out about each adverse matter after I had already invested, I would have sought professional advice and taken whatever steps I could to get out of the Projects...

638 In relation to the alleged financial representations, Mr Van Hoff said that when he read each Product Disclosure Statement, he gained the impression that Timbercorp was a strong and viable company and would be able to see

the projects through to completion. He said he believed that all significant risks in relation to each Recent Project had been identified and disclosed in the Product Disclosure Statement. He continued:

> Had I known that,
> (a) the financial circumstances of the Timbercorp Group were not sufficiently strong that investors could reasonably expect that Timbercorp would continue to manage each of the Recent Projects throughout its term; and
>
> (b) The principal risks associated with each of the Recent Projects were not fully disclosed in the relevant PDS,
>
> I would not have invested in the Recent Projects.

639 This evidence in relation to the financial representations, like the evidence of the plaintiff, carried little weight. It was so infected by the plaintiff's case thesis that it fell victim to a repetition of the pleading, as if evidence of his personal position. His evidence in relation to the scheme contribution representations, the statements made in the scheme financial reports in March and September 2008 and the representations by silence fall into the same category, and suffer from the same defects. The evidence was generalised, formulaic and unhelpful.

640 The defendants submitted the following in relation to the evidence of Mr Van Hoff:

> (a) he did not read the entirety of the project PDSs prior to signing his application to invest and the loan application for the loans and, at most, looked at a small part of them - they were irrelevant to his decision to invest, in that:
>
> > (i) he was content to be, and in fact was, provided with the PDSs for the first time immediately before signing his applications to invest and take out loans;
> > (ii) his primary interest was in the tax deductions he wanted to achieve from the investment, as he had a large amount of other income-producing investments; and
> >
> > (iii) he simply went along with what his accountant and financial adviser recommended without any meaningful independent thought;
>
> (b) he had a similar attitude to other documents he received about his Timbercorp investments, in that:
>
> > (i) he simply sent them off to his accountant and otherwise paid them little or no attention;
> > (ii) he did not appear to have read or understood matters dealt with in the PDSs concerning the absence of financial projections and the ability to call meetings to wind up the schemes and the acknowledgments and disclaimers in the loan applications;
>
> (c) any erroneous understanding he obtained about the structure of the projects could not be traced back to any of the material generated by the Timbercorp entities identified in any pleaded claim prior to or subsequent to each of his investments;
> (d) in fact, each PDS contained relevant warnings and he had access to other information which would have disclosed to him in substance what he complains was not disclosed to him, in that each PDS contained warnings concerning the possible effect of grower defaults and identification of the

> risk that anything that affects TSL's ability to meet its obligations under the scheme documents, and the ability of the land-owning Group entity to meet its obligations under the relevant sub-lease, *could also constitute a risk to Growers* ;
>
> (e) he would not have been deterred had the PDSs included the types of warnings it is alleged should have been included in the PDSs, in that:
>
> > (i) his evidence showed he simply did not read the documents he received;
> > (ii) he was generally content to invest in whatever was recommended to him by his accountant and financial adviser.

641 Mr Van Hoff admitted that he did not read each Product Disclosure Statement carefully and completely. When asked about an interview he gave to the Australian Financial Review prior to 17 November 2009, the following exchange took place:

> Did you tell [the reporter] that you had scrutinised carefully each one of the product disclosure statements for your investments in Timbercorp? --- When you say scrutinised carefully, I've read through a little bit of it with the help of my financial planner, as well as the guy from Timbercorp.
> Let's be clear about this. Is it the case that each time you received a product disclosure statement for each of your investments in Timbercorp, you had a look at a little bit of it, is that right? --- I sat with the guy from Timbercorp, there was a business development manager who came in from Timbercorp, him, the guy from Garrisons was Scott Weaver and Marguglio and they were sitting there and they will explain to me the product disclosure statement before we sign it.
>
> I'm asking you about your actual reading of each of the product disclosure statements? --- I didn't read the whole product disclosure statement it's about 40 pages or 50 pages so I don't go through every single bit of it.
>
> How long would you have spent just on average reading any particular one of these product disclosure statements, you personally sitting down and reading it? --- I would sit at the management meeting with those three, go through the product disclosure statement and I will sign it and give it over to them.
>
> Is it the situation that you didn't read it all for yourself, the product disclosure statement? --- I read part of it, sir, but I've not read the whole 40-50 pages of it because, look, *who reads a product disclosure statement fully like that*?[86]

This evidence is to be contrasted with his witness statement, in which he stated, 'I read each of the PDS's that I received.'

642 The cross-examination of Mr Van Hoff continued:

> Which parts did you concentrate on then when you did your own reading? --- Okay, I just asked them what the financial position of the company and how strong the company is and the main thing is, is how safe is my investment.
> Anything else that you would focus on in terms of your reading of the PDS? --- I would ask for advice from the three of them.
>
> I'm not asking you for what advise you were seeking from them, I'm just asking you what parts of the product disclosure statements you actually focussed on in terms of your reading? --- Like I said to you, the financial part of it, if they can meet their bills, if they

> can make their payments, if they are viable, if it's a viable company and is our investment safe with this company and that's all I asked them, you know.
>
> So apart from that part of the product disclosure statement you didn't read any part of the other parts of the product disclosure statements? --- I can't remember going through any specific part of it but I read a little bit of it and I signed the product disclosure statement.
>
> Just to be clear then, is it the position that you were given a product disclosure statement at the time that you had a meeting with Weaver and Marguglio, you talked about it and then signed the application form at the same meeting for that particular investment? --- Yes, that's correct.

643 In relation to the 2005 Timber project Product Disclosure Statement, it would seem that he gave attention to only that part dealing with the financial position of the Group, and the application sections which he says had been filled in for him:

> Apart from that section I'm just showing you, the application section and apart from the earlier section I was showing you about the financial position of the Timbercorp Group, was there any other section that you glanced at before signing your application? --- Well, not really.

Mr Van Hoff explained his general practice when making investments in new projects from 2005 until 2008. He said that he would meet with his accountant, Sam Marguglio, Scott Weaver and Daniel Iurada, a Timbercorp business investment manager, and discuss a proposed investments and go through the paperwork. It seemed that Mr Iurada brought the application forms already filled out.

644 The Australian Financial Review article recounts that Mr Van Hoff had said he had taken ‘independent financial advice’. Initially, Mr Van Hoff agreed that he had said that to the reporter. When pressed on the issue, he sought to draw Mr Iurada into the frame as having provided him with advice, along with Messrs Marguglio and Weaver. When pressed further about the issue and whether he had told the reporter that he had received independent financial advice, Mr Van Hoff replied that he could not remember whether he had said that to her. The defendants submitted that Van Hoff’s attempt to implicate Mr Iurada (a Timbercorp employee) as having provided advice to him should be rejected. In my view Mr Van Hoff’s evidence to that effect was unsatisfactory, and insofar as it is relevant, I am not persuaded that he was given any particular advice by Mr Iurada.

645 Mr Van Hoff gave the following further explanation of his practice when making investments:

> And you would put an application in for an investment at the same time as the meeting where you are first shown a PDS? --- Well, see, the thing is, we discussed it, what we are going to invest in. Then they will see what we require and they would fill in that PDS, it had all the application at the back of it, so Daniel or Scott Weaver will fill it in and he will bring it to the meeting and he will go through it and then I will sign the PDS at the back of it.
> But when you see the PDS for the first time, that is at the meeting where a PDS is presented with all the application material filled in for you? --- Yes.
>
> Is it the case that sometimes you wouldn't meet with Weaver at all about filling in the application form for a PDS, you would just meet with Marguglio and just deal with him, just one-on-one with him? --- For Timbercorp?
>
> Yes? --- No.
>
> If you would just go to paragraph 10 and this may be an imperfection in your statement, you will see there you refer to, ‘I received some documents from Marguglio’, whereas

> paragraph 8 says that Weaver provides them to you; is that an error in paragraph 10 or is that something that would happen from time to time, that sometimes Weaver would provide you with the PDS or sometimes Marguglio would provide you with the PDS? --- No, it should have been Marguglio and Weaver, I suppose. Yes, that could be a mistake or, you know, but - - -
>
> Or is it the position that when you first invested in Timbercorp you had Mr Weaver present with Mr Marguglio but after you had done your first investment in Timbercorp - - -? --- Yes.
>
> You didn't need to meet with Weaver any more, it was something that you and Sam Marguglio could do around a table? --- Weaver used to handle all the Timbercorp stuff so I didn't - sometimes I will meet with Weaver by himself.

646 Mr Van Hoff said that Mr Marguglio looked after his financial affairs on an ongoing basis, all year round, and that he had been in a professional relationship with him for close to 20 years. Mr Marguglio provided tax advice for personal and business purposes. Mr Van Hoff was unclear as to the precise status of Mr Weaver. Although he had Mr Weaver's card recording a different business name, Mr Van Hoff thought that Mr Weaver was part of Mr Marguglio's firm or a representative of Timbercorp. It seems that Mr Marguglio referred Mr Van Hoff to Mr Weaver when the issue of tax effective investments arose.

647 Mr Van Hoff said of Mr Weaver that 'he will pick the best one for me', referring to schemes. Mr Van Hoff was asked bout his relationship with Mr Weaver:

> He explained to you he was referring you to Scott Weaver as a person who could identify for you tax effective investments to deal with your 30 June tax problem? --- Not necessarily. It was not the tax problem that we were talking about, we were talking about doing this for an investment so that we could - what I wanted to do was to, in our retirement, to get some sort of an income stream so it was for that reason, that is what he said, that's how Timbercorp came up in the first place.
> Timbercorp came up in your conversations with Sam Marguglio because they were offering tax effective investments? --- That's one of the reasons it was attractive to us but that was not the reason why we took it, sir.

648 The explanation given by Mr Van Hoff in his witness statement, of his three reasons for investing in Timbercorp schemes, and their order of significance, was identical to that given by the plaintiff. Seeking tax deductions was ranked third, behind 'the long-term returns being forecasted by Timbercorp' which 'guaranteed that [he] would have an income in the future' and the fact that Timbercorp seemed to him to be a 'very strong and viable company'. Mr Van Hoff accepted that immediately prior to his first investment in a Timbercorp scheme in 2005, he held a fairly extensive portfolio of international and local equities. However, he denied that he was motivated to invest in Timbercorp schemes predominantly for a tax purpose. He asserted that the main reason was to receive an income stream as a grower in 15 or 20 years time. At the time of his investment in June 2005, Mr Van Hoff already held an investment a Great Southern scheme. He said he 'left Great Southern and came to Timbercorp' because Mr Weaver said it was a better product with a better return.

649 Mr Van Hoff said that he was told to 'diversify into something different to have an income stream at a later stage when I decide to retire.' As with the plaintiff, Mr Van Hoff appeared to have been actuated by what was advised by his accountant and the financial advisors.

650 Mr Van Hoff conceded that he had signed a declaration contained in the 2007 Almond project application, to the effect that he had read the whole of the Product Disclosure Statement, whereas in fact he had not done so:

> You see there clause 1: 'How to apply. Before completing and signing this application form you should read the whole of this PDS'? --- Yes.

> So you ignored that direction? --- Yes. How many people read a full PDS, sir, even an insurance PDS?
>
> If you go a few pages on, under the heading, 'Declarations' this is page 4489, you see the heading, 'Declarations'? --- Yes.
>
> 'By signing the application form you make the following declarations: that you have read the PDS'? --- Yes.
>
> You agree you signed the application form? --- Yes.
>
> And you made that declaration, that you had read the PDS? --- Well, not entirely.
>
> And that declaration turned out to be false, didn't it? --- Well, if you say so because I didn't read the entire PDS.

651 Mr Van Hoff gave similar evidence about his reading of the loan applications. He admitted that he should have read the loan acknowledgments before signing them, but did not do so. He then became quite adamant about what he would have done had he looked at those parts prior to signing:

> The next dot point: 'Timbercorp Finance expressly disclaims any responsibility for the PDS', you appreciated that at the time, didn't you? --- The first time I saw that was when I was with my lawyers, with the lawyers before we came here.
> Okay? --- And I've never seen that one before because if I saw that paragraph, I probably would never have taken this.
>
> So you are saying at the time you entered into the loan for this 2005 project you didn't appreciate that you were making any of the acknowledgements set out in this clause? --- Absolutely, especially that clause there. It just says it didn't - makes no representations regarding the truth and accuracy of the contents of either of them. So what's that saying, nothing in this is true?
>
> The middle column just to pick up an example, the last dot point? --- I wouldn't have read any of these, I can tell you.
>
> If you had read it you would have taken some advice on it from Mr Marguglio, would you? --- Well, from one of them.
>
> Just going to the next page 0020, so you signed this application form with Scott Weaver present, did you? --- Yes. That's what it says.
>
> So you had the opportunity to review this application form if you had wanted to? --- Well, we - - -
>
> Before signing it? --- Of course. No-one forced me to sign it.
>
> And if you were unsure about its contents, you could have asked either Mr Weaver or Mr Marguglio about it? --- Absolutely.

652 I am not satisfied that Mr Van Hoff read any of the Product Disclosure Statements in any detail. He may have glanced at some parts, but he was willing to invest without a careful consideration of the documents. That undermines his evidence insofar as he relied on the content of the documents or the absence of information contained in them. He did not look to the Product Disclosure Statements as a source of information to assist him in his decision to invest in Timbercorp schemes. He chose the schemes on the basis of advice from his accountant, and perhaps Mr Weaver, in search of tax relief.

653 What asked about reports he received from Timbercorp, he said:

> Well, all I can say is that I've seen is the ones we get - whatever we get in the mail and whatever I had in the file. If I get a report, I just - I send it to Marguglio and ask them if they require the report or I put it back in the file.

654 When he received grower reports and newsletters, Mr Van Hoff sent them to his accountant. He relied on the advice of his accountant.

> HIS HONOUR: Do you remember being informed of or receiving information to that effect from Timbercorp? --- Your Honour, when I used to receive these documents, I used to send it to BMK Partners and I would put something and I will ask them, 'Is there anything I need to do about this, is there any specific information in this that affects us?' Are you saying you didn't read any of this material? --- Some of these documents come in - I didn't read the entire - if I get an annual report or a grower report, I don't read the whole thing, Your Honour.

Winding up

655 One question to be decided in this stage of the trial is to identify the schemes that conferred a right on members to convene a meeting for the purpose of passing a special resolution to terminate the scheme. Section 601NB of Act provides:

> **Winding up at direction of members**
> If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

656 For a meeting to be convened, more than one grower's support was needed. A responsible entity is only obliged to call such a meeting if requested by members with at least 5% of votes that may be cast on the resolution, or by at least 100 members entitled to vote on the resolution. It is theoretically possible for a single grower to apply to the court to convene a meeting. A meeting once called would require a resolution by 75% of voters approval. The evidence does not support a finding that such a resolution would probably have been sought, let alone passed prior to the appointment of the administrators.

657 In May 2009, the Timbercorp Growers Group was formed, immediately after the second meetings of creditors. Prior to 1 June 2009, the Timbercorp Growers Group sought funds from financial advisers to defend any application to wind up the almond schemes. When the liquidators brought their proceeding to wind up of the almond and olive schemes, it met with resistance from the Timbercorp Growers Group. The proceeding was adjourned to enable grower meetings to take place. Growers in the almond and olive schemes voted on whether their schemes should be wound up at meetings convened by order of Robson J.

658 The Almond meeting on 31 July 2009 involved seven almond projects. Resolution 1 put to members in each almond project was a resolution that the Scheme continue and not be wound up. The Timbercorp Growers Group explanatory statement advocated a vote in favour of the resolution. The Liquidators had posted legal advice of a Queen's Counsel, casting doubt on the legal efficacy of the resolutions. The Growers Group responded by posting a notice on its website that growers should ignore the advice. The meeting voted overwhelmingly in favour of the schemes continuing and not being wound up.

659 In BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd,[87] Davies J described the course of events as follows:

> The liquidators decided that the only option available to them was to wind up the Almond Projects formally and in mid July 2009 the Court heard the winding up applications. A growers' group, the Timbercorp Growers Group ('TGG'), opposed the applications and sought the appointment of a temporary RE for the Almond Projects. TGG's opposition

was partly based on the concern that the winding up may immediately extinguish growers' rights, which the growers wanted to avoid. The Court adjourned the winding up applications by consent to enable meetings of the growers in each Almond Project to consider various resolutions directed at enabling the Almond Projects to continue in a restructured form. These meetings were held on 31 July 2009, but no specific recapitalisation proposal was able to be put before the meetings, and the meetings were adjourned to a date to be fixed. No further occasion arose for the meetings to resume because no restructure proposal could be formulated before the Almond Assets were sold and the growers' rights extinguished.

660 The Olive meeting, held on 17 August 2009, involved seven Olive projects. The notice of meeting had put forward resolutions which were effectively identical to those at the Almond meeting. Macpherson & Kelley, in their circular to growers dated 13 August 2009, advocated a vote for the continuation of the schemes. The meeting voted overwhelmingly in favour of the schemes continuing and not being wound up, except for one scheme in which there had not been a quorum.

661 In relation to the Forestry schemes, including the 2005 and 2007/2008 Timberlot projects, there was no evidence that any grower ever formally raised winding up as an option. An asset sale process ultimately received a favourable vote at a grower meeting on 7 August 2009.

662 In relation to the 2006 Avocado project, a scheme in which Mr Van Hoff had an interest, the grower meeting was held on 12 October 2009. There was a resolution to replace the Responsible Entity. Winding up did not seem to have been contemplated.

663 The proposition that ASIC may have taken some action was not pressed at trial. No evidence was advanced to support that contention.

OTHER MATTERS

664 Any question concerning relief from liability under s 1318 of the Act seems hypothetical. No relevant contravention as pleaded has been established. It might be argued that there would be some utility in such a finding at this stage of the proceeding, if only to answer a common question in the group proceeding. I very much doubt that there would be any such utility. In any event, a proper assessment of the factors to be taken into account could not properly be made in the absence of a finding of contravention and the consequences.

665 While the parties have largely reached agreement on the form of the common questions, they seem overly complex. Some are not necessary to answer. I propose to give further consideration to the common questions that arise in the proceeding and will answer those questions in light of the foregoing findings and reasons. The parties will have a further opportunity to consider and make submissions on that matter.

666 I do not propose to make any finding on proportionate liability, in the absence of a finding of liability. To do so would be entirely unnecessary. The same may be said for a finding at this time as to whether Timbercorp Finance might be liable for any conduct or breach of duty by Timbercorp Securities. Those are complex legal issues which depend upon clear and precise findings about the nature of the conduct and breach.

667 I will hear the parties on the question of costs and final orders at a convenient time.

CERTIFICATE

I certify that this and the 244 preceding pages are a true copy of the reasons for Judgment of Judd J of the Supreme Court of Victoria delivered on 1 September 2011.

DATED this first day of September 2011.

	Associate to Justice Judd

[1] Emphasis added.

[2] Some projects were for terms of up to 20 years.

[3] The plaintiff submitted that this proposition captured the allegations in paragraphs 12P and 75K of his statement of claim.

[4] The plaintiff submitted that this proposition captured the allegations in paragraphs 12A to 12O and 75G to 75J of his statement of claim.

[5] The plaintiff submitted that this proposition captured the allegations in paragraphs 12Q, 12T, 29, 30C, 36A, 36C, 36E, 60, 61, 75K, 75L and 75O of his statement of claim.

[6] The plaintiff submitted that this proposition captured the allegations in paragraphs 12U, 12W, 31, 34, 62, 75L(b) and 75Pof his statement of claim.

[7] The plaintiff submitted that this proposition captured the allegations in paragraphs 39 to 46D of his statement of claim.

[8] The plaintiff submitted that this proposition captured the allegations in paragraphs 47 and 55D of his statement of claim.

[9] The plaintiff submitted that this proposition captured the allegations in paragraphs 63 to 70B of his statement of claim.

[10] (2009) FC AFC 147.

[11] Section 1013F.

[12] Section 1017B(1A)(a).

[13] Section 1013D(1)(c).

[14] Section 1012C(3).

[15] Section 1012C(4).

[16] Section 1012J.

[17] Section 1013C(3).

[18] Emphasis added.

[19] Emphasis added.

[20] [2006] NSWSC 17.

[21] Ibid, [28]–[31].

[22] [2006] NSWCA 32; (2006) 65 NSWLR 418.

[23] Ibid, 422 [14]-[18].

[24] Ibid, 440-1 [131]-[135]; See *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479).

[25] Ibid, 432 [89]-[91].

[26] [2008] NSWSC 98.

[27] Ibid, [52]–[55].

[28] (CL) 2010 MBCA 93.

[29] [2005] EWHC 2342; [2006] 1 WLR 2509.

[30] [2009] EWCA Crim 840; [2009] 1 WLR 2517.

[31] Ibid, 2522-3 [17]-[19].

[32] Ibid, 2523 [21].

[33] [1992] HCA 58; (1992) 175 CLR 479.

[34] Emphasis added.

[35] Section 1013F(2)(d)(ii).

[36] Section 676.

[37] *ASIC v Citigroup Global Markets Australia Pty Ltd (No. 4)* [2007] FCA 963; (2007) 160 FCR 35, 107.

[38] *R v Firns* [2001] NSWCCA 191; (2001) 51 NSWLR 548, 564.

[39] *R v Firns* [2001] NSWCCA 191; (2001) 51 NSWLR 548, 81.

[40] *ASIC v MacDonald (No. 11)* [2009] NSWSC 287; (2009) 256 ALR 199, 372.

[41] Paragraph 12B, s 1013E.

[42] Paragraph 15.

[43] Paragraph 15A.

[44] Paragraph 16.

[45] Paragraph 20.

[46] Paragraph 26.

[47] Sixth amended statement of claim, 14 April 2011.

[48] Paragraph 39.

[49] Paragraph 42.

[50] Paragraph 45.

[51] Paragraph 48.

[52] Paragraph 54.

[53] Paragraph 56.

[54] Paragraph 65.

[55] Paragraph 69.

[56] Paragraph 75B.

[57] Paragraph 75E.

[58] Paragraph 75F.

[59] Joint experts' report, 15 June 2011, para 2.3.38(b).

[60] Joint experts' report, 15 June 2011, para 2.3.38(c).

[61] [2009] NSWSC 1229; (2009) 236 FLR 1.

[62] [2009] FCAFC 147.

[63] [2009] FCAFC 147, [31]-[32].

[64] Section 286(1).

[65] Section 299.

[66] Section 601FB(1).

[67] Section 601FC(1)(c).

[68] Sections 601HA, 601HB, 601HC, 601HD, 601HE, 601HF.

[69] Section 601FF.

[70] Section 601FM.

[71] Section 601HG(1).

[72] Section 601HG(3).

[73] Para 12D of the statement of claim.

[74] Emphasis added.

[75] [2008] FCAFC 196.

[76] Emphasis added.

[77] Emphasis added.

[78] [2008] NSWCA 206; (2008) 73 NSWLR 653, 659 [10]-[11].

[79] [2007] NSWCA 235; (2008) Aust Contract R 90-274, 90,408 [442].

[80] *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; (2008) 73 NSWLR 653, 659 [542].

[81] [2007] NSWCA 235; (2008) Aust Contract R 90-274, 90,375 [139].

[82] [2004] FCA 120.

[83] Ibid, [92].

[84] Ibid, [258].

[85] Ibid, [265].

[86] Emphasis added.

[87] [2011] VSC 255, [16].