

Form 4A (version 1)  
UCPR 6.2

### SUMMONS

#### COURT DETAILS

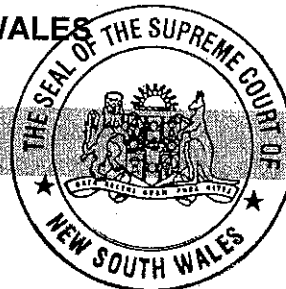
Court Supreme Court of New South Wales  
Division Equity  
List Commercial  
Registry Sydney  
Case number of 2010 | 291263

#### TITLE OF PROCEEDINGS

First plaintiff ALLEN TAYLOR & COMPANY LIMITED (ACN 000 003 056)  
Second plaintiff DUNCAN'S HOLDINGS LIMITED (ACN 000 080 704)  
Number of plaintiffs 2  
First defendant FORESTRY COMMISSION OF NEW SOUTH WALES  
Second defendant STATE OF NEW SOUTH WALES  
Number of defendants 2

#### FILING DETAILS

Filed for Plaintiffs  
Legal representative Freehills  
Contact name and telephone Geoff Healy  
Phone: +61 2 9225 5728



#### HEARING DETAILS

This summons is listed at the Supreme Court of New South Wales, Law Courts Building, Queens Square, Sydney on 10/9/2010 at 9.45am

#### TYPE OF CLAIM

Mercantile Law - Other

**RELIEF CLAIMED**

The plaintiffs seek the following orders and declarations:

1. A declaration that the defendants have breached the Wood Supply Agreement between the plaintiffs and the defendants dated 26 August 2003 ("Agreement") in the manner pleaded in the Commercial List Statement.
2. Damages.
3. Such further or other orders as this Court thinks fit in the circumstances.
4. An order that the defendants pay the plaintiffs' costs of this proceeding.
5. An order that the defendants pay interest on the amount payable under the order for costs in accordance with s 101 of the *Civil Procedure Act 2005* (NSW).

**SIGNATURE OF LEGAL REPRESENTATIVE**

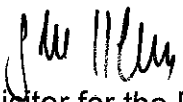
I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiffs that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

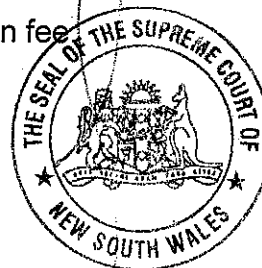
Signature

Capacity

Date of signature

  
Solicitor for the Plaintiffs

1 September 2010



1 SEP 2010

**NOTICE TO DEFENDANTS**

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the relief claimed in the summons and for the plaintiff's costs of bringing these proceedings.

You must enter an appearance before you can appear before the court.

**HOW TO RESPOND**

**Please read this summons very carefully. If you have any trouble understanding it or require assistance on how to respond to the summons you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the summons from:

- The court registry.
- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).

Court forms are available on the UCPR website at [www.lawlink.nsw.gov.au/ucpr](http://www.lawlink.nsw.gov.au/ucpr) or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Supreme Court of New South Wales, Law Courts Building, Queens Square, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	(02) 9230 8111

## FURTHER DETAILS ABOUT PLAINTIFFS

### First plaintiff

Name Allen Taylor & Company Limited  
 ACN 000 003 056  
 Address C/- Boral Limited  
 Level 39, AMP Centre  
 50 Bridge Street  
 Sydney NSW 2000

### Second plaintiff

Name Duncan's Holdings Limited  
 ACN 000 080 704  
 Address C/- Boral Limited  
 Level 39, AMP Centre  
 50 Bridge Street  
 Sydney NSW 2000

### Legal representative for plaintiffs

Name Geoff Healy  
 Practising certificate number 19351  
 Firm Freehills  
 Address Level 38, MLC Centre  
 19 – 29 Martin Place  
 Sydney NSW 2000  
 DX address DX 361 Sydney  
 Telephone +61 2 9225 5728  
 Fax +61 2 9322 4000  
 Email geoff.healy@freehills.com  
 Electronic service address geoff.healy@freehills.com

**DETAILS ABOUT DEFENDANTS****First Defendant**

Name Forestry Commission of New South Wales  
Address 121-123 Oratava Ave  
West Pennant Hills NSW 2125  
Sydney NSW 2125

**Second Defendant**

Name State of New South Wales  
Address The Crown Solicitor's Office  
60-70 Elizabeth Street  
Sydney NSW 2000

## COMMERCIAL LIST STATEMENT

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
Registry	Sydney
Case number	of 2010

### TITLE OF PROCEEDINGS

First plaintiff	<b>ALLEN TAYLOR &amp; COMPANY LIMITED (ACN 000 003 056)</b>
Second plaintiff	<b>DUNCAN'S HOLDINGS LIMITED (ACN 000 080 704)</b>
Number of plaintiffs	<b>2</b>
First defendant	<b>FORESTRY COMMISSION OF NEW SOUTH WALES</b>
Second defendant	<b>STATE OF NEW SOUTH WALES</b>
Number of defendants	<b>2</b>

### FILING DETAILS

Filed for	<b>Plaintiffs</b>
Legal representative	Freehills
Contact name and telephone	Geoff Healy Phone: +61 2 9225 5728

### A NATURE OF DISPUTE

1. The dispute concerns a Wood Supply Agreement between the plaintiffs and the defendants dated 26 August 2003 ("**Agreement**").
2. The plaintiffs contend that the first defendant has failed to supply Timber in the manner required by the Agreement, and that the second defendant has failed to cause the performance by the first defendant of its obligations to supply Timber in the manner required by the Agreement.
3. The plaintiffs further contend that the first defendant's failure to supply Timber in the manner required by the Agreement occurred while the first defendant supplied Timber

of the quantity, size and species required by the Agreement to third-parties in circumstances where it had no contractual obligation to do so.

## **B ISSUES LIKELY TO ARISE**

4. The issues likely to arise include:
  - (a) whether the Agreement has been complied with by the defendants;
  - (b) whether clause 26.2 of the Agreement reduces the damages to which the plaintiffs are otherwise entitled and, if so, in what respects;
  - (c) whether clause 26.2 of the Agreement operates in circumstances where the first defendant has knowingly, intentionally and/or recklessly breached the Agreement and has supplied Timber, which would have been sufficient to satisfy its legal obligations under the Agreement, to third-parties in circumstances where it was not contractually obliged to do so.

## **C SUMMARY OF PLAINTIFFS' CONTENTIONS**

### **Parties**

5. Each of the plaintiffs is:
  - (a) a corporation registered under the Corporations Act 2001 (Cth); and
  - (b) entitled to sue in its own name.
6. The second plaintiff ("**Duncans**") is a wholly owned subsidiary of the first plaintiff ("**Taylors**").
7. Each of the plaintiffs is a group company of Boral Limited.
8. The first defendant ("**State Forests**") is:
  - (a) a corporation constituted under the Forestry Act 1916 (NSW); and
  - (b) entitled to be sued in its own name.
9. The second defendant ("**State**") is:

- (a) the Crown in right of New South Wales; and
- (b) entitled to be sued under the title "State of New South Wales" pursuant to s 5(1) of the Crown Proceedings Act 1988 (NSW).

### **Agreement**

10. On or about 26 August 2003, the plaintiffs and defendants executed a Wood Supply Agreement ("Agreement").

### **Particulars**

The Agreement is in writing. A copy of the Agreement is available for inspection at the offices of the plaintiffs' solicitors.

11. The Agreement includes the following terms:
- (a) State Forests was required to make Timber available, and the plaintiffs were required to take and pay for the supplies of Timber made available, upon the terms and conditions set out in the Agreement: cl 3.4;
  - (b) the State was required to cause State Forests to perform its obligations as required by the provisions of the Agreement: cl 3.6;
  - (c) the Agreement was to operate from 1 July 2004 to 31 December 2023 unless determined at an earlier date under a provision of the Agreement: cl 4.1;
  - (d) State Forests was required to make the Base Allocation available to the plaintiffs each Year: cl 6.1;
  - (e) subject to cl 6.11 of the Agreement, State Forests was permitted to substitute up to 24,350 cubic metres of the Base Allocation of Quota Quality Logs with Small Logs as provided for in cll 6.2.1, 6.2.2 and 6.2.3: cl 6.2;
  - (f) the plaintiffs were permitted in any Year to take not more than 110 percent of the Base Allocation, or to take not less than 90 percent of the Base Allocation, as provided for in cl 6.8.1, 6.8.2, 6.8.3 and 6.8.4: cl 6.8;

- (g) despite any other provision of the Agreement, State Forests was not permitted to supply, or require the plaintiffs to take, more than 35,000 cubic metres of Small Diameter Timber in any Year: cl 6.11;
- (h) subject always to State Forests' sole discretion to determine from time to time the location of Contract Harvesting operations necessary to supply Timber under the Agreement, in accordance with State Forests' opinion of good forest management, and the limitations that flow from the exercise of that discretion, State Forests was required to use its best endeavours to deliver Timber that:
- (i) complies, on an annual basis, with the volume by major species requirements provided for in cl 15.9.1;
  - (ii) complies, on an annual basis, with the volume by diameter requirements provided for in cl 15.9.2; and
  - (iii) complies, on an annual basis, with the volume by preferred length requirements provided for in cl 15.9.3: cl 15.9;
- (i) the volume by major species requirements in cl 15.9.1 provided for a minimum of 60% of the Base Allocation in each Year to be Blackbutt, 5% to be Spotted Gum and 2% to be Brushbox: cl 15.9.1;
- (j) the price payable for Timber taken by the plaintiffs is the Delivered Price, which price was to be comprised of:
- (i) the Stumpage Price determined in accordance with cl 18; and
  - (ii) the Delivery Charges determined in accordance with cl 19: cl 17;
- (k) State Forests was required to ensure that the Delivery Charges determined by it under cl 19.4, 19.5 and 19.7 were fair, reasonable and competitive: cl 19.9;
- (l) State Forests reserved the right to:
- (i) supply Timber and other timber from within the Area of Supply;  
or
  - (ii) issue licences to obtain Timber, timber, products or forest materials within the Area of Supply,

to any other person: cl 23.1;

- (m) where State Forests or the State is in breach of the Agreement by reason of any failure to make Timber available or to supply or deliver Timber, any loss suffered by the plaintiffs will be limited to any loss, damage or expense incurred by the plaintiffs as a direct result of the failure to make Timber available or to supply or deliver Timber under the Agreement and will not include any loss of profits or consequential loss: cl 26.2;
- (n) the Agreement is governed by the laws of New South Wales and the parties agree to the jurisdiction of the Courts of New South Wales: cl 36;
- (o) Base Allocation, Timber, Quota Quality Logs, Small Logs, Small Diameter Timber, Contract Harvesting, Year, Stumpage Price, Delivery Charge and Area of Supply are defined in cl 2.1 of the Agreement.

### **Breaches of the Agreement**

#### *Failure to supply Base Allocation ("Base Allocation Claim")*

12. State Forests supplied the plaintiffs with the following approximate amounts of Timber in each of the following years ("**Relevant Years**"):
- (a) 149,852m<sup>3</sup> in the year from 1 July 2004 to 30 June 2005 ("**FY2005**");
- (b) 163,215m<sup>3</sup> in the year from 1 July 2005 to 30 June 2006 ("**FY2006**");
- (c) 148,334m<sup>3</sup> in the year from 1 July 2006 to 30 June 2007 ("**FY2007**");
- (d) 155,855m<sup>3</sup> in the year from 1 July 2007 to 30 June 2008 ("**FY2008**");
- (e) 143,929m<sup>3</sup> in the year from 1 July 2008 to 30 June 2009 ("**FY2009**"); and
- (f) 141,783m<sup>3</sup> in the year from 1 July 2009 to 30 June 2010 ("**FY2010**").

### **Particulars**

The figures in (a) to (e) of this paragraph were derived from documents provided by State Forests pursuant to requests made under the *Freedom of Information Act 1989* (NSW) ("FOI Act"). The figure in (f) was derived from a Delivery Plan Report dated 22 July 2010 provided to the plaintiffs by State Forests.

13. In each of the Relevant Years, State Forests elected to substitute 24,350m<sup>3</sup> of the Base Allocation of Quota Quality Logs with Small Logs pursuant to cl 6.2 of the Agreement.
14. On or about 29 October 2008, the plaintiffs notified State Forests that the Timber taken by them during FY2009 would be 10% less than the Base Allocation.

**Particulars**

Letter from Bryan Tisher (Executive General Manager, Boral Timber and Director, Taylors) to General Manager, Marketing, Forests NSW dated 29 October 2008.

15. On or about 27 March 2009, the plaintiffs notified State Forests that the Timber taken by them during FY2010 would be 10% less than the Base Allocation.

**Particulars**

Letter from Stephen Dadd (General Manager Hardwood) to Dean Anderson (Director Commercial Services, State Forests) dated 27 March 2009.

16. In the premises of paragraphs 11(d), (e), 13, 14 and 15, State Forests was required to supply the following amounts of Timber to the plaintiffs in each Relevant Year:
  - (a) 171,088m<sup>3</sup> in FY2005;
  - (b) 171,088m<sup>3</sup> in FY2006;
  - (c) 171,088m<sup>3</sup> in FY2007;
  - (d) 171,088m<sup>3</sup> in FY2008;
  - (e) 153,978m<sup>3</sup> in FY2009; and

(f) 153,978m<sup>3</sup> in FY2010.

17. In the premises of paragraphs 12, 13, 14 15 and 16, State Forests breached cl 6.1 of the Agreement.
18. In each of the Relevant Years, State Forests supplied Timber to persons other than the plaintiffs ("**Third-party purchasers**").
19. In each of the Relevant Years, State Forests supplied Timber to one or more Third-party purchasers:
  - (a) in excess of its contractual obligations to that purchaser (or purchasers); and/or
  - (b) to whom State Forests was not, as at the commencement of the relevant Year, contractually obliged to supply Timber.

#### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

20. In or about June 2006, the plaintiffs and State Forests entered into an agreement with respect to the provision of compensation to the plaintiffs for several breaches by State Forests of the Agreement ("**2006 Compensation Arrangement**").

#### **Particulars**

The 2006 Compensation Arrangement is partly in writing and partly oral. Particulars of the Arrangement will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

21. The 2006 Compensation Arrangement required State Forests to:
  - (a) pay an amount of \$500,000.00 to the plaintiffs as compensation in respect of:
    - (i) 32,000m<sup>3</sup> of Timber which State Forests failed to supply to the plaintiffs in the 3 years up to 30 June 2005; and

(ii) 2,000m<sup>3</sup> of Timber which State Forests failed to supply to the plaintiffs in FY2006; and

(b) supply to the plaintiffs 15,000m<sup>3</sup> of Timber from the NSW south coast, at a rate of 5,000m<sup>3</sup> of Timber per year for 3 years from 2008.

22. In each of FY2008, FY2009 and FY2010, State Forests failed to supply the plaintiffs with any part of the 15,000m<sup>3</sup> of Timber to be supplied pursuant to the 2006 Compensation Arrangement.

*Excessive supply of Small Diameter Timber* (“**Small Diameter Claim**”)

23. State Forests supplied the plaintiffs with the following approximate amounts of Small Diameter Timber in three of the Relevant Years:

(a) 36,023m<sup>3</sup> in FY2007;

(b) 41,433m<sup>3</sup> in FY2008; and

(c) 40,422m<sup>3</sup> in FY2009.

**Particulars**

The figures in (a) to (c) of this paragraph were derived from documents provided by State Forests pursuant to requests made under the FOI Act.

24. In the premises of paragraphs 11(g) and 23, State Forests breached cl 6.11 of the Agreement.

25. “High Quality Large Sawlogs” (“**HQL sawlogs**”) are logs which:

(a) meet the specifications for Quota Quality Logs set out in Schedule 1 to the Agreement; and

(b) which have centre diameter under bark of more than 40cms.

26. In each of FY2007, FY2008, FY2009 and FY2010, State Forests supplied HQL sawlogs to one or more Third-party purchasers:

- (a) in excess of its contractual obligations to that purchaser (or purchasers); and/or
- (b) to whom State Forests was not, as at the commencement of the relevant Year, contractually obliged to supply HQL sawlogs.

### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

#### *Breach of best endeavours obligation to supply minimum major species allocations* **("Minimum Species Claim")**

27. State Forests supplied the plaintiffs with the following approximate amounts of Blackbutt in each of the Relevant Years:
- (a) 84,908m<sup>3</sup> in FY2005;
  - (b) 89,669m<sup>3</sup> in FY2006;
  - (c) 81,315m<sup>3</sup> in FY2007;
  - (d) 90,336m<sup>3</sup> in FY2008;
  - (e) 82,701m<sup>3</sup> in FY2009; and
  - (f) 82,560m<sup>3</sup> in FY2010.

### **Particulars**

The figures in (a) to (e) of this paragraph were derived from documents provided by State Forests pursuant to requests made under the FOI Act. The figure in (f) was derived from a Delivery Plan Report dated 22 July 2010 provided to the plaintiffs by State Forests.

28. In each of the Relevant Years, the amount of Blackbutt provided to the plaintiffs by State Forests was:

- (a) less than 60% of the Base Allocation; and
- (b) in the alternative, less than 60% of the Timber supplied to the plaintiffs in those Years.

#### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

29. In each of the Relevant Years:

- (a) State Forests supplied Blackbutt to one or more Third-party purchasers:
  - (i) in excess of its contractual obligations to that purchaser (or purchasers); and/or
  - (ii) to whom State Forests was not, as at the commencement of the relevant Year, contractually obliged to supply Blackbutt;
- (b) State Forests had access to quantities of Blackbutt sufficient to meet the minimum Blackbutt allocation requirement provided for in cl 15.9.1; and
- (c) State Forests was able to supply Blackbutt to the plaintiffs sufficient to meet the minimum Blackbutt allocation requirement provided for in cl 15.9.1 without contravening any then-existing contractual obligation to a Third-party purchaser.

#### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

30. State Forests supplied the plaintiffs with the following approximate amounts of Spotted Gum in each of the following Years:

- (a) 6,908m<sup>3</sup> in FY2008;
- (b) 7,252m<sup>3</sup> in FY2009; and
- (c) 5,317m<sup>3</sup> in FY2010.

#### **Particulars**

The figures in (a) and (b) of this paragraph were derived from documents provided by State Forests pursuant to requests made under the FOI Act. The figure in (c) was derived from a Delivery Plan Report dated 22 July 2010 provided to the plaintiffs by State Forests.

31. In each of FY2008, FY2009 and FY2010, the amount of Spotted Gum provided to the plaintiffs by State Forests was:

- (a) less than 5% of the Base Allocation; and
- (b) in the alternative, less than 5% of the Timber supplied to the plaintiffs in those Years.

#### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

32. In each of FY2008, FY2009 and FY2010:

- (a) State Forests supplied Spotted Gum to one or more Third-party purchasers:
  - (i) in excess of its contractual obligations to that purchaser (or purchasers); and/or
  - (ii) to whom State Forests was not, as at the commencement of the relevant Year, contractually obliged to supply Spotted Gum;
- (b) State Forests had access to quantities of Spotted Gum sufficient to meet the minimum Spotted Gum allocation requirement provided for in cl 15.9.1; and

- (c) State Forests was able to supply Spotted Gum to the plaintiffs sufficient to meet the minimum Spotted Gum allocation requirement provided for in cl 15.9.1 without contravening any then-existing contractual obligation to a Third-party purchaser.

### **Particulars**

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

33. State Forests supplied the plaintiffs with the following approximate amounts of Brushbox in each of the following Years:
- (a) 1,382m<sup>3</sup> in FY2005;
  - (b) 2,087m<sup>3</sup> in FY2006;
  - (c) 2,255m<sup>3</sup> in FY2007;
  - (d) 2,276m<sup>3</sup> in FY2008;
  - (e) 2,175m<sup>3</sup> in FY2009.

### **Particulars**

The figures in (a) to (e) of this paragraph were derived from documents provided by State Forests pursuant to requests made under the FOI Act.

34. In each of FY2005, FY2006, FY2007, FY2008 and FY2009, the amount of Brushbox provided to the plaintiffs by State Forests was:
- (a) less than 2% of the Base Allocation; and
  - (b) in the alternative, less than 2% of the Timber supplied to the plaintiffs in those Years.

### Particulars

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

35. In each of the Relevant Years:

(a) State Forests supplied Brushbox to one or more Third-party purchasers:

(i) in excess of its contractual obligations to that purchaser (or purchasers); and/or

(ii) to whom State Forests was not, as at the commencement of the relevant Year, contractually obliged to supply Brushbox;

(b) State Forests had access to quantities of Brushbox sufficient to meet the minimum Brushbox allocation requirement provided for in cl 15.9.1; and

(c) State Forests was able to supply Brushbox to the plaintiffs sufficient to meet the minimum Brushbox allocation requirement provided for in cl 15.9.1 without contravening any then-existing contractual obligation to a Third-party purchaser.

### Particulars

Particulars, based on data derived from documents provided by State Forests pursuant to requests made under the FOI Act, will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

36. In the premises of paragraphs 11(h) – 11(i) and 27 – 35, State Forests breached cl 15.9.1.

### Particulars

State Forests did not use its "best endeavours" to satisfy its obligations under cl 15.9.1 in circumstances where: (a) it knowingly supplied Blackbutt, Spotted Gum and Brushbox to Third-Party purchasers to whom it had no contractual obligation to do so while failing to satisfy the minimum species allocation requirements provided for by cl 15.9.1; and/or (b) sufficient Blackbutt, Spotted Gum and Brushbox was available in each Year to satisfy the

minimum species allocation requirements under cl 15.9.1 without State Forests contravening any contractual obligations it had to Third-party purchasers as at the commencement of the relevant Year.

*Failure to determine Delivery Charges that are fair, reasonable and competitive (“Delivery Charge Claim”)*

37. On and from FY2005, the Delivery Charges determined by State Forests have increased annually in each Year as set out Schedule 1 to this Commercial List Statement.
38. The Delivery Charges determined by State Forests in FY2004 are set out in Schedule 2 to this Commercial List Statement.
39. In the same period, the Australian Transportation Inflation Index has increased as follows:
  - (a) as at June 2004, the Australian Transportation Inflation Index was 144.1;
  - (b) as at June 2005, the Australian Transportation Inflation Index was 148.8;
  - (c) as at June 2006, the Australian Transportation Inflation Index was 160.2;
  - (d) as at June 2007, the Australian Transportation Inflation Index was 160.5;
  - (e) as at June 2008, the Australian Transportation Inflation Index was 171.6;
  - (f) as at June 2009, the Australian Transportation Inflation Index was 161.4;
  - (g) as at June 2010, the Australian Transportation Inflation Index was 166.5.

**Particulars**

The figures in this paragraph were derived from the Australian Bureau of Statistics Consumer Price Index for Transportation.

40. By reason of the matters in paragraphs 37 – 39, in the period FY2005 to FY2010, the Delivery Charges determined by State Forests have increased 63% compared to a 12% increase in the Australian Transportation Index during the same period.

### Particulars

In calculating the percentage of increased Delivery Charges determined by State Forests in comparison to the Australian Transportation Index, a weighted average of 40% of the Delivery Charges incurred to and from the Koolkhan plant, and 60% of the Delivery Charges incurred to and from the Herons Creek plant, was used.

41. The Delivery Charges determined by State Forests in each Year are primarily comprised of two components which respectively reflect the costs of the harvesting ("**Harvest element**") and haulage ("**Haulage element**") of Timber.
42. In or about 2009:
- (a) the Haulage Element of the Delivery Charges determined by State Forests in that Year exceeded the industry mean by not less than 20%;
  - (b) the Harvest Element of the Delivery Charges determined by State Forests in that year exceeded the industry mean by not less than 10%.

### Particulars

The matters pleaded in this paragraph are derived from a report entitled "Native Forest Harvesting and Haulage Cost Benchmarking Study 2009" prepared by Pöyry Forest Industry for State Forests dated 21 August 2009, together with a power-point presentation by Pöyry Forest Industry to State Forests on 18 December 2009. Further particulars will be provided, including in relation to all Years between FY2005 and FY2010, after discovery and evidence, including expert evidence.

43. In the premises of paragraphs 37 – 42, the Delivery Charges determined by State Forests in FY2005 to FY2010 are not:
- (a) fair;
  - (b) reasonable; or
  - (c) competitive,
- as required by cl 19.9 of the Agreement.

### Particulars

Further particulars will be provided after discovery and evidence, including expert evidence.

*Breach by the State*

44. In the premises of paragraphs 11(b), 17, 24, 36 and 43, the State:
- (a) failed to cause State Forests to perform its obligations as required by the provisions of the Agreement; and
  - (b) has thereby breached cl 3.6 of the Agreement.

### **Loss and damage**

45. The breaches of the Agreement pleaded in:
- (a) paragraphs 17, 24, 36 and 43; and
  - (b) paragraph 44,
- have caused loss and damage to the plaintiffs.

### **Particulars**

1. So far as the Base Allocation Claim is concerned: (a) the taking of Timber from State Forests is a profitable exercise for the plaintiffs, with the result that an undersupply of Timber by State Forests reduces the opportunity for the plaintiffs to profit from the taking of their contractual entitlement of Timber; and (b) the undersupply of Timber by State Forests results in wasted expenditure by the plaintiffs.
2. So far as the Small Diameter Claim is concerned: (a) the weighted average unit profitability of each cubic meter of Small Diameter Timber is less than the weighted average unit profitability of HQL sawlogs, with the result that the oversupply of Small Diameter Timber reduces the overall weighted average unit profitability of the Timber supplied by State Forests; and (b) the plaintiffs suffer reduced cost efficiencies when State Forests supplies in excess of 35,000 cubic metres of Small Diameter Timber.
3. So far as the Minimum Species Claim is concerned, the weighted average unit profitability of each cubic metre of each of Blackbutt, Spotted Gum and Brushbox ("**Premium Species**") exceeds the unit profitability of the species of Timber supplied by State Forests as an alternative to the Premium Species, with the result that the failure to supply the minimum allocations of Premium Species reduces the opportunity for the plaintiffs to profit from the taking of their contractual entitlement of Timber.

4. So far as the Delivery Charges Claim is concerned, the loss or damage is the difference between the Delivery Charges determined by State Forests, and paid by the plaintiffs, and the amount of the Delivery Charges if they were determined in compliance with cl 19.9.
5. In or about June 2006, State Forests paid the plaintiffs an amount of \$500,000.00 pursuant to the 2006 Compensation Arrangement.
  
46. Clause 26.2 of the Agreement does not operate to reduce the damages to which the plaintiffs are otherwise entitled in respect of the breaches of the Agreement pleaded at paragraphs 17, 24, 36 and 43 in circumstances where:
  - (a) the breaches were intentional, wilful and/or deliberate; and/or
  - (b) State Forests was reckless as to whether or not it had committed the breaches.
  
47. Since at least 7 February 2005, State Forests was made aware that:
  - (a) the plaintiffs considered State Forests to be breaching the Agreement; and
  - (b) the plaintiffs considered that they had, or were likely to, suffer loss and damage as a result of State Forests' breaches of the Agreement.

#### **Particulars**

Particulars will be provided in correspondence from the plaintiffs' instructing solicitors dated on or about the date of this Commercial List Statement.

Further particulars will be provided following discovery.

48. By reason of the matters pleaded in paragraphs 18, 19, 26, 29, 32, 35 and 47, the breaches of the Agreement by State Forests pleaded in paragraphs 17, 24, 36 and 43 were:
  - (a) intentional;
  - (b) wilful; and/or
  - (c) deliberate.

49. In the alternative to paragraph 48, by reason of the matters pleaded in paragraphs 18, 19, 26, 29, 32, 35 and 47, State Forests was reckless as to whether or not it committed the breaches of the Agreement pleaded in paragraphs 17, 24, 36 and 43.

#### **D QUESTIONS APPROPRIATE FOR REFERRAL**

50. The proceeding involves the construction of the Agreement between the parties.
51. It is considered that there are no questions appropriate for referral.

#### **E MEDIATION**

52. The plaintiffs and defendants have not mediated this dispute.
53. The plaintiffs are willing to mediate the dispute at an appropriate time.

#### **SIGNATURE OF LEGAL REPRESENTATIVE**

Signature



Capacity

Solicitor for the Plaintiffs

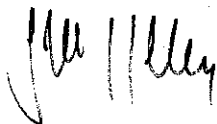
Date of signature

1 September 2010

#### **CERTIFICATE – SECTION 347 OF THE LEGAL PROFESSION ACT 2004**

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

Signature



Name

Geoff Healy

Capacity

Solicitor for the Plaintiffs

Date of signature

1 September 2010

**FURTHER DETAILS ABOUT PLAINTIFFS****First plaintiff**

Name Allen Taylor & Company Limited  
 ACN 000 003 056  
 Address C/- Boral Limited  
 Level 39, AMP Centre  
 50 Bridge Street  
 Sydney  
 NSW 2000

**Second plaintiff**

Name Duncan's Holdings Limited  
 ACN 000 080 704  
 Address C/- Boral Limited Address  
 Level 39, AMP Centre  
 50 Bridge Street  
 Sydney NSW 2000

**Legal representative for plaintiffs**

Name Geoff Healy  
 Practising certificate number 19351  
 Firm Freehills  
 Address Level 38, MLC Centre  
 19 – 29 Martin Place  
 Sydney NSW 2000  
 DX address DX 361 Sydney  
 Telephone +61 2 9225 5728  
 Fax +61 2 9322 4000  
 Email geoff.healy@freehills.com  
 Electronic service address geoff.healy@freehills.com

**DETAILS ABOUT DEFENDANTS****First Defendant**

Name Forestry Commission of New South Wales  
Address 121-123 Oratava Ave Address  
West Pennant  
Hills NSW  
2125  
Sydney NSW

**Second Defendant**

Name State of New South Wales  
Address The Crown Solicitor's Office  
60-70 Elizabeth Street  
Sydney NSW 2000

## SCHEDULE 1 - Delivery Charges

Plant	Price Zone	FY2005	FY2006	FY2007	FY2008	FY2009	FY2010	FY2011
		(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )	(\$/m <sup>3</sup> )
<i>Herons Creek</i>	Boonabilla							
	Bulahdelah		59.83	60.69	63.12	67.17	70.84	67.44
	Chichester							
	Coffs Harbor		52.86	54.22				
	Coopernook	32.21	35.20	40.78	44.45	49.59	50.31	52.84
	Doyles			57.64	59.58	70.95	67.15	70.93
	Gloucester East	36.48	58.17	65.77	71.55	77.43	81.27	79.06
	Kempsey		50.73	50.99	50.22	64.26	64.11	61.84
	Kendall	31.42	32.76	35.03	42.96	47.90	49.4	48.08
	Morisset	34.23	62.72					
	Taree	45.20	45.90	50.77	54.51		62.72	60.07
	Urunga Coastal		57.11	62.16	60.29	66.68	67.12	64.66
	Urunga Upriver			65.57	60.88	69.45	71.35	77.37
	Walcha	26.77	45.41	66.22		82.47		
	Wauchope Coastal	31.41	40.83	43.23	44.25	44.33	47.39	52.05
	Wauchope Foothills	39.54	46.50	48.58	54.37	52.82	61.36	56.2
	Wauchope Upriver						62.92	65
Wingham	52.80	52.73	56.95		68.13	68.92	68.92	
<b>AVERAGE</b>	<b>32.68</b>	<b>39.66</b>	<b>46.43</b>	<b>48.39</b>	<b>52.87</b>	<b>56.71</b>	<b>59.07</b>	
<i>Koolkhan</i>	Bom Bom	32.31	33.50					
	Casino	37.99	41.10	46.06	47.17	55.05	57.27	58.41
	Coffs Harbor	43.15	47.81	55.51	52.63	55.67	63.31	58.53
	Coopernook	39.85	39.98					
	Dorrigo Central	47.31	50.59	53.62	55.84	62.77	67.74	61.61
	Dorrigo West	51.21	53.62	60.30	70.57	68.13	70.99	69.24
	Ewingar	51.06	55.71	55.58	61.52	68.80	75.47	71.94
	Galn Innes	50.92	59.37	60.75	60.40		72.16	63.96
	Gloucester East		51.13					
	Grafton Coastal		45.19	46.99	55.41	64.79	63.96	57.13
	Grafton Inland	47.50	48.38		56.62	56.23	71.54	66.16
	Kempsey	40.83	41.77	61.70	64.69			
	Kendall	39.75	42.25			83.46		
	Richmond		50.17	53.58	57.85	68.02	70.81	67.71
	Taree	47.58	48.77					
	Tenterfield Slopes	54.70	54.70	61.01	72.80	72.61	76.16	72.59
	Tenterfield Tablelands	54.70	58.82		74.24	70.53	82.02	81.21
	Urbenville	54.83	57.42	61.83	62.01	72.68	74.48	70.29
	Urunga Coastal	47.14	55.79	58.22	56.80	62.80	66.26	61.35
	Urunga Upriver	62.93	64.20	65.69	61.62	69.96	72.70	75.97
	Walcha	43.81	52.99					
	Wauchope Coastal	38.95						
	Wauchope Foothills	40.29	43.62	71.52		71.60		
Wingham			78.37					
<b>AVERAGE<sup>1</sup></b>	<b>45.75</b>	<b>49.85</b>	<b>54.91</b>	<b>58.38</b>	<b>63.67</b>	<b>67.72</b>	<b>62.88</b>	

<sup>1</sup> 'Average' refers to the volume weighted average delivery charges, being the volume delivered from a price zone multiplied by the price for that price zone with the sum of these calculations divided by the total volume.

## SCHEDULE 2 – Delivery Charges for FY2004

Plant	Price Zone	FY2004
		(\$/m <sup>3</sup> )
<i>Herons Creek</i>	Boonabilla	34.41
	Bulahdelah	50.16
	Chichester	
	Coffs Harbor	
	Cooperook	30.52
	Doyles	
	Gloucester East	36.91
	Kempsey	
	Kendall	29.42
	Morisset	33.93
	Taree	
	Urunga Coastal	
	Urunga Upriver	
	Walcha	29.28
	Wauchope Coastal	31.69
	Wauchope Foothills	37.66
	Wauchope Upriver	
	Wingham	48.88
	<b>AVERAGE</b>	<b>31.22</b>
	<i>Koolkhan</i>	Bom Bom
Casino		36.20
Coffs Harbor		42.23
Cooperook		36.76
Dorrigo Central		46.44
Dorrigo West		52.05
Ewingar		52.48
Galn Innes		49.92
Gloucester East		
Grafton Coastal		46.50
Grafton Inland		48.46
Kempsey		38.79
Kendall		36.34
Richmond		40.19
Taree		46.98
Tenterfield Slopes		50.34
Tenterfield Tablelands		53.00
Urbenville		52.44
Urunga Coastal		44.31
Urunga Upriver		54.98
Walcha		43.04
Wauchope Coastal		39.51
Wauchope Foothills		38.20
Wingham		
<b>AVERAGE</b>		<b>43.89</b>