FEDERAL COURT OF AUSTRALIA

TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited [2019] FCA 1747

File number:	VID 1494 of 2016
Judge:	**BEACH J**
Date of judgment:	24 October 2019
Catchwords:	**CORPORATIONS** – representative proceeding – listed securities – continuous disclosure obligations – ASX listing rule 3.1 – failure to disclose material information to market – forecast of net profit after tax – absence of reasonable grounds – failure to correct forecast – concept of "information" under listing rules – concept of "awareness" under listing rules – contravention of s 674 of *Corporations Act 2001* (Cth) – misleading or deceptive conduct relating to securities – contravention of s 1041H of Corporations Act – availability of market based or indirect causation theory – loss and damage
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) s 12GF(1B) *Corporations Act 2001* (Cth) ss 180, 674, 676, 729(1), 729(2), 769C, 1041H, 1041I, 1317HA, 1325 *Evidence Act 1995* (Cth) ss 63, 64, 69(1) *Securities Exchange Act 1934* (US) s 10(b) *US Federal Rules of Civil Procedure* r 23(b)(3)
Cases cited:	*ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 *Australian Breeders Co-Operative Society Ltd v Jones* (1997) 150 ALR 488 *Basic Inc v Levinson* 485 US 224 (1988) *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 *Cammer v Bloom* 711 F Supp 1264 (DNJ 1989) *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359 *Chowder Bay Pty Ltd v Paganin* [2017] FCA 332 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 *Digi-Tech (Aust) Ltd v Brand* (2004) 62 IPR 184

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Solicitor for the Applicant:	Portfolio Law
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Solicitor for the Respondent:	Clayton Utz

ORDERS

VID 1494 of 2016

BETWEEN:	**TPT PATROL PTY LTD AS TRUSTEE FOR AMIES SUPERANNUATION FUND** Applicant
AND:	**MYER HOLDINGS LIMITED** Respondent
JUDGE:	**BEACH J**
DATE OF ORDER:	**24 OCTOBER 2019**

THE COURT ORDERS THAT:

1. Within 14 days of the date of these orders, the applicant file and serve minutes of orders and submissions (limited to 5 pages) to give effect to these reasons including a protocol for stipulating declarations on s 33C common issues, further proceedings on loss and damage and on costs.
2. Within 14 days of the receipt of the applicant's minutes of orders and submissions, the respondent file and serve responding minutes of orders and submissions (limited to 5 pages) on the said topics.
3. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 The applicant, TPT Patrol Pty Ltd, has brought the present representative proceeding for itself and on behalf of all persons who acquired ordinary fully paid shares (MYR ED securities) in the respondent, Myer Holdings Limited (Myer), on or after 11 September 2014 and who were at the commencement of trading on 19 March 2015 holders of any of those MYR ED securities and who have claims for loss and damage caused by Myer's alleged breaches of ss 674 and 1041H of the *Corporations Act 2001* (Cth) (the Act) concerning non-disclosure to the ASX of price sensitive information about MYR ED securities and misleading or deceptive conduct.

2 Let me introduce my reasons with the following factual summary.

3 On 11 September 2014, in presentations and in question and answer sessions with equity analysts and financial journalists, Myer's chief executive officer, Mr Bernie Brookes, represented that in his opinion in the financial year ending 26 July 2015 (FY15) Myer would likely have a net profit after tax (NPAT) in excess of Myer's NPAT in the previous financial year which ended on 26 July 2014 (FY14) (the 11 September 2014 representation), with the implication being that it would be materially above although nothing turns on that implication save an aspect of the counterfactual disclosure that I will discuss later concerning 21 November 2014. Myer's FY14 NPAT had on 11 September 2014 been announced as $98.5m. Mr Brookes' opinion which was also in the nature of a forecast was clearly to be attributed to Myer in terms of both the statement made and the opinion held.

4 On 19 March 2015, Myer announced to the ASX that Myer then expected its FY15 NPAT to be between $75 to 80 million excluding one-off costs. In its 19 March 2015 announcement, Myer told the market that:

(a) its sales were up only 1.5% in the FY15 first half (H1);

(b) its operating gross profit (OGP) margin had declined year-on-year by 24 basis points to 40.54%;

(c) its cash cost of doing business (CCODB) had increased from $536.2m in FY14 H1 to $569.6m in FY15 H1 and now represented 32.3% of sales up from 30.87% of sales in FY14 H1;

(d) its NPAT for FY15 H1 had fallen to $62.2m, 23.1% below FY14 H1, when NPAT of $80.8m had been achieved; and

(e) NPAT for FY15 was expected to be in a range from $75m to $80m before one-off costs, which was down from NPAT of $98.5m achieved in FY14.

5 Immediately after Myer announced this adverse information concerning its year-to-date and expected final FY15 performance, its share price declined materially; correspondingly its market capitalisation declined by $90.8m or by more than 10%.

6 At its core, the applicant's claim is for losses caused to itself and group members by Myer, inter-alia:

(a) making the 11 September 2014 representation to the market that its NPAT in FY15 would be higher than its FY14 NPAT, when Myer did not have reasonable grounds for making that representation; and

(b) failing to disclose at any time after 11 September 2014 and prior to 19 March 2015 that Myer did not have reasonable grounds for making the 11 September 2014 representation or that the 11 September 2014 representation of increased FY15 NPAT was wrong.

7 Now throughout 11 September 2014 to 19 March 2015 inclusive (the relevant period), Myer was subject to continuous disclosure obligations pursuant to s 674 of the Act and listing rule 3.1 of the ASX listing rules. Subject to exceptions arising under listing rule 3.1A, which are relied upon in Myer's defence and which I will discuss later, listing rule 3.1 required Myer to immediately notify the ASX, once Myer was or became aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of MYR ED securities, of that information.

8 For the purposes of listing rule 3.1, the word "aware" was explained in listing rule 19.12 at the relevant time as follows:

> an entity becomes aware of information if, and as soon as, an officer of the entity … has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

9 Moreover, for the purposes of listing rule 3.1, "information" was defined in listing rule 19.12 to include:

> (a) matters of supposition and other matters that are insufficiently definite to

warrant disclosure to the market; and

(b) matters relating to the intentions, or likely intentions, of a person.

10 As I say, the starting point for the applicant's case is the statement made by Mr Brookes on 11 September 2014 that Myer anticipated NPAT growth in FY15, which I have defined in terms of the 11 September 2014 representation. In the context of Myer's NPAT for FY14 being $98.5 million, it is alleged that the 11 September 2014 representation disclosed to the market that Myer expected to achieve NPAT in FY15 in excess of $98.5 million.

11 The applicant claims that Mr Brookes and therefore Myer, under the usual rules of attribution, did not have reasonable grounds for the 11 September 2014 representation and accordingly engaged in misleading or deceptive conduct in contravention of s 1041H of the Act.

12 The applicant's allegation that Mr Brookes did not have reasonable grounds for the 11 September 2014 representation is also a building block for the applicant's continuous disclosure claim. The applicant's continuous disclosure claim has in substance two parts to it. The first part is an allegation that Myer was aware as at 11 September 2014 that it "had no reasonable grounds for representing that it would achieve NPAT in the 2015 financial year in excess of $98.5 million" (no reasonable grounds information). The second part is an allegation that Myer was aware by no later than 11 November 2014 that Myer's NPAT in FY15 "would be materially lower than in the 2014 financial year [viz. $98.5 million]" (NPAT information). It is alleged that in failing to disclose that specific information of which it is alleged to have been aware, Myer breached its continuous disclosure obligations under listing rule 3.1 and therefore under s 674 of the Act.

13 A yet further claim pleaded by the applicant is that particular publications of Myer on certain dates, being 21 October, 11 November and 21 November 2014, and 2 and 3 March 2015, constituted misleading conduct because those publications did not disclose the specific information which I have identified as underpinning the continuous disclosure claim.

14 Finally, I should note at this point that on 10 October 2018, after the applicant had completed its closing submissions, I granted leave to the applicant to amend its statement of claim to introduce a new claim by which it alleged that Mr Brookes' statement on 11 September 2014 was a continuing representation. The applicant's further amended statement of claim was subsequently filed on 15 October 2018. Relevantly, the applicant amended its pleading to advance an extended claim relying on s 769C of the Act. Further, it also amended to allege that Myer's failure to disclose the information about the earnings forecast matter, which I will

define later, and which in essence amounted to a failure to correct case, was misleading or deceptive conduct.

15 The present trial has dealt with all aspects of the applicant's individual claims and the common issues. For the reasons that I will now elaborate on, the applicant has succeeded on part of its case concerning establishing contraventions of ss 674 and 1041H.

16 In the context of and given the fact that the 11 September 2014 representation had been made, Myer should have disclosed to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 would not be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

17 Now in a sense these are cascading possibilities because making any one disclosure *may* have removed the need for any later disclosure in the sequence that I have just outlined.

18 In my view on the evidence, Myer can be taken to have held such an opinion as to the likely FY15 NPAT on each of the above dates and accordingly there should have been disclosure of such an opinion under listing rule 3.1 and s 674. But in any event in the context of the 11 September 2014 representation, such a disclosure should have been made at these various points in time to correct the 11 September 2014 representation. By not having so corrected at each of these points in time, Myer engaged in misleading or deceptive conduct in contravention of s 1041H.

19 But notwithstanding these contraventions, I am not convinced that the applicant and group members have suffered any loss flowing from such contraventions.

20 As will become apparent later, I have accepted the market-based causation theory. I have also accepted and found to be valuable event study analysis in terms of assessing materiality and share price inflation. Nevertheless, the applicant and group members may not have suffered any loss flowing from the contraventions that I have identified. This is because the market price for MYR ED securities at the time the contraventions occurred already factored in an NPAT well south of Mr Brookes' rosy picture painted on 11 September 2014. In other words, the hard-edged scepticism of market analysts and market makers at the time of the contraventions had already deflated Mr Brookes' inflated views. So, any required corrective statement that should have been made at the time of the contraventions, if it had been made, is likely to have had no or no material effect on the market price of MYR ED securities. QED: As the applicant only advanced a market-based causation theory and an inflation-based measure for its loss analysis for itself and on behalf of group members, all claims for damages would appear to fail.

21 It is convenient to divide my discussion into the following topics:

(a) The pleaded case – [23] to [49];

(b) The applicant – [50] to [75];

(c) Key lay witnesses – [76] to [94];

(d) The structure of Myer's business – [95] to [113];

(e) The development and approval of the FY15 budget – [114] to [296];

(f) 11 to 30 September 2014 events – [297] to [378];

(g) October – November 2014 events – [379] to [491];

(h) December 2014 – March 2015 events – [492] to [639];

(i) Event study framework – [640] to [774];

(j) Application of event study framework – [775] to [923];

(k) Share price inflation – [924] to [1120];

(l) Continuous disclosure claim – [1121] to [1315];

(m) The "no reasonable grounds" claim and other claims – [1316] to [1499];

(n) Causation and loss analysis – [1500] to [1718];

(o) Conclusion – [1719] to [1721].

22 But before proceeding further, let me say that I was much assisted by the comprehensive legal and forensic presentations made by Mr Norman O'Bryan SC for the applicant and Mr Ian Waller QC for Myer including plummeting the depths of statistical theory, although I was not completely convinced about the former's knowledge of heteroskedasticity.

THE PLEADED CASE

23 It is appropriate at this point to set out in some detail the applicant's final version of its pleaded case. I gave the applicant leave late in the piece during closing addresses to amend its case. I will explain why I did so and its consequences later in this section.

24 The applicant alleges that on 11 September 2014, Myer announced an NPAT for FY14 of $98.5 million. This was stated in Myer's ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014" and "Preliminary Financial Report" each published on 11 September 2014.

25 The applicant says that on 11 September 2014 Myer disclosed to the market that it forecast profit growth in FY15. In a statement made by Myer's then CEO, Mr Brookes on 11 September 2014 as part of Myer's "Preliminary 2014 Myer Holdings Ltd Earnings Call", Myer disclosed to the market that its outlook in 2015 was that "[w]e will therefore not only have anticipated sales growth, but anticipated profit growth this year".

26 It is said that on 11 September 2014 by Myer announcing its FY14 NPAT and its expectation of profit growth, Myer represented to the market that its forecast NPAT for FY15 would be in excess of $98.5 million.

27 The applicant says that Myer's representation of anticipated profit growth in FY15 made on 11 September 2014 was a representation with respect to a future matter, namely that Myer expected to achieve NPAT in excess of $98.5 million in FY15, which representation was continuing until 19 March 2015.

28 Further, it says that Myer had no reasonable grounds for making the representation alleged and accordingly the representation was taken to be misleading or deceptive pursuant to s 769C(1) of the Act.

29 Accordingly, the applicant says that Myer's publication of the statements made by Mr Brookes on 11 September 2014 as part of Myer's "Preliminary 2014 Myer Holdings Ltd Earnings Call"

was conduct by Myer in relation to a financial product (namely MYR ED securities) that was misleading or deceptive or was likely to mislead or deceive in breach of s 1041H of the Act, with the publication taken to be misleading or deceptive by operation of s 769C(1).

30 The applicant says that on 19 March 2015 Myer issued a release to the ASX which disclosed that it expected that Myer's NPAT for FY15 would be in the range of $75 to $80 million excluding one-off costs. Myer disclosed its revised forecast for FY15 in an ASX & Media Release of 19 March 2015 entitled "Myer First Half 2015 Results and Full Year 2015 Guidance".

31 According to the applicant, Myer's disclosure to the ASX on 19 March 2015 advised the market for the first time that Myer would not achieve NPAT in FY15 in excess of $98.5 million (the earnings forecast matter).

32 The applicant says that the information concerning the earnings forecast matter that a reasonable person would have expected to have a material effect on the price or value of MYR ED securities, if that information was made generally available, was that:

(a) Myer had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million;

(b) Myer's sales would not increase in FY15 as previously forecast;

(c) Myer's OGP margin would not improve in FY15 as previously forecast;

(d) Myer's CCODB in FY15 would increase more than previously forecast; and

(e) Myer's NPAT in FY15 would be materially lower than in FY14.

(together, the information about the earnings forecast matter).

33 As to (a) immediately above, the applicant says that on 11 September 2014, Myer was aware that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million.

34 Further, the applicant says that by no later than 11 November 2014, Myer was aware of the information about the earnings forecast matter alleged in (b) to (e) immediately above.

35 Further, the applicant says that despite Myer's awareness of the above matters, the information about the earnings forecast matter was not generally available until Myer made it generally available by releasing the information about the earnings forecast matter to the ASX on 19 March 2015.

36 Accordingly the applicant says that Myer's failure to disclose the information about the earnings forecast matter to the market immediately upon becoming aware of the earnings forecast matter constituted a breach of s 674(2) of the Act.

37 Further, the applicant says that Myer's failure to disclose between 11 September 2014 and 19 March 2015 any information about the earnings forecast matter, including when it published each of the:

(a) Myer Holdings Limited 2014 Annual Report on 21 October 2014;

(b) "Q1 2015 Myer Holdings Ltd Corporate Sales Call" on 11 November 2014;

(c) Myer Holdings Limited Annual General Meeting Chairman's Address on 21 November 2014;

(d) "Myer Holdings Ltd Strategic Review Conference Call" on 2 March 2015;

(e) ASX & Media Release of 2 March 2015 entitled "Myer announces CEO succession and update on strategic review to transform business for future growth"; and

(f) Letter to shareholders on 3 March 2015;

was conduct by Myer that was misleading or deceptive or was likely to mislead or deceive, in breach of s 1041H of the Act including by reason of the operation of s 769C.

38 Now various particulars were given of this allegation. As concerns the allegation that Myer had no reasonable grounds for continuing to represent that it would achieve NPAT in FY15 in excess of $98.5 million (the first element of "the information about the earnings forecast matter" alleged as (a) above), the applicant referred to matters in existence on 11 September 2014 and from time to time thereafter during the period 11 September 2014 to 19 March 2015 from which it could be inferred that Myer, by continuing to represent by its silence that it would achieve NPAT in FY15 in excess of $98.5 million, engaged in misleading or deceptive conduct.

39 Further, the applicant says that the matters referred to in para (a) of the particulars to paragraph 21 filed on 14 July 2017 (the [21] particulars) and the documents referred to therein were also relevant to a consideration of the matters in existence immediately following the making of the 11 September 2014 representation. For present purposes it is not necessary to detail those matters.

40 Further, the applicant also relies upon the following matters which occurred on various dates that I will shortly identify between 11 September 2014 and 19 March 2015 and which it is said were cumulative upon one another:

(a) 14 September 2014:

 (i) the identification by Myer's CEO in an email to Myer's directors that "[t]he pleasing news is that the median NPAT consensus has fallen 14% to $92m and this reflects in the share price";

 (ii) Myer's General Manager of Merchandise Planning identifying that Myer's sales were already $18m behind budget with at least a $22m "sales risk moving forward";

(b) 15 September 2014: the matters referred to in (b) of the [21] particulars and the documents referred to therein;

(c) 25 September 2014: the matters referred to in (c) of the [21] particulars and the documents referred to therein;

(d) 2 October 2014: the matters referred to in (d) of the [21] particulars and the documents referred to therein;

(e) 5 October 2014: by that date the sales and buying gross profit for week 10 were available, which showed that sales for the year to date were $27.86m behind budget and $4.90m behind forecast and buying gross profit was $14.34m behind budget and $2.28m behind forecast;

(f) 8 October 2014: the matters referred to in (e) of the [21] particulars and the document referred to therein;

(g) 12 October 2014: by that date the sales and buying gross profit for week 11 were available, which showed that sales for the year to date were $33.07m behind budget and $9.45m behind forecast and buying gross profit was $17.35m behind budget and $4.46m behind forecast;

(h) 15 October 2014:

 (i) the matters referred to in (f) of the [21] particulars and the document referred to therein;

 (ii) the matters referred to in the September FY15 Financial Board Report, including the note that Myer had reversed the year-to-date provision for the Myer Annual Incentive and that the NPAT loss of $5.8m was nonetheless $1.6m below budget;

(i) 16 October 2014: the matters referred to in (g) of the [21] particulars and the documents referred to therein;

(j) 26 October 2014: the matters referred to in (h) of the [21] particulars and the documents referred to therein;

(k) 30 October 2014: by that date the “November Forecast for FY15” had been prepared, including “the actualisation of August to October”, which disclosed that “the NPAT forecast (on a consolidated basis) for the year is $95m, which is $11m below budget ($107m) and $3m down on last year ($98.5m)”. The document also noted that removing “unidentified savings” and “vacancy provisions” from the forecast “would reduce the npat forecast to $90m” and that there was a $6m risk to NPAT from “the Online operation”. If both risks were included, a FY15 NPAT forecast of $84m would have been calculated;

(l) 31 October 2014: the matters referred to in (i) of the [21] particulars and the documents referred to therein;

(m) 2 November 2014: by this time:

(i) sales and buying gross profit results for week 14 were known, which disclosed for the year-to-date that sales were $15.09m below forecast and buying gross profit was $10.37m below forecast;

(ii) “The Good, The Bad and the Ugly” email had been sent to the Myer’s directors; and

(iii) Myer’s Chairman had replied to “The Good, The Bad and the Ugly” email and said: “I get the complex message!”;

(n) 9 November 2014: by this time sales and buying gross profit results for week 15 were known which disclosed for the year-to-date that sales were $23.40m below forecast and buying gross profit was $13.56m below forecast;

(o) 13 November 2014: by this date Myer had prepared a draft FY15 budget disclosing an NPAT forecast for FY15 of $92m, with that forecast reliant upon the second quarter achieving NPAT of $97m (or 104.4% of the forecast NPAT for the full year) in circumstances where Myer had made a net loss of $17m in the first quarter, and had forecast that it would achieve NPAT of only $13m in the second half of FY15;

(p) 14 November 2014: by this date Myer had prepared a draft presentation entitled "Revised Forecast FY15 Quarter 2 Focus" disclosing a then-current forecast or "FY Actualised S15 to FY 15 Forecast" NPAT of $91m for the full year, and outlining options to recover NPAT to the budgeted level. The options included cutting the CCODB including by "deep cuts (20%) of support office headcount";

(q) 16 November 2014: by this date the sales and buying gross profit results for week 16 were known which disclosed that for the year-to-date that sales were $22.52m below forecast and buying gross profit was $13.95m below forecast;

(r) 17 November 2014: by this date the "FY15 Target: A Quarter 2 Focus" document had been finalised, which disclosed an "Actuals to wk16 + approved reforecast" NPAT of $100m, which was reliant on first half NPAT of $73m and second half NPAT of $27m, but which provided no explanation as to how the "approved reforecast" figures had been significantly increased above those calculated on inter-alia 13 and 14 November 2014;

(s) 20 November 2014: by this date Myer had prepared an FY15 budget (not marked as "draft") in the same format as that dated 13 November 2014 disclosing an NPAT forecast for FY15 of $90m, with that forecast reliant upon achieving NPAT of $96m (or 106.5% of the forecast NPAT for the full year) in the second quarter in circumstances where Myer had made a net loss of $17m in the first quarter, and had forecast that it would achieve an NPAT of only $11m in the second half;

(t) 24 November 2014: by this date the sales and buying gross profit results for week 17 were known which disclosed that for the year-to-date sales were $23.07m below forecast and buying gross profit was $17.17m below forecast;

(u) 30 November 2014: by this date the sales and buying gross profit results for week 18 were known which disclosed that for the year-to-date sales were $29.18m below forecast and buying gross profit was $19.86m below forecast;

(v) 7 December 2014: by this date the sales and buying gross profit results for week 19 were known which disclosed that for the year-to-date sales were $32.51 m below forecast and buying gross profit was $22.45m below forecast;

(w) 8 December 2014: on this date Myer's CFO gave to Myer's CEO a draft "Full Year Forecast- FY15" presentation which disclosed an "FY15 Forecast" lower than "FY 14 Actual" and which disclosed that with sales growth of 4% on FY14 an NPAT of $92m could be achieved, with sales growth of 3% on FY14 an NPAT of $83m could be achieved, and with sales growth of 2% on FY14 an NPAT of $74m could be achieved without "Actions/Levers" being employed to recover NPAT to a $94m level;

(x) 9 December 2014: on this date:

(i) a revised version of the "Full Year Forecast - FY15" presentation (see para (w) above) was tabled at Myer's board meeting which disclosed an FY15 Forecast of $92m, approximately $7m less than the FY14 Actual NPAT of $98.5m. With lower sales growth rates of 4%, 3% and 2% on FY14 sales, NPAT forecasts of $89m, $80m and $74m respectively were shown, although "Actions/Levers" said to be capable of recovering NPAT to a $91m or $92m level were also shown;

(ii) Myer's board discussed the forecast and noted that "the full year revised forecast is slightly above consensus";

(y) 14 December 2014: on this date the sales and buying gross profit results for week 20 were known which disclosed that for the year-to-date sales were $8.44m below forecast and buying gross profit was $3.25m below forecast;

(z) 18 December 2014: on this date Myer's CEO sent an email setting out his concerns in relation to achieving "forecast" over the Christmas trading period;

(aa) 21 December 2014: on this date the sales and buying gross profit results for week 21 were known which disclosed that for the year-to-date sales were $22.59m below forecast and buying gross profit was $12.26m below forecast;

(bb) 22 December 2014: on this date:

(i) Myer's board conducted a "board discussion" by telephone, the minutes of which disclose that the current forecast NPAT could potentially be materially less than consensus but that with planned actions the forecast for FY15 NPAT would be $89m; and

(ii) Myer's board was given a presentation entitled "Full Year Forecast- FY15 December 22 Board update" which disclosed that the "FY15

Current Forecast (CF)" was for FY15 NPAT of $68m and that only with a $21m boost to NPAT in the second half could an FY15 NPAT of $89m be achieved;

(cc) 23 December 2014: on this date Myer's General Manager Corporate Affairs and Media gave a statement drafted to notify the market on or around 5 January 2015 that Myer no longer expected to achieve earnings growth on last year to Myer's CEO, CFO and Company Secretary for their consideration;

(dd) 28 December 2014: on this date the sales and buying gross profit results for week 22 were known which disclosed that for the year-to-date sales were $21.14m below forecast and buying gross profit was $11.08m below forecast;

(ee) 4 January 2015: on this date the sales and buying gross profit results for week 23 were known which disclosed that for the year-to-date sales were $20.96m below forecast and buying gross profit was $12.80m below forecast. For week 23, Myer's sales were $93m, up $0.17m on a forecast of $92.8m;

(ff) 5 January 2015: on this date:

(i) Myer's board conducted a "board discussion" by telephone, the minutes of which disclose that "the full year forecast NPAT is $90m, with cost actions, although the full year forecast is still being finalised" and that the board determined that no update to the market was necessary because "the current forecast NPAT result [was] in line with the Bloomberg consensus";

(ii) Myer's board was given a presentation entitled "Full Year Forecast - FY15 January 5 Board update" which disclosed at slide 4 an "FY15 Current Forecast (CF)" of FY15 NPAT of $74m, and an NPAT "with actions" of $90m;

(gg) 11 January 2015: on this date the sales and buying gross profit results for week 24 were known which disclosed that for the year-to-date sales were $21.77m below forecast and buying gross profit was $12.27m below forecast. For week 24, Myer's sales were $69.5m, down $0.81m on a forecast of $70.3m;

(hh) 18 January 2015: on this date the sales and buying gross profit results for week 25 were known which disclosed that for the year-to-date sales were $24.43m below forecast and buying gross profit was $11.11 m below forecast. For week 25, Myer's sales were $54.8m, down $2.65m on a forecast of $57.5m;

(ii) 21 January 2015: on this date:

(i) Myer updated its "FY15 Current Forecast (CF)" and "FY15 CF + Actions" showing figures of $76m and $90m respectively;

(ii) Myer's CEO sent an email to each of the directors of Myer as well as Myer's CFO and Company Secretary in which it was stated that "[o]ur belief is that we have no need to disclose any updates to the market out of our normal cycle" on inter-alia the following grounds:

1. Myer's forecast showed $90m with less cost reduction than previously presented to the board;

2. "January trade is up 5% on last year and 3% ahead of forecast with good momentum", although according to the applicant the statement concerning January trade being 3% ahead of forecast was inconsistent with the matters referred to in paragraphs (ee), (gg) and (hh) above;

3. "split of 68% average in first half profit is in line with this year but 2014 was a one-off", although according to the applicant the status of FY14 as a "one-off" is not supported by the figures shown in Exhibit A1 tendered before me;

(iii) Myer's board conducted a "board discussion" by telephone, the minutes of which disclose that "[t]he Board discussed the NPAT split between H1 and H2, and compared it to the historic split. Whilst last year the NPAT split between H1 and H2 was 82%:12% [sic], in the previous four years the split has been around two thirds:one third. The current forecast for the split for 2015 will be approximately two thirds:one third. Further, it was noted that the Bloomburg [sic] consensus NPAT figure is currently $90m, which is in line with the FY2015 NPAT forecast with cost actions, although the full year NPAT forecast is being finalised";

(jj) 9 February 2015: on this date:

(i) Myer's "FY15 Forecast February 2015 Board update" disclosing an "FY15 Current Forecast (CF)" of $76m and "FY15 CF + Actions" of

$90m, was presented at Myer's board meeting. Both the "CF" and "CF + Actions" forecasts were said to be dependent on 4% growth in sales over FY14 in H2, where only 2% growth had been achieved in H1 of FY15; and

(ii) Myer's January FY15 financial performance was known and advised to Myer's board which showed that January performance was below the "forecast" level and that Myer had been unable to constrain its costs as forecast;

(kk) 27 February 2015: on this date a revised forecast was presented at Myer's board meeting and Myer's board noted inter-alia that "the forecast NPAT for the year, before the strategic review costs, is $91m, and including the strategic review costs is $87m. The Bloomberg consensus NPAT is $89m" and that there were "potential downside risks" to sales and operating gross profit;

(ll) early-March 2015: Myer's performance in February 2015 was weaker than Myer's forecast and Myer had been unable to constrain its costs as forecast with a CCODB of $102.2m achieved as against a forecast of $100.1m, and an NPAT of ($18.7m) as against a forecast of ($14.8m). The figures are recorded in the "Financial Summary February 2015" completed on 11 March 2015 and set out in the "February FY2015 Financial Board Report" at page 2; and

(mm) for each week in FY15 up to and including week 33 ending on 14 March 2015, the sales and buying gross profit figures recorded in Exhibit A7 as tendered before me.

41 Let me state now that I have considered each and every one of the above documents and matters although the more detailed chronology that I have set out later places varying emphasis on these matters.

42 Further, as noted above, at the heel of the hunt I gave the applicant leave to amend to plead a continuing representation case and a failure to correct case, bounded only by the 19 March 2015 date. Myer opposed the application. But its disappointment in my granting leave and any prejudice were ameliorated by my giving Myer leave to re-open its case and to call further evidence to address the amendments. It took that opportunity. It was also protected by any costs consequences.

43 Let me turn to another part of the applicant's pleaded case. The applicant's loss and damage case is the following.

44 The applicant and group members held their interests in MYR ED securities in a market:

(a) regulated by, inter-alia, the ASX listing rules and the Act; and

(b) where the price or value of MYR ED securities would reasonably be expected to be informed and affected by information disclosed in accordance with the ASX listing rules and the Act.

45 The applicant expected that Myer had complied with its obligations under the ASX listing rules and the Act and had no knowledge of the information about the earnings forecast matter when it purchased 40,000 MYR ED securities on 17 November 2014.

46 It is said that the applicant and the group members acquired their MYR ED securities in a market:

(a) in which Myer had failed to disclose information about the earnings forecast matter that a reasonable person would expect to have a material effect on the price or value of MYR ED securities;

(b) in which Myer had engaged in the misleading or deceptive conduct alleged above, where each instance of misleading or deceptive conduct affected the applicant and those sub-groups of group members who acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged; and

(c) in which the significant falls in the price of MYR ED securities on and after 19 March 2015 were caused by and were a result of the disclosure of information about the earnings forecast matter.

47 The applicant says that the failure to disclose the information about the earnings forecast matter caused the market price for MYR ED securities prior to 19 March 2015 to be substantially greater than:

(a) their true value;

(b) further or alternatively, the market price for MYR ED securities that would have prevailed but for Myer's failure to disclose the information about the earnings forecast matter at any time prior to 19 March 2015.

48 The applicant says that the applicant and group members have each suffered loss and damage because of and resulting from the failure to disclose the information about the earnings forecast matter to the market, the applicant and those sub-groups of group members who acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct by Myer alleged have also suffered loss by that misleading or deceptive conduct, and all group members are entitled to compensation pursuant to ss 1041I, 1317HA and 1325 of the Act. It is said that Myer's failure to disclose the information about the earnings forecast matter caused the applicant and the group members to suffer loss and damage because the failure to disclose caused the market price for MYR ED securities prior to 19 March 2015 to be substantially greater than their true value or further or alternatively, the market price for MYR ED securities that would have prevailed but for Myer's failure to disclose the information about the earnings forecast matter. Accordingly the applicant and the group members overpaid for their MYR ED securities. The losses are said to be comprised of the difference between the prices at which the MYR ED securities were acquired by the applicant and the group members and the prices that would have prevailed at the times of those acquisitions had the information about the earnings forecast matter been disclosed at that time and, as relevant to the applicant and those sub-groups of group members who acquired their MYR ED securities after the occurrence of each respective instance of misleading or deceptive conduct alleged, had Myer not engaged in the alleged misleading or deceptive conduct.

49 It will be apparent that the applicant and group members are not putting a causation and loss case based upon specific reliance, but rather are putting a case solely on the basis of an indirect or market-based causation thesis, which causation thesis in my view is available as a matter of law.

THE APPLICANT

50 Before proceeding further, let me say something about the applicant.

51 The applicant is the trustee of a self-managed superannuation fund known as the "Amies Superannuation Fund" for Mr Christopher Amies (the SMSF). Prior to the appointment of the applicant as trustee of the SMSF in 2015, Mr Amies and his sister, Ms Jacinta Amies, were the trustees of the SMSF.

52 Mr Amies had spent most of his career working in finance and investment banking roles. He had also been active in small business, including as a franchisee of several cafes and most recently as the owner of Sunshine Coast Organic Meats, the largest organic butcher in South

East Queensland. The finance and investment banking roles he had held included being an investment manager for an investment company over a thirteen year period, investment banking roles with Prout Partners and First Class Capital, chief financial officer of Bright Eyes, a subsidiary of Oakley, Inc and various roles with North Ltd and its subsidiary Energy Resources of Australia Ltd.

53 He held a Bachelor of Commerce from the University of Queensland, a Graduate Diploma in Applied Finance and Investment from the Securities Institute of Australia, and a Masters of Applied Finance from Macquarie University.

54 Mr Amies gave evidence of the following matters on behalf of the applicant. He was not cross-examined.

55 Mr Amies had been investing in listed companies since 1985 when he was at high school. He had invested continuously since then. Over the last ten years he had managed an investment portfolio with a value ranging from $1m to $10m.

56 He established the SMSF in March 2004. The purpose of establishing the SMSF was to take ownership of investment decisions for his, and his sister's, superannuation purposes. From the establishment of the SMSF, both he and his sister had accounts with the SMSF and both acted as trustees.

57 His investment strategy for the SMSF was to be a long-term investor in shares in listed companies. But his investment strategy for his share investments other than those in the SMSF had been focused on achieving trading gains over the short to medium-term.

58 When he made investment decisions, including for the SMSF, he tried to take relevant financial information into account. The information he habitually took into account included earnings outlooks, market consensus expectations, company outlook statements, commentary by public commentators, economic conditions generally or in the specific sector, as well as his own thoughts and analysis.

59 He also took into account the views of various stockbrokers to whom he talked from time to time. He had used several different stockbrokers over the years and from time to time he discussed with them general market conditions and specific stocks.

60 When he made investment decisions, he took into account a company's share price, its most recent results, statements which had been made by the company, and whether he considered the market as a whole to be relatively cheap or expensive.

61 He was aware that listed public companies had a continuous disclosure obligation which obliged them to make announcements to the market as soon as they became aware of materially price-sensitive information.

62 He always assumed that market prices for shares reflected all available information which was known to the market. As I say, he held a Masters of Applied Finance degree from Macquarie University and had studied the operation of the stock market.

63 Mr Amies made the decision for the SMSF to purchase Myer shares in November 2014.

64 He discussed the potential purchase with a stockbroker friend of his, Mr Shayne Gilbert, who worked as a broker for Ord Minnett at the time.

65 Mr Gilbert and he had a particular and long-running interest in Myer. They attended together one of the town-hall investor meetings held in late 2009 at the time of the initial public offering of Myer shares. I note that in evidence was a photograph of Mr Amies with Myer ambassador, Ms Jennifer Hawkins, taken at that meeting.

66 Mr Amies did not do any particular research into Myer at the time of the initial public offering of Myer shares. Generally, he read the Australian Financial Review and the business section of The Australian every day, along with reports from several stockbrokers each day. He also kept a good working knowledge of the activities and performance of many listed companies, including Myer. And when brokers released research reports on particular companies, he tended to read those reports.

67 In 2014 he was aware that Myer's share price had declined since listing but, despite this, Myer's management commentary remained positive. As a consequence, he thought that Myer shares looked cheap in 2014.

68 When he spoke to Mr Gilbert, they discussed the fact that Myer shares appeared to be cheap, offered a good dividend, and that Myer's outlook was positive based on Myer's own guidance to the market.

69 Mr Amies did not execute the purchase of Myer shares on 17 November 2014 with Mr Gilbert because the SMSF did not have a trading account with Ord Minnett. Instead he gave instructions to Morgan's to buy the shares on an "execution only" basis.

70 The trustees of the SMSF, Mr Amies and his sister, purchased 40,000 MYR ED securities on 17 November 2014, with settlement on 20 November 2014.

71 As trustees they paid $1.7575 for each MYR ED security which were acquired on-market on 17 November 2014.

72 They held those 40,000 MYR ED securities at the opening of the market on 19 March 2015.

73 When the SMSF purchased the shares on 17 November 2014, Mr Amies did not have any inside information about Myer and, in particular, he did not know any of the information which was disclosed by Myer to the market for the first time on 19 March 2015.

74 The applicant was appointed trustee of the SMSF on 31 July 2015 and so the trust property of the SMSF vested in the applicant from that time.

75 The applicant, as trustee of the SMSF, continued to hold the MYR ED securities following its appointment as trustee until their sale on 1 November 2016 at a price of $1.1650 for each MYR ED security.

KEY LAY WITNESSES

76 Myer principally relied on evidence from Mr Brookes and its chief financial officer, Mr Mark Ashby at the relevant time. Mr Brookes and Mr Ashby were involved in the preparation of the budget for FY15 and the decision to present that budget to the board for approval, and they also gave evidence in relation to these matters.

77 Myer also relied on evidence from the heads of its stores and merchandise teams, being Mr Anthony Sutton, the Executive General Manager of the Stores team and Mr Adam Stapleton, the Executive General Manager of Merchandise.

78 Further, Myer also relied on evidence from each of its directors at the relevant time, which in addition to Mr Brookes included Mr Eric Paul McClintock, Mr Robert Edward Thorn, Mr Rupert Horden Myer, Mr Ian Grainger Cornell, Ms Christine Joanna Froggatt, and Ms Anne Bernadette Brennan.

79 Mr Brookes, Mr Ashby, Mr Sutton and Mr Stapleton had between them considerable retail experience.

80 Mr Brookes was the CEO and MD of Myer from 12 July 2006 to 24 February 2015, and had therefore had ultimate management responsibility for the Myer business, subject to oversight by the board, for a period of about eight years at the time the FY15 budget was prepared. Prior to his time at Myer, Mr Brookes worked for 25 years at Woolworths in Australia, including as the General Manager of Woolworths in Queensland. Mr Brookes had very significant corporate experience in the retail sector in Australia (over 30 years), and following his time at Myer he became the CEO of the largest clothing, footwear and general merchandise retailer in South Africa (which has over 1,400 stores).

81 Mr Ashby also had significant relevant experience and qualifications. He was a certified practising accountant with around 30 years of corporate and finance experience, the majority of which has been in senior finance roles with retail companies. Further, he had substantial experience at Myer, having been, at the relevant time, the CFO at Myer for over six years since 14 January 2008. Further, he had substantial corporate experience, having been the CFO of Mitre10 Australia Limited between 2004 and 2008, and having been involved as both a senior executive and in less senior roles in forecasting, budgeting and preparing business plans for various retail businesses.

82 In my view both Mr Brookes and Mr Ashby were honest witnesses, but some aspects of their evidence were problematic particularly once one proceeded into and past October 2014 concerning their states of mind as to the likely NPAT for FY15. I was also left surprised about their professed ignorance concerning some of the draft forecasts and the like that were prepared at and after that time. Further, in relation to Mr Brookes' evidence concerning his understanding as to the board's position at the board meeting on 10 September 2014, his understanding was in tension with the understanding of other directors. I do not need to linger on this aspect at this point.

83 Mr Stapleton, the head of the Merchandise team, was also an experienced and senior retailer, who has gone on to hold senior management roles at Coles, and then to become the CEO of Grill'd Burgers, since he left Myer. At the relevant time, his experience included working with Myer for more than 12 years, including more than 10 years in senior merchandise and marketing roles, including as head of Merchandise from December 2012 to July 2014.

84 Mr Tony Sutton, the head of the Stores team, had worked at Myer for over 25 years in roles related to the operations of Myer's department stores. In these roles he had extensive experience in relation to store operations, and in relation to the process of preparing budget submissions by the Stores team.

85 Each of these members of the senior management team also gave evidence as to their role in the preparation of the FY15 budget.

86 Each of the directors also had significant relevant experience. Let me give a brief summary.

87 Mr McClintock, the Chair of the board, had been a director of Myer since August 2012. Mr McClintock had very significant corporate experience, including serving on the boards of dozens of companies and entities, a number of which were listed on the ASX.

88 Mr Thorn had over a decade of experience as a director of numerous retail companies.

89 Mr Myer, the Deputy Chair of the board at the relevant time, had been a director of Myer since 2006, as well as having served as a director of a number of other companies including ASX listed companies.

90 Ms Brennan had been a director of Myer since 2009, was the director of a number of other ASX listed companies, had been the CFO of an ASX listed company (CSR Limited) and had worked for almost 20 years at Ernst & Young, Arthur Anderson and KPMG.

91 Ms Froggatt had also been a director of Myer since 2010, and was the director of various other companies, including an ASX listed company.

92 Mr Cornell had worked in senior roles in the retail industry for over 15 years.

93 These directors gave evidence in relation to their practice in approving budgets at Myer, and in relation to their knowledge, particularly whether they knew that Myer's NPAT in FY15 would be materially lower than in FY14.

94 On the whole their evidence was credible and compelling, particularly the evidence given by Mr McClintock who was smart, competent and direct.

THE STRUCTURE OF MYER'S BUSINESS

95 It is necessary at this point to say something about the structure of Myer's business. What I am about to describe is not controversial and is largely taken from Myer's accurate summary of the evidence.

Teams and key personnel at Myer

96 The key "teams" at Myer were the following.

97 First, the National Store Operations team (Stores team or NSO). This was the team that was directly responsible for running the department stores. The head of the Stores team at all relevant times was Mr Sutton. He reported directly to Mr Brookes. Reporting to Mr Sutton were a series of Regional Managers who were responsible for the stores in a particular State (or part of a State, for example, NSW had two Regional Store Managers) as well as various administrative positions.

98 Second, the Merchandise and Marketing team (Merchandise team). This was the team that was directly responsible for running the merchandise and marketing aspects of the Myer business, including product selection, range allocations, development of new product ranges and negotiations with suppliers. The head of the Merchandise team at the time of the preparation of the FY15 budget was Mr Stapleton. The head of Merchandise Planning (who was then Mr Darrel Maillet) reported to Mr Stapleton.

99 Third, the Property team, which worked on all issues associated with new stores and refurbishments, lease negotiation, space allocation, store maintenance and property design. Mr Tim Clark was the head of the Property team and reported directly to Mr Brookes. In relation to new stores, this team worked on the evaluation of new sites and consideration of matters such as local demographics, the size of a centre in which a new store would be located, potential population growth in the area, and the likely capital costs of the new store.

100 Fourth, the Online team, which worked closely with the IT and supply chain teams. When preparing the yearly budget, this team provided an analysis of the sales and forecast for the online component of the business. At the relevant time Mr Richard Umbers was the Chief Information and Supply Chain Officer and the head of this team.

101 Fifth, the Finance team, which was responsible for all of the traditional financial elements of the business, including accounting, treasury and tax, as well as investor relations, audit, risk, compliance and assurance. Mr Ashby was the head of the Finance team.

102 The heads of each of these teams formed part of the Executive General Management (EGM), and reported directly to Mr Brookes.

The department store business and other parts of the business

103 At the relevant time, the Myer business consisted of:

(a) its physical department stores;

(b) the online business, by which it sold merchandise to customers online;

(c) the Sass & Bide business, being a separate brand owned by Myer which was sold out of separate Sass & Bide stores; and

(d) free-standing stores, being three speciality stores that were being trialled in Epping and which only sold Myer Exclusive Brand (MEB) products.

104 Various internal Myer documents that forecast or discuss sales and other financial metrics only refer to or incorporate figures for the "Department Store" business, which was typically used in internal documents to mean both the physical department stores and the online business, but which did not include the Sass & Bide or "free-standing" stores.

Key financial metrics

105 The key drivers of Myer's NPAT which are evident from the documents are:

(a) Sales, being the total amount received by Myer for inventory sold;

(b) OGP margin, which is the operating gross profit as a percentage of sales. Operating gross profit consisted of total sales minus the cost of goods sold with other adjustments made for the cost of markdowns, discounts on gift cards and other matters; and

(c) CCODB, which as I have said is Myer's cash cost of doing business. The CCODB was all costs incurred in running the business excluding depreciation and amortisation.

MEBs, National Brands and Concessions

106 Myer's merchandise offering fell into three general categories which were referred to as MEBs, National Brands and Concessions. The mix of sales as between these categories was important and influenced the OGP margin. In particular, MEBs had the highest OGP margin, and therefore increasing sales of MEBs, relative to National Brands and Concessions, would improve the OGP margin.

Key trading periods relative to annual results

107 Myer's financial year ended on the last Saturday in July, beginning on the Sunday following.

108 Historically, a very significant proportion of Myer's sales and full year NPAT was achieved during the second quarter (Q2), which comprised the months of November, December and January, particularly in December and January which include the Christmas, Boxing Day and New Year sales. As an example, in FY14 Q2 generated 87.6% of NPAT, Q4 generated 33.6% of NPAT, and Q1 and Q3 generated losses.

109 According to Myer's case, the actual results for Q1 are not, given their relative insignificance when compared to Q2 and Q4, a sure guide for the likely full year result and it is difficult to determine, at least until the results for Q2 are available which does not occur until early February, where NPAT is likely to end up for the full year based on actual results.

MAIP and CEO One Time Costs

110 The FY15 budget included two relatively significant cost items in the figures that were factored into the forecast NPAT of $107 million.

111 The first was "CEO One Time Costs". These were essentially discretionary one-off or non-recurring costs that the CEO could determine whether to incur. Mr Brookes' evidence was that he would typically only incur these costs if the business was going well. Mr Ashby's evidence was that if sales performance was lower than expected it was relatively easy to cut these costs back. The FY15 budget included $17 million for such costs, being an increase of $6 million from FY14.

112 The second was MAIP. MAIP was the Myer Annual Incentive Plan, which was a bonus scheme (also known as "STIP", short term incentive plan) which provided for potential additional remuneration to be payable to Myer senior management including the CEO and CFO. The criteria for payment of MAIP focused on financial and non-financial targets, including, in particular, earnings before interest and tax (EBIT) and sales growth. Accordingly, if EBIT and sales growth were below budget, then at least 80% of the MAIP provided for in the budget would not be paid.

113 The FY15 budget made a provision of $12 million for MAIP being 85% of the total MAIP payment that might become due. This was in circumstances where no MAIP had been paid in FY14.

THE DEVELOPMENT AND APPROVAL OF THE FY15 BUDGET

114 The evidence is that the FY15 budget was prepared as the result of a comprehensive and thorough process. Indeed, I should say now that at the time the budget was approved and also as at 11 September 2014, all of Myer's directors and relevant senior executives considered the forecast figures in the budget to be achievable.

The budgeting process

115 The process for preparing a budget including the FY15 budget was a lengthy and detailed one, which involved input from a substantial number of experienced people within the Myer business.

116 The first important step was for the key teams within Myer to prepare and submit to the Finance team their initial submission setting out what they expected Myer's financial metrics would be for the coming year.

117 This aspect of the budget was a "bottom up" process, which involved the build-up of financial information for the business from the work of staff in particular in the Merchandise and Stores teams, albeit that this process would involve broad guidance from senior management.

118 This process commenced around January or February each year. Early in the process a series of key parameters were provided to the teams involved in the preparation of the budget (including the Merchandise team and the Stores team) and there would be a strategy session which focused on development of the following year's budget.

119 The Merchandise team, and the Stores team, would each undertake substantial work in order to prepare a submission to the Finance team in relation to estimated sales for the coming year.

120 Relevantly, the Merchandise team consisted of:

(a) the head of Merchandise Planning who reported to Mr Stapleton;

(b) heads of each of 12 trading product categories (TPCs), being a "general manager" and a "head planner" (Merchandise Planning Manager or MPM) for each TPC;

(c) "buyers" within each TPC; for each TPC there were a number of "buyers", who would be responsible for purchasing one or more specific products within that TPC; and

(d) “planners”, being staff who analysed the performance of TPCs (or specific products within TPCs), and worked with the buyers in each TPC.

121 The evidence was that there were various reasons that militated against buyers estimating an unrealistically high sales figure for their products for the coming year.

122 The Merchandise team would prepare its own forecast of sales. This would commence by preparing:

(a) a sales forecast for each category of product within a TPC; this “sales plan” was prepared by the buyer and planner for each product category to create a sales estimate for that category; and

(b) a sales forecast for each TPC as a whole, which involved combining the sales plans for each product category within the TPC.

123 The sales plan (forecast) for each category within a TPC was then reviewed by the general manager and MPM for that TPC. The job of the general manager and MPM in conducting this review was to ensure that each category was setting itself a realistic budget.

124 The MPM for each TPC would then present the sales plan for that TPC to the head of Merchandise Planning (Mr Maillet), who would review it.

125 The sales plan for each TPC would then be reviewed by Mr Stapleton.

126 The forecasts for each TPC would then be combined into a submission by the Merchandise team to the Finance team setting out estimated sales (and the First Margin and Buying Gross Profit (BGP)) for the coming year. In the submission, as estimating the sales for each TPC, the Merchandise team would also break down the estimated sales for each TPC within National Brands, MEBs and Concessions.

127 In preparing the sales figures for each TPC, the Merchandise team would consider factors such as sales in that TPC for the previous year, whether new brands would be introduced for that TPC in the coming year, store openings and closures, and the entry or exit of a competitor.

128 I would note that relevantly to the FY15 budget, the sales figure included by the Merchandise team in its original submission was $3,266m excluding Sass & Bide and free-standing stores. The final sales figure adopted in the FY15 budget was $3,267m excluding Sass & Bide and free-standing stores.

129 As I said above, the Stores team consisted of a series of Regional Managers, each of whom would be responsible for a particular State (or part of a State). It also consisted of Store Managers, each of whom would be responsible for a particular store.

130 The Stores team would prepare a separate submission of what sales it anticipated for the store network for the coming year. These sales figures would be prepared by each Regional Manager, with input from each Store Manager, and would be prepared by considering factors such as:

(a) how each store performed in the previous year;

(b) refurbishments, and whether sales would increase due to a completed refurbishment or sales would decrease due to the commencement of a refurbishment;

(c) whether any store may be subject to disruptions such as renovations to the mall it was situated in or roadworks around the mall;

(d) whether the mall could attract more customers due to developments to the mall being completed;

(e) economic factors and demographic factors of the area the store was located in;

(f) competitors entering or exiting the area the store was located in; and

(g) new initiatives for individual stores.

131 The Stores team would have regard to each of these factors to ensure that a balanced view was reached as to the estimated sales which a store was expected to achieve in the coming year.

132 The Stores team would also consider the opening of new stores and the closure of existing stores. The estimate of sales for a new store that was to be opened involved consideration of the business case for opening the new store, including cannibalisation of sales from existing stores (i.e. loss of sales by an existing store that was located close by to the new store).

133 The impact of the closure of an existing store considered the extent to which customers who shopped at the existing store might shop at another Myer store in a nearby area.

134 The sales for each store would then be combined into a submission from the Stores team to the Finance team. Relevantly to the FY15 budget, the submission of the Stores team was for sales of $3,286m excluding Sass & Bide and free-standing stores. This figure built from the

"bottom-up" was ultimately higher than the sales figure that Myer included in the FY15 budget being $3,267m excluding Sass & Bide and free-standing stores.

135 The submissions of the Merchandise team and the Stores team were two different perspectives on the one matter, being sales, with each submission being a useful check against the other.

136 After the initial submissions of the Merchandise team and the Stores team were prepared:

(a) Mr Ashby would analyse the budget with his direct reports and seek to identify further opportunities to increase sales and decrease costs; and

(b) senior management (the EGMs) would meet to consider the first cut of the draft budget.

137 From this point a detailed process would be undertaken by which the proposed budget would be considered, discussed and refined, so as to ultimately result in a final budget that would be presented to and approved by the board.

The purpose and uses of a budget at Myer

138 The finalised budget, and the figures and details underlying it, served several purposes. First, it was used to determine where resources were to be allocated within Myer's business, that is, in relation to matters such as staffing. Second, it was used to run the business, such as determining what stock to purchase. Third, bonuses under the MAIP were significantly dependent on achieving metrics in the budget, and in particular earnings and sales. Overall, the intention underlying the budget was to prepare figures that were realistic and achievable or which were considered to be realistically achievable although not easy to achieve.

139 The evidence was that an unrealistic budget was likely to have several negative effects on the business. First, if an unachievable sales figure was set this would likely lead to a surplus of inventory, which would in turn harm margins due to the need to sell stock at a "markdown". Second, an unrealistic sales figure would lead to excess store costs, that is, by way of overstaffing. Third, an unrealistic budget may disincentivise staff, who would not be paid bonuses, or would be paid smaller bonuses, because bonuses were dependent on figures in the budget. Fourth, an unrealistic budget may lead to a loss of credibility by senior management among staff.

140 According to Myer's submissions, the process undertaken by Myer, along with the evident issues that would arise if an unrealistic budget was set, meant that the process by which the

budget was arrived at was predisposed not to be unduly optimistic, whilst setting a budget that presented a challenge to the business, and that there is in turn a strong inference that management would be unlikely to present for approval a budget which they did not consider to be realistic. To put the matter another way, there is no proper basis to suggest any reason why management would knowingly inflate the figures in a budget.

The FY15 budget – Applicant's submissions

141 Let me at this point summarise the applicant's contentions.

142 The applicant contends that the senior management of Myer, particularly Mr Brookes and Mr Ashby were determined to produce a FY15 budget showing substantial growth in sales and profits and which reversed the declines in sales and profitability which Myer had experienced in the preceding four financial years, since its maiden profit result in FY10. It is said that this can be seen in the FY15 budget preparation and planning documents, for example Mr Ashby's email of 26 March 2014 to Mr Sutton, Ms Kerry Davenport and Mr Chris Lauder in which he described the budget submission which he had received in respect of the new store sales cannibalisation. He said "clearly it is a net unacceptable level for mt gravatt and joondalup" and demanded to see "realistic sales numbers ASAP". According to the applicant, the figures which Mr Ashby had received are consistent with the figures which appeared in the original draft of the budget but which were later amended.

143 Further, the applicant submitted that Mr Ashby's longer email of the following day, at 2.02 am on 27 March 2014, to Mr Stapleton, Mr Sutton, Mr John Joyce, Mr Timothy Clark, Ms Louise Tebutt, Mr Anthony Coelho, Ms Marion Rodwell and Ms Megan Foster with Mr Brookes, Mr Richard Harrison, Mr Len Kocovic, Mr Lauder, Ms Vicki Reid and Mr Greg Travers copied in, and titled "FY15 budget build up" more clearly illustrates his ambitions for the FY15 budget, in which he described the need to align Myer's budget targets to its business strategy and complained that "[i]n the first cut budget, whilst I am sure elements of this are calculated, there is not the outcome we require. There does appear to be a need for more confidence to back our strategy". He later stated "when I look at the numbers on a store basis, the new stores appear to be a profit drag – because of significantly lower than business case sales and higher cannibalisation…[a]gain we seem to be heading too conservative – we are investing heavily in service initiatives, but not backing with sales targets". Further, in relation to investment in the Myer one program "the numbers we see in the budget really don't back our plans" and "[t]here is a disconnect between what we are strategising and promoting to our shareholders and our

confidence to back the outcome". He noted that "[f]ollowing on from the last EGM, where it was proposed to issue targets, something we are generally reluctant to do, we now need to move down this path".

144 Mr Ashby then announced the targets in respect of sales ("current department stores forecast for fy14 is $3118m, budget submission was $3266m, the new target is $3290m"), the MEB mix ("MEB mix forecast for fy14 is 20.7%, the proposed was 21.7%, new target is 22.0%"), MEB first margin ("MEB first margin forecast for FY14 is 72.68%, FY 15 submission is 71.98% - the new target is at FY 14 levels of 72.70%") and stated that Mt Gravatt and Joondalup needed to generate a certain level of sales from the opening year and that cannibalisation should be no more than a particular level from the two stores. Significantly, so it was said, Mr Ashby stated:

> We need 2 years of "clean air" to deliver eps growth. Our Capex and associated opex will have to be moderated to support the future. In each EGM discipline we need to develop financial thought processes that have the shareholder in mind, rather than what is right for that function in isolation.
>
> You will see this in the budget process as we set the business for the next few years.

145 Further, in an email sent at 2.49 pm on 27 March 2014 in response to Mr Ashby, Mr Stapleton said:

> What is your expectation regarding the pre-read information for the FY15 budget meeting on 8th April? The planning team sent through to your team last night the monthly splits detail (see attached), but those monthly splits are on the sales number we went through in the February budget meeting, not the below target. It took the planning teams over 2 weeks to build this level of detail so we don't have the time or bandwidth to go back and do it again. From what I have been able to think of, the options are:
>
> - present the monthly splits as per what has been built and then talk to where we have identified the difference to the $3,290m ($+24m to current budget proposal)
> - identify exactly where the extra $24m sales growth is coming from and then take a relatively unscientific approach to allocating out the extra $24m across TPC's and weeks so that when we talk about the detail in the budget meeting at least it adds to the number the company is targeting
>
> In regards to the targets themselves, I have communicated the below note to my GM's and Darrel and I have spent some time today working on it. If it was easy we would have already put it into the budget but I fully understand why we need to find a way to get these targets.

146 Mr Ashby replied at 9.43 pm on 27 March 2014 stating "thanks Adam appreciate the note. I am comfortable with the first option, talking to where the $24m has been identified".

147 The applicant pointed out that Mr Ashby's evidence was that he did not recall following up with Mr Stapleton after this email exchange to discuss with him whether or not the targets that he had set were or were not in fact achievable.

148 Now the applicant said that neither Mr Ashby nor Myer's senior management team could be criticised for having or expressing their high ambitions for Myer's FY15 sales, but it said that the ambitious FY15 budget must be considered in its actual business context. Its actual business context included aspirations and desires on the part of the Myer senior management to turn the business around in FY15 which can with the benefit of hindsight be seen to have been overly optimistic and which were ultimately not able to be achieved. Mr Brookes' short email response "[g]reat note well done!" at 1.31 pm on 27 March 2014 indicates his support for Mr Ashby's agenda of improvement in FY15 sales and profits, which coincided with his own.

149 According to the applicant, Mr Ashby's directions given to the senior executives of Myer to produce a FY15 budget showing higher sales and profit numbers had their desired effect.

150 According to the applicant it is also apparent from the draft budget documents that Mr Ashby was explicitly targeting 2015 NPAT growth, which would achieve the earnings per share (EPS) hurdles which applied under the Myer Long Term Incentive Plan (LTIP). It is said that this is made clear by the reference to that consideration in the 14 May 2014 budget document, which refers to targeted NPAT growth of 9%, which is said to be "consistent with past EPS hurdles for LTI (2%-7%) as communicated to shareholders" and also consistent with the sales and NPAT figures, where sales of $3,365m produce NPAT of $113m, being an increase of 9.3% above the then anticipated FY14 NPAT forecast of $103m. It is also consistent with the draft budget document appearing, where 10% earnings per share growth is the target set in the budget, requiring an NPAT target $116m or, in order "to outperform Consensus", an NPAT target of $120m. Setting a growth target for NPAT was an explicit objective of the FY15 budget.

151 The applicant says that despite the optimism which was expressed in the draft sales and profit targets in the versions of the budget which were prepared in May 2014, Myer's actual trading performance at that time was not giving any indication that there was likely to be a significant improvement in sales or profits in the near future. In Mr Brookes' board update for the board meeting in May 2014, he noted that both sales and profits for April 2014 were below the reforecast figures which had previously been given to the Myer board (and therefore

necessarily below the original FY14 budget, which had presumably been superseded some time earlier, when the reforecast was prepared). Mr Brookes referred to "a disappointing performance in MEB's, with sales down $2.8m and the continued sales growth of [the lower margin] concessions up $2.3m". Mr Brookes also referred to "difficulties in first margin reflecting the changes in the Australian dollar and the change in MEB mix" which was compensated for with lower mark downs. This report was presented to the board at its meeting in New York in May 2014.

152 The applicant says that in relation to the draft of the FY15 budget which was presented to the Myer board in New York in May 2014 Mr Ashby noted in a presentation dated 14 May 2014 that the FY15 budget in its then current draft "highlights market expectations" and "details major initiatives supporting the 5 point plan". The market expectations include a number of positive and negative sentiments which had been expressed by the various stock market analysts whose reports are there summarised, which were said to be "impacting [the Myer] share price". Included amongst them, under the heading "Earnings" are the comments: "[e]xpect underlying cost growth to rise ahead of sales growth in FY17 and beyond" (attributed to UBS), "[d]eclining historical EBIT margin trend, concern about outlook for EBIT margin" (unattributed). Later, the draft noted various "Strategies / actions to address Analyst concerns" and noted under the heading "earnings": "[a]nticipate earnings growth in FY2015", consistent with the representations which had been made for the past few years by Myer and Mr Brookes in particular.

153 There was an examination of various external market factors which were identified as representing "the challenge" to Myer. The first of these were the consumer sentiment index figures at the time. The Westpac Consumer Sentiment Index, an index followed closely by Myer's board and senior management, was said to have risen to 99.7 in April, from 99.5 in March. It was also said to have fallen 9.6% since November 2013, when job cuts were announced across several sectors of the Australian economy. The slide notes that an index of 100 indicates that there is an equal number of optimists and pessimists in the marketplace. Various other macro and microeconomic challenges were identified. The budget as presented maintained an NPAT forecast of $113 million, up 9.3% on the then anticipated $103 million NPAT for FY14, and the sales were assumed to be $3,365m, up $198m or 6.2% above the $3,167m of sales then expected to be achieved in FY14.

154 The applicant says that also in this draft budget pack was a summary of the “current consensus” for sales, EBIT and NPAT, showing a Bloomberg consensus for FY15 NPAT of $120m, whereas the Bloomberg average was said to be $112m and the median the same amount. It is unclear from what source those Bloomberg figures derived or what they were understood to mean by Myer’s directors or its senior management.

155 At its meeting in New York on 14 May 2014 the board noted a concern that, after the passage of the Federal Budget on the previous day in Australia, Myer’s sales had declined 2%. This was the low period of consumer sentiment following the first budget of the Liberal Government elected in September 2013. The consumer sentiment index plunged to 92.94 in May 2014 and did not again recover to equilibrium until briefly in February 2015. The index remained subdued throughout the 2015 financial year.

156 In respect of the May 2014 draft budget presented to the board in New York, the applicant says that the minutes record that the proposed sales growth of $198m was “aggressive” and the board acknowledged “that the strategy was currently being developed, and that the budget was being drafted prior to the strategy being completed”. Mr Ashby was asked to “reconsider the draft budget, on the business being conducted in the manner in which it is currently being conducted (without strategy overlay)”.

157 According to the applicant it is not clear how this instruction was carried out by Mr Ashby. The reference to the “aggressive” sales growth of $198m assumed in the budget appears to come from the slides which Mr Ashby presented to the board at its meeting in New York.

158 The FY15 budget remained a work-in-progress at this time.

159 The applicant says that an explanation of the process of development of the FY15 budget during late June 2014 is provided by various emails in evidence where Ms Reid explained to Mr Ashby and Mr Kocovic on 26 June 2014 that the draft of the budget turned an assumed FY15 NPAT of $77 million into $122 million, by the addition of two items of revenue, being fast track initiatives valued at $3 million of NPAT and foreign exchange gains valued at $2 million of NPAT, and $40 million of cost savings, including $11 million by reducing store wages and $8 million by removing the MAIP short term incentive plan allowance of $12 million from the budget. Ms Reid’s email goes on to describe a meeting which Mr Ashby and Mr Kocovic had with Mr Brookes whereby $12 million of costs were then added back into the budget, including $6 million worth of MAIP, which reduced the FY15 budget NPAT to $112

million. The document makes clear that, without the $5 million NPAT value of additional revenues from fast track initiatives and foreign exchange gains and the reduction of the various costs identified, the budgeted NPAT for FY15 was $77 million on an assumed sales base of $3,312m. This is consistent with the figures shown in the contemporaneous version of the draft budget.

160 The applicant says that the final Myer FY15 budget, which was adopted by the Myer board in July 2014, contains the erroneous page 2705 "Where were we in May" which gives the wrong figures for the budget as presented to the board in May. It notes a number of negative matters which had occurred since the May board meeting, including the downturn in consumer sentiment since the 2014 Federal Budget was released. The Westpac Consumer Sentiment Index is identified as having declined 6.5% since May 2014, which had a negative impact on both the sales and the NPAT forecast for FY14. There were also identified a number of profit warnings from other large Australian retail companies on that page.

161 The summary final budget presented assumed sales of $3,325m (an increase of 5.6% over the then FY14 forecast of sales) and NPAT of $107m (a 9% increase over the then forecast $98m NPAT for FY14). The applicant says that it is noteworthy that the final budgeted 9% increase in NPAT was maintained. The applicant says there was a measure of reverse engineering of this budget in order to achieve an NPAT figure which would show growth in NPAT and therefore in earnings per share so as to justify payments to be made to those executives who were eligible under the LTIP. The applicant says that Mr Ashby agreed that there was reverse engineering in the FY15 budget. OGP was budgeted to increase by $95m, with improved margins at each level of the profit assessment, including an improvement of 0.7% in the margin rate at the OGP level.

162 According to the applicant the board adopted this final version of the FY15 budget at its meeting on 16 July 2014. The applicant says that Mr Ashby's affidavit of 28 November 2017 refers throughout to a later version of the budget dated 13 August 2014 as the final Myer FY15 budget. But this version of the budget appears to have been prepared after the FY14 year end was completed and, according to the applicant, it contains numerous figures which were inconsistent with the figures in the final FY15 budget as actually adopted by the Myer board in July 2014.

163 The applicant says that at its meeting on 13 August 2014, the board was presented with Mr Ashby's CFO report which presented the provisional financial summary for July 2014

showing substantial declines in all of the profit levels, in particular at the NPAT level, where a decline between FY13 and FY14 of more than $11 million or 28% was recorded, indicating a very significant downturn in the retail sector of the economy following the May 2014 budget. The low level of the Westpac Consumer Sentiment Index is specifically mentioned. According to the applicant, these factors were plainly in the mind of Myer's directors leading up to the board meeting on 10 September 2014, when consideration was given to the question whether Myer would once again provide explicit profit guidance by way of an NPAT forecast to the market.

164 I have dealt with the applicant's take on these events, but in my view Myer's recitation is more accurate, balanced and consistent with the contemporaneous documents.

The FY15 budget – Analysis

165 Planning for the FY15 budget formally commenced around January or February 2014, and involved at the outset of the process a three-day strategy review conducted in mid-February 2014. Following this strategy review, the Merchandise team and the Stores team prepared their submissions separately. But prior to those submissions being received, a preliminary budget forecast was prepared which was based on sales to BGP as presented at the Strategy sessions and the Finance team's view of costs. This preliminary budget forecast an NPAT of $121m.

166 On 25 March 2014, the draft Merchandise Submission was provided to Mr Ashby. The draft Merchandise Submission included forecast sales of approximately $3,265 million. That forecast was only for sales from the department stores and online business, and did not include Sass & Bide or the free-standing stores. Sass & Bide and the free-standing stores contributed approximately $58 million in additional sales in the FY15 budget. The forecast sales were broken down by TPC, so that a forecast sales figure for each TPC was set out.

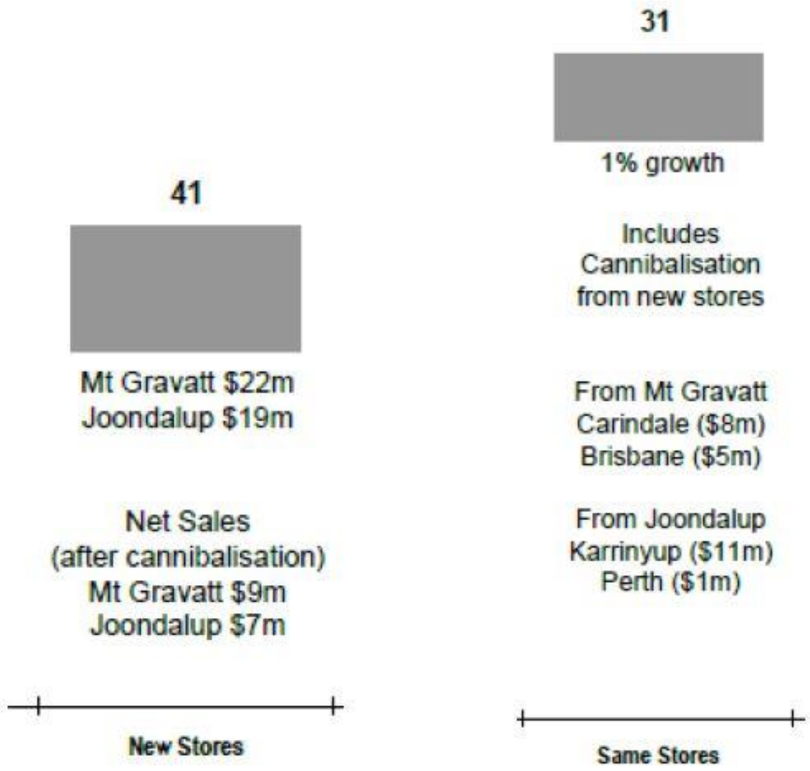
167 Around this time the draft of the Stores Submission was also finalised. The Stores Submission forecast sales for FY15 of $3,286 million again also excluding Sass & Bide and free-standing stores. A "reconciliation" sheet in evidence explains that the Stores Submission forecast an increase in sales of $183 million in FY15 compared to FY14, consisting of $93 million for new stores and completed refurbishments net of store closures and ongoing refurbishments, $60 million for merchandise initiatives and $30 million for an online sales increase.

168 By comparison, the Merchandise Submission forecast sales for FY15 of approximately $3,265 million, with the Merchandise Submission forecasting an increase in sales in FY15 compared

to FY14 of $157 million, consisting of $67 million for new stores and completed refurbishments net of store closures and ongoing refurbishments, $60 million for merchandise initiatives and $30 million for an online sales increase.

169 The two submissions therefore had a $26 million difference in the assumed impact of new stores.

170 The Merchandise Submission included only a $16m net increase in sales for new stores. This is apparent from the sales waterfall, which includes the following two items:



171 Mr Ashby identified that these sales figures included cannibalisation figures that were incorrect. This was a conclusion independently arrived at by the Stores team, which included different net new stores sales figures in its initial submission.

172 In his email of 26 March 2014, Mr Ashby stated that the Merchandise Submission for new store sales cannibalisation is a “net unacceptable level for mt gravatt and joondalup”, and he requested “realistic sales numbers ASAP”. The applicant argues from this email that Mr Ashby was determined to produce a budget showing substantial sales growth, and was arbitrarily

demanding sales figures that had no basis. But I agree with Myer that this overlooks the fact that once the matters Mr Ashby identified were examined it was found that:

(a) "the sales budget from the merch team didn't have the correct impacts from new/refurb/closed stores";

(b) the Stores team had independently arrived at a net figure for new stores of $40m; and

(c) it was confirmed in a subsequent email that the merchandise submission "showed incorrect net of cannibalisation numbers", and the correct overall net number was $41m.

173 The applicant submits that the correct cannibalisation figures for new stores should have led to a net sales increase of only $16m, and that the higher net stores sales figure of $41m included in the budget was simply a product of the directions given to the Myer senior management by Mr Ashby to increase the budgeted sales for FY15. But on the evidence that is not the case.

174 Now the documentary evidence demonstrated that the figure for new stores included in the budget pack sent on 4 April 2014 like that in the merchandise submission sent on 25 March 2014 was incorrect.

175 On 7 April 2014, a further "budget pack" was sent by Mr Maillet to Mr Ashby and others. The covering email noted that "Store refurb/closure/new impacts for FY15 aligned".

176 Mr Ashby was asked whether he understood that the Merchandise team had considered the new budget pack that was sent on 7 April 2014. He understood that the Merchandise team would have considered this information before it was circulated.

177 The net new store figures being the sales figures for the new stores, and the cannibalisation figures had been altered ("aligned") from the (incorrect) figures in the February Merchandise document. The result of the alterations is that net sales from the new stores were increased to $40.021 million. That corresponds very closely to the figure of $40 million included in the Store team's budget submission and the final figure of $41 million included in the budget. Whilst Mr Ashby could not recall specifically who had changed these figures and how, his evidence was that a possibility was that the Merchandise team and Stores team had "now … got together" and compared their numbers. I agree with Myer that it may be inferred that this is what happened, that the low figure adopted by the Merchandise team in its initial submission

was an error, and that the final figure of around $40 million was based on the detailed business cases and reflected Myer's expectations for new stores in FY15.

178 Further, the evidence of Mr Stapleton was that he understood Mr Ashby's comment about the new stores (Mt Gravatt and Joondalup) containing "significantly lower than business case sales and higher cannibalisation", as referring to the "business cases" which were prepared for the two new stores, and that he understood him to be saying that the sales figures in the "business case" have not been adopted in the submission of the Merchandise team. Mr Stapleton also noted that, in relation to new stores, Mr Ashby appeared to have had the figures from the original business plan for the opening of the new stores, which did not align with the figures used by the Merchandise team.

179 As to how Mr Sutton's Stores team arrived at their new stores sales figure of around $40 million, Mr Sutton's evidence was that this figure was arrived at by considering the business case that had been prepared for the new stores ahead of their opening. Mr Brookes' evidence was consistent therewith.

180 Subsequent documents confirm that the sales impact for new stores ultimately included in the budget were based on the Approved Business Cases for new, closed and refurbished stores together with latest sales disruption information Property Space Planning for stores under works in FY15.

181 In part based on Mr Ashby's email in relation to the new stores, and in part by reference to his subsequent email of 27 March 2014 in which he identified targets, the applicant has submitted that, in effect, Mr Ashby imposed his numbers on the business and, implicitly, that those imposed numbers then formed the basis of the FY15 budget, which therefore did not reflect a realistic view as to what the business would achieve, but were simply a product of the directions given to Myer senior management by Mr Ashby. But I agree with Myer that this submission is not sustainable.

182 First, the primary criticism is Mr Ashby's reference to targeting sales of $3,290m for the department stores business of Myer, without any apparent basis. But in relation to sales, once one corrects the incorrect new stores figures used by the Merchandise team, their sales figure would be $3,291m for the department stores business, which was already higher than Mr Ashby's figure. Further, the Stores team had independently and through its own detailed

process arrived at a sales figure of $3,286m for the department stores business. Further, the sales figure ultimately included in the budget was $3,267m for the department stores business.

183 Second, the applicant also focused on the online sales figure. But in the original merchandise submission the figure for online sales was a net increase of $24m. Mr Ashby identified a target of a net increase of $30m. And the increase ultimately adopted in the budget was $23m. Again, this is not consistent with Mr Ashby having imposed an online sales figure on the Merchandise team.

184 Third, insofar as the Merchandise team lifted its net new stores figure from $16m net to $40m net, that corrected the earlier error in its submission and brought its figures into line with those of the Stores team and as set out in the detailed business cases prepared for the new stores.

185 Fourth, in relation to the MEB mix, the original submission was 21.7%, Mr Ashby identified a target of 22%, and the figure adopted in the budget was 22.07%. Given that a figure of 22% was not adopted, as Myer says, it can be inferred that further work was done on the MEB mix so as to justify this change.

186 Fifth, Mr Stapleton's evidence in relation to the "sales target" of $3,290 million was that he understood Mr Ashby to be asking the Merchandise team to consider both positive and negative impacts on sales from identified matters to see if the target of sales of $3,290 million was feasible.

187 Sixth, Mr Stapleton's evidence in relation to the targets generally was that he would have understood these targets to be matters that the Merchandise team should assess to see whether the matters were achievable, and if so, how. Moreover, he did not recall thinking that the targets proposed by Mr Ashby were unrealistic or unlikely to be achieved and did not recall anyone expressing those views to him.

188 Seventh, Mr Stapleton gave evidence that he did not consider that the FY15 budget was unrealistic or unlikely to be achieved, and that he would not have agreed to a budget which he believed was unlikely to be achieved or unrealistic.

189 Eighth, Mr Sutton noted that the first submission from the Stores group had a sales figure of $3,286 million, that this figure was arrived at from the bottom-up process they applied, and that given that Mr Ashby's target was $3,290 million, this would not have caused him any concern and he was comfortable with this figure. Further, Mr Sutton confirmed that he was not involved in any discussions about what NPAT growth would be targeted for the purposes

of ensuring that EPS hurdles were met, and he did not recall any discussion about a desire to outperform consensus or to achieve a particular level of EPS growth.

190 Ninth, in addition to Mr Brookes, Mr Stapleton, Mr Sutton and Mr Ashby, each other member of the EGM had to agree to the budget before it was presented to the board for approval. And the budget would not be submitted to the board until a consensus view had been reached on the issue. The budget was ultimately submitted to the board with the agreement or approval of all of the EGMs. Those EGMs whose work was most important to the figures in the budget (Mr Sutton and Mr Stapleton) said that they would not have agreed to support the budget if they believed it was unrealistic or unachievable.

191 These matters are not consistent with the applicant's case thesis that Mr Ashby or Mr Brookes imposed a target driven and unrealistic budget on the business.

192 Following receipt of the Merchandise and Stores Submissions, the budget figures were subjected to further discussion and work during April and early May, leading to finalisation of a draft budget to be presented to the board for review and discussion.

193 A draft "Budget pack", as it stood in May 2014, was provided to the board in advance of the board meeting in New York on 14 May 2014. At the board meeting, Mr Ashby presented a paper called "Myer Holdings Ltd FY15 Budget". At this stage management's forecast NPAT for FY15 was $113 million. This figure was arrived at on assumed sales of $3,365m, an OGP margin of 42.06% and CCODB of $1,136m. The document presented by Mr Ashby also included a scenario in which assumed sales were reduced to $3,325m, the OGP margin was reduced to 42.04%, CCODB was reduced to $1,118m, and which retained an NPAT of $113m. The explanation for the scenario is that the scenario allowed for cost investment assuming sales being achieved rather than in advance of growth. That is, if sales were assumed at the lower amount of $3,325m, the anticipated costs investment could be reduced. This scenario was included in part of Mr Ashby's paper which does not appear to have been formally presented to the directors in New York.

194 On 4 June 2014 Mr Ashby received by email a "budget update" for a meeting that he was to have with Mr Brookes. The budget update/presentation included an NPAT figure of $110 million, and the following other figures:

(a) total sales of $3,332 million, which was a reduction of $33 million from the sales of $3,365 million in the May draft budget and an increase of $7 million from the sales of $3,325 million in the scenario included in the May presentation;

(b) CCODB of $1,121 million, which was a reduction of $15 million from the CCODB of $1,136 million in the May draft budget, and an increase of $3 million from the CCODB of $1,118 million in the scenario included in the May presentation;

(c) an OGP margin of 41.90%, being a reduction from the 42.06% in the May draft budget and the 42.04% in the scenario included in the May presentation.

195 The budget update noted that all costs were based on submissions from the business "as a starting point", and then listed a number of cost reductions that were adopted as compared to the submissions from the business, in particular $12 million for store wages, $5 million for store expenses, $2 million for IT, $2 million for Omni / Marketing, $2 million for Buying & Supply Chain, $2 million for Finance and $1 million for NSO.

196 Mr Ashby's evidence was that the reductions or savings in costs were reductions as against the requests or submissions received from different business divisions for the amount of costs that they be permitted to incur for the coming financial year. Further, he said that these savings and initiatives would not have been included in this document unless he considered that they were realistic and achievable. Further, he said that not every option to reduce the cost submissions from the business included for discussion in the document was adopted. Instead, what was adopted were those that were considered realistic and appropriate.

197 Mr Brookes' evidence was that the figure of $77 million in the reconciliation document was a preliminary figure which had not received any input from the EGM, and which did not have regard to a range of matters that could substantially increase the NPAT.

198 Further, Mr Brookes' evidence in relation to the cost reductions reflected in this document was that he would not have agreed to those matters being included in the proposed budget unless he considered that they were realistic and achievable.

199 Let me now deal with the question of the form of the approved budget.

200 A final draft budget was presented to the board for approval at a board meeting on 16 July 2014. The key components of the approved budget were as follows:

(a) forecast sales of $3,325 million, which represented an increase in sales of $176 million (5.6%) from then forecast FY14 sales;

(b) a forecast OGP margin of 41.86% compared to a then forecast 41.18% in FY14;

(c) a forecast CCODB of $1,122 million, which represented an increase of $74 million from then forecast FY14 costs; and

(d) a forecast NPAT of $107 million, compared to $98.5 million in FY14.

201 As Myer points out, it is evident that each of the sales, OGP margin, CCODB and NPAT numbers moved throughout the period when the budget was being prepared. For example, as Myer listed, the changes made between the draft May budget and the approved July budget were as follows:

(a) forecast sales were reduced from $3,365 million to $3,325 million;

(b) the OGP margin was reduced (from 42.06% to 41.86%);

(c) the CCODB was reduced from $1,136 to $1,122 million; and

(d) NPAT was reduced from $113 million to $107 million.

202 As compared to the scenario in the May budget presentation, the movement was:

(a) forecast sales steady at $3,325 million;

(b) the OGP margin was reduced (from 42.04% to 41.86%);

(c) the CCODB was increased from $1,118 to $1,122 million; and

(d) NPAT was reduced from $113 million to $107 million.

203 Myer adduced evidence supporting the key assumptions in the budget. The applicant did not adduce any contrary evidence to suggest that these assumptions were unreasonable. What is set out below is Myer's summary provided to me which I accept.

The increase in sales

204 The sales growth of around $176 million compared to FY14 consisted of a number of identified matters. Those matters can be summarised as follows:

	Reason for increase/decrease compared to FY14	**Amount of increase/decrease compared to FY14**	**Comments**
1.	**New stores**	$50 million	"Cannibalisation" of sales on surrounding stores was forecast to be ~$10

			million. This figure was taken into account in the sales figures for "same stores" (see Item 8 below).
2.	**Completed refurbishments**	$69 million	
3.	**Store closures**	($12 million)	
Total impact on sales for new stores, refurbished stores, and store closures		$107 million	
4.	**Online sales growth**	$40 million	"Cannibalisation" of sales on the department stores was forecast to be $17 million. This figure was taken into account in the sales figures for "same stores" (see Item 8 below).
5.	**Merchandise initiatives**	$37 million	
6.	**Free standing stores**	$3 million	
7.	**Sass & Bide sales growth**	$9 million	
8.	**Same stores**	($19 million)	This was based on: (i) assumed cannibalisation from online sales of ($17 million); (ii) assumed cannibalisation from new stores of ($10 million); and (iii) the expectation that $8 million of sales from the closed Hurstville store would be retained in surrounding stores
	<u>**TOTAL**</u>	$176 million	

205 First, as to these matters, there were the expected additional sales from the opening of two new stores in FY15, being Mt Gravatt and Joondalup, which stores were forecast to have sales of $50 million or more. Now that figure did not take into account the amount of sales that it was expected these two new stores would take away from existing nearby Myer stores. But this was forecast at $10 million, and was taken into account by Myer in projecting its sales figures for the "same stores" as in FY14. The evidence was that the estimated sales for each new store was based on a large amount of work undertaken over a number of years, including in relation to the "initial business case" for the new stores. Further, the initial business case was prepared mainly by the Property team but also with input from the Merchandise team and the Stores team; the business case was a detailed document that contained information regarding a number of key matters. The business case documents were then "updated" prior to the FY15 budget being finalised.

206 As to how the cannibalisation figures were arrived at, Mr Ashby's evidence was that analysis was done, including by using information obtained from the Myer One Customer database, to determine the likely impact of the opening of the new stores on surrounding stores. He said that the approach used was an analytical approach that had been used by Myer since before he joined the company, and that based on his experience, he considered that it provided a reasonably reliable estimate of likely sales and cannibalisation.

207 It may be noted that the two new stores were scheduled to open ahead of the key trading season of Christmas/New Year and so Myer would likely have had the benefit of their assistance during that season.

208 Second, there were the expected additional sales following the completion of the redevelopment or refurbishment of a number of stores that would be fully operational again during FY15 being Adelaide, Indooroopilly, Miranda and Macquarie, as well as the completion of the refurbishment of the Melbourne store (Emporium). Adelaide, Indooroopilly, Miranda and Macquarie would all be operational before the key Christmas/New Year trading season. The evidence was that the Property, Stores and Merchandise teams performed a detailed analysis and prepared data regarding the predicted impact of redeveloped and refurbished stores. Having regard to this work, the forecast was for $69 million in additional sales to be achieved. This forecast also had regard to the fact that one store (Warringah) was being refurbished during FY15.

209 Third, the approved FY15 budget took into account the likely effect on sales from the closure during FY15 of the store at Hurstville. This was the only store that operated during FY14 that was expected to close during FY15. The $12 million of sales for the Hurstville store during FY14 were therefore taken into account. In addition, Myer forecast the amount of those sales that would be retained in surrounding Myer stores. Its estimate was $8 million or 65% of those sales. This estimate was based on the detailed work of the Stores, Property and Myer One Teams. This $8 million in increased sales for surrounding stores was taken into account by Myer in projecting its sales figures for the same stores as in FY14.

210 Fourth, the budget assumed growth in online sales of about $40 million in FY15 compared to FY14. The evidence was that this figure was developed primarily by the Online team, and that this took into account a number of matters, the most important of which was that online sales were consistently doubling (year-on-year) within Myer.

211 The work undertaken by Myer also had regard to the extent to which in-store sales may be impacted (cannibalised) by online sales. It was concluded that in-store sales would be cannibalised by approximately $17 million. Accordingly, the net increase in sales based on increased online sales was $23 million. These forecasts were based on a large amount of analysis and modelling.

212 Fifth, a number of merchandise initiatives were predicted to generate increased sales of $37 million. The key merchandise initiatives identified in the budget, and addressed in the evidence, were the introduction of new brands, the extension of existing brands, development of MEBs on more of a "design led" basis, the introduction of "Giftorium" which was a dedicated area in each Myer store that contained products that were suggested Christmas gifts, and the launch of Myer's new branding ("Find Wonderful") which was expected to assist sales.

213 Sixth, the trial of three free-standing stores was expected to deliver sales of $2.5 million in FY15.

214 Seventh, Myer expected increased sales of $9 million for the Sass & Bide brand.

215 As a cross-check or validation on the numbers arrived at, Myer then analysed its forecast sales on a "comparable sales" basis. This involved Myer comparing the forecast sales for FY15 to the sales generated by the same stores that operated in FY14 (i.e. ignoring new stores, refurbishment effects etc.). The result of this comparison was that the budget of $176 million in sales growth involved comparable sales growth of about 1% from FY14. Mr Ashby's evidence was that based on his experience such sales growth was achievable. Further, comparable sales growth in FY14 compared to FY13 was 1.2%, and so the assumed comparable sales growth in FY15 was less than in FY14.

The improved OGP margin

216 The budget projected an increase in OGP margin from 41.19% in FY14 to 41.86% in FY15. Two factors were most relevant to the expected improvement in the OGP margin.

217 The first factor was changes in the sales mix, and more specifically an increase in MEBs as a proportion of sales from 20.29% of sales to 22% of sales. The evidence was that in the years prior to FY15 Myer had experienced growth in MEB sales greater than 1%, and Myer had in FY14 invested additional funds in MEBs in the areas of new developments and new designs, designers and product ranges, which would support the anticipated growth. In light of these

strategies and historical growth, Mr Brookes considered the assumed growth in MEBs to be reasonable.

218 The second factor was a decrease in anticipated markdowns from 9.3% to 8.9% of total sales. These anticipated markdowns were estimated by the Merchandise team. The evidence in relation to markdowns was that the reduction in FY15 was supported by various new initiatives, including planners within the business being given an increased role in buying and planning decisions, Myer becoming more aggressive on entry price points for private label brands rather than relying on markdowns, an overall reduction in the range of products, plans to be less reliant on promotions, which would thereby reduce promotional markdowns, and Myer's buying cycle being reviewed more frequently rather than once a season, giving less markdowns.

CCODB

219 The estimate of the CCODB used in the budget was $1,122 million, being an increase of $74 million on the CCODB from FY14. Of this amount, about 3% related to "underlying costs", whilst $35 to $50 million related to other matters (Other Costs). These Other Costs were included in the budget toward the top end of the contemplated range. Examples of the Other Costs include matters such as MAIP and CEO One Time Costs. The evidence was that these costs were largely discretionary or were largely dependent on Myer achieving its forecast financial metrics (including earnings targets). Therefore, if performance of the business was worse than projected, then costs could be removed from the MAIP and CEO One Time Costs relatively easily.

Forecast NPAT

220 The forecast NPAT was materially dictated by the result of the forecasted figures in relation to sales, OGP margin and CCODB. The following points may be noted.

221 First, the applicant does not allege that any particular aspect of Myer's forecast of sales for FY15 was unreasonable, for example, that forecast sales for new stores was unreasonable or not based on reasonable grounds, or that the forecast increased sales from refurbished stores was unreasonable or not based on reasonable grounds.

222 Second, the applicant does not allege that the forecast OGP margin was unreasonable or not properly based. Further, it has adduced no evidence to the effect that the forecast OGP margin

for FY15 was unreasonable or not properly based or that the forecast for MEB growth and/or for a decrease in markdowns was unreasonable.

223 Third, the applicant does not allege that the forecast figure for CCODB was unreasonable or not properly based. Further, it has adduced no evidence to the effect that the forecast of CCODB for FY15 was unreasonable or not properly based.

224 In summary, Myer's evidence has set out what its forecasts were in relation to each of these matters, and provides detail as to how the forecasts were arrived at. I am not in doubt that more than sufficient cogent evidence was adduced by Myer to support a reasonable basis for each of these aspects of the budget.

Events after approval of the FY15 budget and before the 11 September 2014 representation

225 Now the applicant has focused on the period between the approval of the FY15 budget on 16 July 2014 and when Mr Brookes made his comments on 11 September 2014.

226 On the applicant's case, as a result of what occurred during this period, Myer through not only Mr Brookes and Mr Ashby but also its directors knew that its budget was unrealistic, and had determined that a realistic NPAT was in fact only $73 million.

227 I would say now that I reject this aspect of the applicant's case. But let me go into some detail.

228 The applicant relies on several specific matters during this period.

229 The first matter pointed to by the applicant is that after approval of the FY15 budget on 16 July 2014, Myer continued to model profit scenarios that were inconsistent with that budget. The applicant relied in particular on two documents. Those two documents were an email from Ms Reid to Mr Ashby dated 4 September 2014, and the attachment to that email which modelled various scenarios for FY15. Let me set out both of these documents.

230 The email said the following:

> Hi Mark,
>
> As discussed with Davina / Olivia, attached are various npat scenarios for FY15 using comments in the release document:
>
> - scenario 1 – using all comments in the release document, including ebit guidance
> - scenario 2 – using all comments, but provide no ebit guidance
> - scenario 3 – assumes a larger improvment in OGP than in scenarios 1 & 2

- scenario 4 – assumes sales growth of $100m (+3.2%)
- scenario 5 – more moderate sales growth of $85m (+2.7%)
- scenario 6 – assumes no sales growth

npat in the various scenarios ranges from $73m (scenario 6) up to $123m (scenario 3).

Can we discuss when you have a minute.

231 The NPAT scenarios were the following:

FY15 Scenarios

	FY14 Actual	FY15 Budget	FY15 Bloomberg consensus	FY15 Scenario 1	*Using all comments in market release document, including ebit guidance*	FY15 Scenario 2	*Using all comments in market release document, except ebit guidance*	FY15 Scenario 3	*Assume OGP modeled at 50bps improvement*
Sales	3143	3324	3249	3293	based on growth of 4.8%: refurb stores completion $40m, plus 2 new stores $50m, plus comp growth 2% $60m (comp includes online growth)	3293	same as scenario 1 $150m (+4.8%) growth	3293	same as scenario 1 $150m (+4.8%) growth
OGP	1295	1399		1363		1363		1373	
% to Sales	41.19%	42.08%		41.39%	assumes 20bps modest OGP margin expansion	41.39%	same as scenario 1 +20bps	41.69%	50bps improvement
CCODB	-1042	-1129		-1099	growth of 5.5% required to hold ebit margin	-1079	growth of 3.5% (FY14 +3.5%, FY13 +3.1%) continue to invest	-1079	same as scenario 2 +3.5% growth
% to Sales	33.16%	-33.95%		33.37%		32.75%		32.75%	
EBITDA	253	270		264		284		294	
Depreciation	-92	-97		-96		-96		-96	
EBIT	160	173	185	168		188		198	
% to Sales	5.10%	5.20%	5.69%	5.10%		5.72%		6.02%	
Interest	-22	-21		-22		-22		-22	
Tax	-40	-46		-44		-50		-53	
NPAT	98	107	112	102		117		123	

	FY14 Actual	FY15 Budget	FY15 Bloomberg consensus	FY15 Scenario 4	*$100m growth in sales*	FY15 Scenario 5	*Moderate sales growth*	FY15 Scenario 6	*Flat Sales*
Sales	-2	3324	3249	3243	$100m sales growth, 3.2%	3228	$85m sales growth, +2.7%	3143	No sales growth
OGP	-77	1399		1342		1336		1301	
% to Sales	3942.86%	42.08%		41.39%	same as scenario 1 +20bps	41.39%	same as scenario 1 +20bps	41.39%	same as scenario 1 +20bps
CCODB	160	-1129		-1079	same as scenario 2 +3.5% growth	-1079	same as scenario 2 +3.5% growth	-1079	same as scenario 2 +3.5% growth
% to Sales	8187.86%	-33.95%		33.26%		33.41%		34.32%	
EBITDA	83	270		264		258		222	
Depreciation	0	-97		-96		-96		-96	
EBIT	83	173	185	168		162		126	
% to Sales	-4245.00%	5.20%	5.69%	5.17%		5.00%		4.02%	
Interest	0	-21		-22		-22		-22	
Tax	0	-46		-44		-42		-31	
NPAT	0	107	112	102		98		73	

232 But Mr Ashby's evidence was that Ms Reid was modelling what NPAT figures analysts might create for FY15 based on the documents Myer released to the market concerning its full year results for FY14. Accordingly, the scenarios that Ms Reid had created were not modelling Myer's views on what its NPAT might be for FY15. That evidence is consistent with the document. Further, in no realistic scenario was Myer forecasting that there would be no sales growth in FY15, which was the modelled scenario giving rise to NPAT of $73 million. And I agree with Myer that that would, on any view, have been an odd assumption given the significant additional sales anticipated from the new and refurbished stores. In my view there is no substance to the applicant's assertions relying upon these two documents.

233 The second matter relied on by the applicant was that Myer's board had received a document titled "Guidance issues for discussion" prior to 10 September 2014 circulated by Mr Brookes which concerned the issue of whether Myer should provide profit guidance to the market. This document stated that sales were very hard to predict and NPAT was hard to forecast given the fickle nature of the consumer market. It was also noted that Myer (through the board) removed reference to a forecast NPAT increase from the draft documents provided to it. From this, the applicant said that it may be inferred that the board was aware that Myer's FY15 budget was in doubt and/or unlikely to be achieved.

234 Let me set out this document:

September 4th 2014

Guidance issues for discussion

Current Median Bloomberg consensus:

	FY14	FY15
NPAT	100.0	112.0
EBIT	167.0	185.0

	Arguments for	Arguments against
Sales Guidance	• Demonstrates benefits of investment in stores coming through and gives credibility to support promises of improved sales outlook	• Very hard to predict • Credibility risk if we don't hit the forecast
NPAT Guidance	• Gives certainty for market consensus outcome • Allows us to talk more broadly about the drivers of our expected FY15 P&L • Low risk strategy in relation to managing consensus and adhering to revised listing obligations • Avoids the need to disclose the STIP payment which would be a tough message to handle in context of FY14 result **In the absence of NPAT guidance range:** • It will be very hard for CEO, CFO and Investor Relations to manage consensus down to an appropriate level without calling out the plan and quantum for STIP • Credibility risk if we have to issue a statement to bring consensus shortly after announcement • Market could assume strong sales growth driven by new stores, refurbishments, MEBS, online, sass & bide growth. This could be compounded by analysts applying strong comparable store sales growth of 2% seen in Q4 to FY2015 to FY2015 • If no NPAT guidance is given, then GP margin and detailed CODB commentary would be needed to manage expectations down	• Hard to forecast given the fickle nature of the consumer market • Consensus is not currently far from FY15 budget NPAT of $107 million • Could use commentary around challenging trading environment in relation to start of FY2015 to manage expectations down • Returns Myer to the guidance cycle which we have effectively now broken • It is going to be very difficult not to give guidance

Goldman Sachs feedback

- Confirmed GS supported our thoughts around NPAT range as being the preferred option.
- Added that this approach would allow us to speak to the analysts broadly about potential for bonuses to be paid without having to give the number. They pointed out that the reference to people investment in the outlook statement already flags this

Flagstaff feedback

- After discussing the pros and cons, Tony Burgess supported giving guidance. He recommended using 'in the vicinity of 5%' as opposed to a range of between x and y NPAT growth.

235 Now the document headed "Guidance issues for discussion" provides a number of arguments for and against providing guidance in relation to both sales and NPAT. It was sent from

Mr Brookes to the board under cover of an email which said: "Davina [Gunn] has put together, to assist our thoughts, a one page document that puts forward some pluses and minuses [to giving guidance]". But there is no sound basis to draw an inference that the reason for not issuing guidance was the specific "arguments against", being that sales are very hard to predict and NPAT is hard to forecast. And even if that inference was to be drawn, the applicant then relies on the drawing of a further inference that because sales and NPAT are hard to predict/forecast, the board was aware that the budget was in doubt and/or unlikely to be achieved. In my view such reasoning involves to say the least a non sequitur.

236 But in any event, Mr Brookes said that he did not consider the FY15 budget to be in doubt or unlikely to be achieved, and he did not recall any other board member expressing such a view. That evidence was not successfully challenged in cross-examination.

237 Further, Mr McClintock said that each of the matters in the "Arguments against" column in the document was discussed and considered as relevant to the decision not to provide NPAT guidance in the ASX Release, but that he was not thinking about the budget in the context of that document.

238 Further, other directors gave evidence that:

(a) none of them specifically recalled the document or discussions in relation to it; and

(b) none of them recalled thinking that the FY15 budget was unrealistic or was unlikely to be achieved, or that it was in significant doubt.

239 Further, they gave evidence that the fact that the trading results for August 2014 were behind budget would not have caused them to form the view that the budget was unrealistic or unlikely to be achieved, or that it was in significant doubt. The reason for this is the relative insignificance of August results to the full year results given it was one of the less significant trading months.

240 Now the applicant has referred to the August FY15 results, which were available prior to 11 September 2014, which results showed that sales, OGP margin and NPAT were all behind budget. These were presented at a board meeting on 10 September 2014. But as I say, Myer's witnesses did not consider that the fact that results in August were behind budget was a reason for considering that Myer could not achieve the FY15 budget figures, including in relation to sales and NPAT.

241 The applicant has also referred to the sales results for the first six weeks of FY15, which included the first two weeks of September. But the significance which the applicant seeks to place on the limited results in August and early September as leading to an inference that Myer held a view that its FY15 budget should be abandoned and that it expected a far lesser NPAT for the year, particularly an NPAT materially below $98.5 million, was not made out on the evidence.

242 In my view, Myer's witnesses cogently emphasised the importance of the key trading season of Christmas/New Year to its full year results, especially as compared to the relatively insignificant months of August and September. In particular, Mr Ashby gave evidence that sales and profit during Q1 (August – October) had historically not provided a clear or reliable guide for performance for the remainder of the year due to its relatively small size. Mr Brookes also gave evidence that a "1% movement in sales in December or January could make a huge difference to the end NPAT results, whereas missing sales budget's [sic] in the early part of the year would not make much difference to NPAT".

243 Relatedly, August and early September were relatively insignificant to the overall result for a financial year. Q2 in FY14 generated 87.6% of NPAT for FY14, Q4 generated 33.6% of NPAT and Q1 and Q3 generated losses.

244 Further, for FY15, August was budgeted to generate a loss of $10.5 million from sales of $190.1 million. By contrast, December was budgeted to generate NPAT of $61 million from sales of $567.9 million.

245 On 10 September 2014, a board meeting was held.

246 At this meeting, Mr Brookes gave the following update:

> **August Result**
>
> Sales in August were $180.5m down $9.6m on budget. Operating Gross Profit was $72.2m down $6.9m and cost of doing business was $84.5 some $700k less than budget.
>
> As such our Net profit loss was $14.8m which was $4.2m worse than budget.
>
> The result was driven by mix issues with concessions up 96 basis points on budget, an impact on First Margin from the fall-out in sales and higher than budgeted markdowns, particularly in National Brands.
>
> This is a disappointing start to the year, particularly as the first week was particularly strong. The issue is not necessarily the operating gross profit or the cost of doing business, but rather a deterioration in sales.

Whereas we saw a very strong July and first week in August that started the season well; recent weeks have seen disappointing sales which will result in us needing to step up markdown promotional activity to drive topline sales.

This puts us "behind the eight ball" already and will require, even more so, everything at Christmas (including Giftorium) and Stocktake sale to overperform.

247 The board minutes noted the following:

3. Chief Executive Officer's Report

The Board noted the CEO's report and BB spoke to the report.

- August was a difficult month, with sales down $9.6m on budget, resulting in a disappointing start to the year; there will be added pressure for Christmas, including Giftorium, and Stocktake Sale to perform well;
- The Board discussed trading in general; recent weeks have traded better;

…

4. Chief Financial Officer's Report

The Chief Financial Officer's Report was taken as read. The Board noted that:

- August sales were $180.5m, $9.6m (5.1%) below budget and $4.3m (2.3%) below last year. Comparative sales were down 1.42%;
- Results for the month against budget and last year were impacted by the planned issuance of the quarterly mailer containing the MYER One reward cards on August 18 this year to coincide with the ten year anniversary of the MYER One Reward Program, compared to August 8 last year, with impact to sales circa $4.0m;
- Operating Gross Profit was $72.2m, $6.9m below budget and $728k below last year;
- NPAT was a loss $14.8m, $4.2m (40.08%) below budget and $2.3m (18.00%) below last year;
- MEB mix was 19.51% v last year 18.74% and budget 20.04%;
- Online sales were $3.1 m v $1,4m last year and budget $3.9m;
- Stock turns for department stores were 3.55 v last year 3.46.

5. Audit, Finance & Risk Committee Update

The Chair of the Audit, Finance & Risk Committee (AB) reported on the meeting held the previous day on Tuesday 9 September 2014.

The main objective of that meeting had been to review the Appendix 4E and accounts. The main areas of judgement and the significant issues that needed to be brought to the attention of the Committee had been discussed. The auditors (PricewaterhouseCoopers) were in attendance and reported to the Committee on their investigations.

…

8. ASX, Press Release and Analysts Presentation for Full Year FY14 Statutory

> **Accounts**
>
> The Board considered the draft ASX Press Release and Analysts Presentation in detail.
>
> The Board read through each page of the proposed ASX Release and Analysts Presentation. The Board provided input and comments on the draft ASX Release and Presentation.
>
> The Board **resolved** to approve the draft ASX Release and Analysts Presentation as amended subject to the accounts being finalised first.

248 I should note that prior to the board meeting, on 7 September 2014 Mr Brookes sent an email to the directors in the following terms:

> We will have a discussion in regard to Guidance as part of our results announcements for next week. As you may have noticed the results announcement has two alternatives. One with guidance and one with a more general comment regarding the performance. Davina has put together, to assist our thoughts, a one page document that puts forward some pluses and minuses.
>
> Mark and I really look forward to Board's input on this important topic.

249 Ultimately the ASX release excised reference to an NPAT forecast. I will return to this in more detail in the next section.

General

250 Now the applicant says that based upon Myer knowing that the FY15 budget was unrealistic and unlikely to be achieved at the time it was presented and approved by the board and events that occurred after the budget was approved and prior to 11 September 2014, Myer knew a number of key matters. This allegation is set out in paragraph (a)(xxvii) of the applicant's particulars of knowledge, which provides:

> The Applicant provides the following particulars of the allegation in paragraph 21 of the Statement of Claim that the Respondent had knowledge of the matters alleged in paragraphs 19(b) – (e) by 11 November 2014 at the latest.
>
> The Respondent was aware of information about the earnings forecast matter which is alleged in paragraph 19 of the Statement of Claim on the following dates:
>
> (a) 11 September 2014, by which date the Respondent knew through its officers who are identified below that:
>
> …
>
> xxvii. as a result of these matters it is reasonable to infer that the Respondent (through those of its officers who are identified above) knew that:
>
> 1. the Respondent's FY15 budget was unrealistic and was unlikely to be achieved, or at least was in significant doubt;
>
> 2. due to the Respondent's poor sales in the first six weeks of FY15, the Respondent could not reliably "anticipate

delivering sales growth in FY2015", as was announced to the market by the CEO, Mr Brookes, on 11 September 2014;

3. the Respondent was not achieving "modest growth in the operating gross profit margin driven by improved sourcing and the mix benefit from the growth in Myer Exclusive Brands" and therefore had no reliable basis to anticipate this growth, as was also announced to the market on 11 September 2014;

4. the Respondent was achieving actual sales in FY15 which were below those achieved in FY14, and sales at this level were consistent with achieving an NPAT of only $73m in FY15;

5. the Respondent's forecast of 3% growth in CCODB in FY15 announced on 11 September 2014 was dependent on aggressive and unidentified savings; and

6. the Respondent had determined internally that a realistic NPAT forecast for FY15 was $73m,

such that upon the release of the Respondent's results on 11 September 2014 and the Respondent's CEO's statements in the "Preliminary 2014 Myer Holdings Ltd Earnings Call" the Respondent came under an obligation on the basis of its knowledge of its actual and its likely FY15 performance to disclose each of the matters alleged in paragraph 19 of the Statement of Claim;

251 But in relation to the specific matters set out in paragraph (a)(xxvii), the directors each gave evidence that they did not hold, or do not recall holding, the views which it is alleged they held. Further, in their evidence they provided context or an explanation as to why the matters relied on by the applicant were not known to them or were not relevant.

252 Further, each director said that he or she would not have approved the FY15 budget if they believed it was unrealistic, unlikely to be achieved or in significant doubt of being achieved, and nothing that occurred prior to 10 September 2014 altered their view.

253 Further, as I have said, the first six weeks or early period of trading for a year provided little indication of the total sales that Myer would achieve for the entire year. For that reason, the directors did not believe that the results in the months of August and September would have caused them to form a view that the FY15 budget was unrealistic or unlikely to be achieved, or that it was in significant doubt.

254 Further, the directors did not believe they would have approved the FY15 budget unless they were satisfied the OGP margin was likely to increase, and sales results in the early part of the year would not have altered their view.

255 Further, it was far too early in the year to think that Myer would achieve an NPAT materially less than budget.

256 Further, the directors did not recall being presented with an NPAT of $73 million, let alone one that they considered to be realistic.

257 In my view, the clear position on largely uncontested evidence is that Myer through its senior management and each of its directors was of the view and had reasonable grounds for the view that its NPAT in FY15 would be greater than $98.5 million. Mr Brookes "believed that the budget presented to the Board for approval at the July 2014 Board meeting was realistic and achievable". Mr Ashby considered that the process undertaken to arrive at the budget provided an acceptable degree of confidence as to the likely performance of the business, and believed that it was realistic and achievable. Further, each of the directors gave evidence to the effect that they would not have approved the budget unless they considered it to be reasonable.

258 In summary, none of the directors had formed the view by 11 September 2014 that the figures in the budget would not be achieved. Further none of the directors had formed the view by 11 September 2014 that NPAT in FY15 would not be greater than $98.5 million.

259 Further, on the evidence, none of the directors ought to have formed such a view.

260 Before proceeding to the events of 11 September 2014, I should say something on the question of guidance.

Myer's explicit profit guidance by ASX announcements made prior to 2014

261 Following its IPO in November 2009, Myer provided regular explicit profit forecasts and profit guidance updates by way of formal ASX announcements to the market between September 2010 (for FY11) and 2012 (for FY13). Making these formal ASX profit forecasts proved to be a difficult exercise for Myer, because its sales were flat and its profits were in continuous decline throughout this period. Myer reported sales of $3,159m in FY11, $3,119m in FY12 and $3,145m in FY13. It earned NPAT of $163m in FY11, $141m in FY12 and $130m in FY13. Because it had made explicit profit forecasts and gave explicit profit guidance in these years, Myer recognised that it had a responsibility to update the market as to its current profit expectations at regular intervals, as can be seen from the ASX announcements which Myer made between September 2010 and September 2012. Myer made a total of eleven profit guidance announcements during this period seven of which confirmed existing guidance. Significantly, it made announcements whenever it recognised that its expectations for profit

had declined by 5% to 10% from its previous announcement, for example the announcements made on 7 February 2011 and 23 May 2012. This is consistent with the guidance-to-expectation thresholds referred to by a number of the Myer directors in their evidence and it is also consistent with the advice given in ASX Guidance Note 8.

262 The Guidance Note as at 1 January 2014 provides that whilst "ASX does not consider it appropriate to lay down any general rule of thumb or percentage guidelines on when a difference in earnings compared to market expectations ought to be considered to be market sensitive and therefore disclosed under Listing Rule 3.1", ASX goes on to suggest that a variance to guidance equal to or in excess of 10% is material and creates a presumption that guidance needs updating and a variance of less than 5% is not material and does not create a presumption that guidance needs updating. ASX goes on to suggest that "[w]here the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgment as to whether or not it is material" before concluding that "[t]he mere fact that an entity may expect its earnings to differ from its published guidance by more (or less) than a particular percentage will not necessarily mean that its guidance is (or is not) misleading".

263 Following this initial period of giving explicit profit guidance to the market between 2010 and 2012, in the ASX announcement of its FY12 results made on 13 September 2012, Myer announced that it would cease its practice of giving profit guidance and would not provide any sales or profit guidance to the market for FY13. Myer explained the reason for this decision as being that "[t]he outlook is uncertain due to a continued tough retailing environment and subdued consumer confidence".

264 Myer did not thereafter make any ASX announcements giving explicit profit forecasts or guidance, including in respect of FY15, until 19 March 2015 when it announced another unexpected downgrade.

265 Now there appears to have been a debate at the time concerning whether Myer should once again give explicit profit guidance for FY15.

266 Mr Brookes was keen in 2014 that Myer should return to its practice in the era 2010 to 2012, when it gave explicit profit guidance to the market prior to the commencement of each financial year. In an email to Ms Olivia Reeve, Ms Davina Gunn, Mr Ashby and others of 18 August 2014, Mr Brookes commented upon a draft ASX release in respect of the FY14 results

announcement and stated a number of things which he wanted to announce to the market including:

> - In our expectations in regard to improved performance and profitability we should spell out the word now positioned the business and specifically our store network and online operating platform.
> - In our opening couple of lines we should specify that we see a return to sales and profit in this year.
>
> …
>
> - Finally, I would propose that we do look at a debate on guidance, my thoughts would be a line that says we expect sales to grow between 2% and 4% and net profit to grow greater than 5% this year.

267 As I have said, Mr Brookes presented his August board update at the 10 September 2014 board meeting. Mr Brookes advised the board that Myer's sales in August 2014 were down $9.6m against the budget, OGP was down $6.9m and the NPAT loss was $14.8m.

268 Further, as I have already said, shortly prior to the September 2014 board meeting Mr Brookes had circulated to the members of the board a document entitled "Guidance Issues for Discussion", which spelt out various arguments for and against Myer giving explicit guidance to the market in respect of its anticipated sales and NPAT for FY15.

269 Myer appears to have been concerned about the possibility that analysts' expectations might exceed Myer's internal NPAT forecast as disclosed in the FY15 budget, and there might be a need for Myer to manage the analysts', and therefore the market's, FY15 NPAT expectations, downwards.

270 All of the Myer directors except Mr Brookes were clear in their evidence that the board had resolved not to give any explicit profit guidance in the form suggested in the draft release which was considered by the board at its meeting on 10 September 2014. The minutes of the board meeting simply record that the board read through each page of the proposed ASX release and analysts' presentation, provided input and comments on the drafts and resolved to approve the draft release and analysts' presentation "as amended subject to the accounts being finalised first".

271 The announcement as made to the ASX, consistently with the non-executive directors' evidence and the board minutes, omits any reference to a forecast improvement in FY15 NPAT, stating only that Myer "anticipates delivering sales growth in FY15" driven by a number of identified factors, "[w]e anticipate modest growth in the operating gross profit margin" and

"we anticipate the underlying cash cost of doing business will increase by approximately three percent".

272 I will return to this question later.

273 Before turning to 11 September 2014, let me deal with two other matters.

The desire to turn the business around in FY15 and Myer's previously stated optimism

274 The applicant says, which I accept, that Myer had for some time expressed optimism about FY15 as being a turnaround year for Myer. From this foundation it submits that these previous statements motivated Mr Brookes in September 2014 to make a statement which he did not consider to be justified in relation to increased NPAT. But the fact that Myer had anticipated for some period of time that FY15 would see improved results compared to FY13 and FY14 supports, rather than detracts from, the reasonableness of the FY15 budget and Mr Brookes' expectation. It demonstrates that the strategic initiatives that were expected to generate increased sales had been planned and developed over an extended period of time.

275 Now as to these initiatives, the applicant contended that there was nothing special about FY15 in terms of new store openings and refurbishments, and that new stores open every year. But Mr Ashby's evidence was that there was something special about FY15. This is borne out by the documents.

276 The FY13 budget shows that the net position based on new stores / store closures was an increase in sales of $38 million. This can be seen from the sales waterfall, which records $53 million of sales for three new stores (Fountain Gate, Townsville and Mackay), with a loss of $15 million in sales from the closure of Forest Hill and Tuggeranong. It is also recorded that $19 million in sales will be lost due to refurbishments. Therefore, the position as a result of new stores / closed stores / refurbishments for FY13 was anticipated to be a sales increase of $19 million.

277 The FY14 budget shows that the net position based on new stores / store closures / refurbishments was a decrease in sales of $5 million. This can be seen from the sales waterfall, which records $26 million of sales from three new stores (Shellharbour, Fountain Gate and Townsville), with a loss of $15 million from the closure of Fremantle and Elizabeth. It is also recorded that $16 million will be lost due to refurbishment. Therefore, the position as a result of new stores / closed stores / refurbishments for FY14 was anticipated to be a sales decrease of $5 million.

278 Contrastingly, the FY15 budget shows that the net position based on new stores / store closures was an increase in sales of $38 million, with a further $69 million in increased sales anticipated as a result of store refurbishments, meaning that the result of new stores / closed stores / refurbishments for FY15 was anticipated to be a sales increase of over $100 million.

279 Therefore, the result of store openings (new stores and refurbishments) in FY15 was significantly different to preceding years.

280 Further, management did expect Myer's performance in FY15 to represent a turnaround on FY13 and FY14 for the reasons that they identified in their evidence.

281 Further, the applicant seeks to characterise the turnaround of results in FY15 as being no more than an aspiration or a desire. Plainly Myer desired such a result. But it had put in place significant underlying initiatives and plans which made the expectation of such a turnaround reasonable.

282 Further, Myer had plans or targets for growth in the years preceding FY15 as well. For example, Myer had a strategic plan for 6.1% sales growth in FY14. Yet, when it came to its budget for FY14, it only included a forecast of sales growth of 1.9%. For example, sales in FY13 were $3,145m, and the FY14 budget forecast sales of $3,205m. Similarly, Myer's strategic plan was for NPAT in FY14 to be only a -0.7% decrease on FY13. However, in the FY14 budget the forecast decline in NPAT was much higher, at -6.9%. Myer analysed and considered those figures and arrived at what it considered to be a reasonable forecast. Further, the strategic plans of Myer showed a desired NPAT growth of 17.5% in FY15; yet, the forecast NPAT growth included in the FY15 budget was only around 9%.

Targeting of NPAT growth and EPS hurdles

283 The applicant submits that Mr Ashby was explicitly targeting 2015 NPAT growth, which would achieve the earnings per share (EPS) hurdles which applied under the LTIP. It submitted that it was clear that there was a measure of reverse engineering in this budget in order to achieve an NPAT figure which would show growth in NPAT and therefore earnings per share so as to justify payments to be made to those executives who were eligible under the LTIP. But as Myer points out, there are difficulties with such a submission.

284 First, the 9% growth does not correspond to past EPS hurdles, which were in the range of NPAT growth of 2 to 7%.

285 Second, the applicant's proposition must be that executives would become entitled to bonus payments under the LTIP simply because the budget forecasted a certain level of NPAT growth and irrespective of actual performance and whether that growth was in fact achieved. This is problematic to say the least.

286 Third, Myer's "target" in its internal plans was for NPAT growth of 17.5% in FY15. If it was to reverse engineer the budget to reach a particular NPAT result, it is unclear why it would have chosen the 9% figure rather than its stated target of 17.5%.

287 Fourth, if the concern of executives was to put in place a budget that would increase their personal remuneration (through bonuses), then the incentive was in fact for them to set a lower budget, which would make it easier for them to receive their bonus payments under the MAIP scheme. Indeed, for Mr Brookes his MAIP payments were entirely dependent on sales and earnings measured as against the budget, and for Mr Ashby 80% of his MAIP payments were dependent on sales and earnings measured as against the budget.

288 In my view, the applicant's submission that the budget was not an assessment of realistically achievable performance of the business is largely built on the foundation of the erroneous submission that the budget was reverse engineered to achieve certain EPS hurdles so as to justify executives being paid LTIP payments.

289 Further, its submission that the budget was not an assessment of realistically achievable performance is also advanced by reference to internal Myer documents which refer in slides which set out drafts of the budget, to "market expectations" and analysts' criticisms, and by reference to references by management to the fact that the budget should reflect, or be aligned to, "the strategy" of the business.

290 But that senior management considered that the budget should reflect, or be aligned to, the strategy of the business is hardly surprising. The strategy of the business had been developed over time, with oversight and input from the board, and was backed by investment by the business. So, by way of practical example, part of the strategy of the business was to open certain new stores. Investments were made to open those new stores, with the expected result of this investment (increased net sales for the business) being developed in detailed business cases associated with the opening of the new stores. If Myer was to develop a budget that ignored its strategy (and, therefore, the realities of its business), and the increased sales expected from these new stores, then the budget would not reflect, or be aligned to, the strategy

of the business. In turn, the budget would not be a realistic forecast of the expected performance of the business.

291 As to the reference in internal documents to "market expectations" and the views of analysts, Mr Ashby was asked questions about references in documents to analysts' views as well as matters such as EPS. His evidence was that whilst regard would be had to such matters, and while (unsurprisingly) it was a desire of Myer to achieve EPS growth and respond to analysts' criticisms that were placing pressure on the share price, it was not a process whereby the figures in the budget would be constructed so as to meet some pre-conceived targets (and independently of whether they were realistic).

292 As Mr Brookes explained: "The objective of management and the board is to try and enhance the return for our shareholders, and so, therefore, we provide a budgeting process that's robust to give us an accurate budget that can be supported and backed with the alternate – with the final motive to provide a better return for our shareholders". Mr Brookes' evidence was that he did not recall any discussion about the need or intention or desire to produce a certain EPS growth.

293 Further, that references to market expectations and the like would be included in material sent to the board is not surprising. As Mr McClintock explained, the budget would be built from the "bottom-up", and at the end of that process the board would want to know whether the result forecast by the budget was likely to meet the expectations of shareholders and analysts. In this regard it was relevant information which the board wished to see.

294 Further, that the budget was *not* reverse engineered to meet some result (independently of the actual expected performance of the business) is demonstrated by the detailed evidence as to how the various key assumptions in the budget were arrived at.

295 Further, the evidence of the directors was that the budget was not target based in the sense of a top-down "target" number being imposed.

296 Let me now turn to 11 September 2014.

11 TO 30 SEPTEMBER 2014 EVENTS

(a) The 11 September 2014 representation

297 On 11 September 2014, Myer issued an ASX and media release dealing with its full year results for the year ending 26 July 2014. In relation to the ASX release, little guidance was given concerning FY15. The following was said:

> "Myer is positioned to deliver an anticipated improvement in sales in FY2015 benefiting from the recently refurbished stores at Adelaide and Indooroopilly, expansion of our flagship Melbourne City store, the imminent launch of two new stores at Mt Gravatt (October 2014) and Joondalup (November 2014) and the completion of refurbishments at Macquarie (October 2014) and Miranda (November 2014).
>
> "We expect continued online sales growth, and a positive customer response to several exciting new brands including Alex Perry and L Lisa Ho and a strengthened menswear offer with the introduction of brands such as M.J. Bale, Herringbone and Scotch & Soda.
>
> "We look forward to leveraging the valuable insights and experience of our recently strengthened leadership team as we continue to evolve our strategy and deliver improved shareholder value," said Mr Brookes.

298 The following was also said concerning the outlook:

> **OUTLOOK**
>
> As we move into FY2015 we anticipate realising the benefits from recent investments and a number of strategic initiatives. We see this as a time of opportunity and will continue to invest to position Myer at the forefront of a rapidly changing retail environment.
>
> The business anticipates delivering sales growth in FY2015 driven by:
>
> - Full benefit of refurbished Adelaide (SA) and Indooroopilly (QLD) stores following completion of major refurbishments in May 2014 and June 2014 respectively as well as the opening of additional space at our Melbourne City (VIC) store in late May 2014;
> - Opening of two new stores before Christmas, (Mt Gravatt (QLD) and Joondalup (WA)). This will be partly offset by the annualised impact of the Dandenong (VIC) and Elizabeth (SA) store closures and the closure of our Hurstville (NSW) store scheduled for early 2015;
> - Completion of the remaining two major store refurbishments (Miranda (NSW) and Macquarie (NSW)) in part offset by a major refurbishment at our Warringah (NSW) store;
> - Continued growth of the online business supported by enhanced customer experience achieved through improved website functionality, content, and lower-cost fulfilment, as well as a number of initiatives including 'Click & Collect' in all stores and the roll-out of 1,400 iPads to stores which provides customers with a significantly expanded product range;
> - New partnerships with Australian designer brands such as Alex Perry, by Johnny, M.J. Bale as well as continued growth in sass & bide, Myer Exclusive

Brands, and other national and international new brands; and

- Significant new Christmas merchandise and marketing strategies.

We anticipate modest growth in the operating gross profit margin driven by improved sourcing and the mix benefit from the growth in Myer Exclusive Brands, offset by lower average exchange rates.

We are committed to investing in the business in FY2015 and we anticipate the underlying cash cost of doing business will increase by approximately three percent.

We are also planning to invest between $35 and $50 million, dependent on business performance, to focus on:

- Accelerating the delivery of our omni-channel strategy;
- Investing in our people including enhanced training and development, strengthened leadership, performance-based reward and recognition, and increased frontline management in stores;
- Optimising the Myer Exclusive Brands strategy;
- Customer service innovation; and
- Refreshing the Myer brand.

These investments are important to delivering the operational improvements and capabilities required to underpin long-term, sustainable growth.

Strong cash generation is expected to strengthen our balance sheet and support capital investment in the business of approximately $80 million (gross).

The recent strengthening of the leadership team including the appointments of Daniel Bracken as Chief Merchandise and Marketing Officer, Richard Umbers as Chief Information and Supply Chain Officer, and Gary Williams as Executive General Manager Strategic Planning and Business Development is expected to contribute to the evolution of our strategy.

(Emphasis added.)

299 But nothing was said concerning NPAT. I note that an earlier draft had said "[Whilst some recent cost growth pressures such as labour will begin to moderate, the continuation of investment for future growth is expected to result in a flat FY2015 EBIT margin against FY2014, and assuming no significant change in market conditions, FY2015 NPAT growth in the vicinity of 5 percent]" but this had been removed.

300 There then occurred an analysts briefing at 10.00 am (Melbourne time) which involved a slide presentation. The briefing was webcast. One slide stated:

FY2015 outlook

- Anticipate sales growth
- Modest growth in operating gross profit margin driven by:
    - Improved sourcing

    - Mix benefit of Myer Exclusive Brands growth
    - Offset by lower average exchange rate
- Committed to investing in the business
- Strong cash generation expected to:
    - Strengthen balance sheet
    - Support capital investment of approximately $80 million
- Recent strengthening of the leadership team expected to contribute to the evolution of our strategy

> "Investments are important to delivering operational improvements and capabilities required to underpin long-term growth"

301 The reference to profit growth in the draft had been removed. An earlier draft had bracketed "[FY2015NPAT growth in vicinity of 5 percent]".

302 There was also a disclaimer in both the ASX release and the slides in the following terms:

> All numbers are unaudited. The financial information includes non-IFRS information which has not been specifically audited in accordance with Australian Accounting Standards but has been extracted from the Preliminary Full-Year Financial Report (Appendix 4E). This release may contain "forward-looking statements". Forward-looking statements can generally be identified by the use of words such as "may", "will", "expect", "intend", "plan", "estimate", "anticipate", "believe", "continue", "objectives", "outlook", "guidance" and similar expressions. Indications of plans, strategies and objectives of management, sales and financial performance are also forward-looking statements. Forward-looking statements are not guarantees of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are outside the control of Myer. Actual results, performance or achievements may vary materially from any forward-looking statements. Readers are cautioned not to place undue reliance on forward-looking statements, which are current only as at the date of this release. Subject to law, Myer assumes no obligation to update such information.

303 The following persons participated:

> **CORPORATE PARTICIPANTS**
>
> **Bernie Brookes** *Myer Holdings Ltd – CEO and MD*
>
> **Mark Ashby** *Myer Holdings Ltd – CFO*
>
> **Tony Sutton** *Myer Holdings Ltd – Executive General Manager Stores*
>
> **CONFERENCE CALL PARTICIPANTS**
>
> **Michael Courtney** *Bank of America Merrill Lynch – Analyst*
>
> **Ben Gilbert** *UBS – Analyst*
>
> **Michael Simotas** *Deutsche Bank – Analyst*
>
> **Andrew McClelland** *CBA – Analyst*

Rob Freeman *Macquarie Group – Analyst*

David Thomas *CLSA – Analyst*

Shaun Cousins *JP Morgan – Analyst*

Craig Woolford *CitiGroup – Analyst*

Tom Kierath *Morgan Stanley – Analyst*

Grant Saligari *Credit Suisse – Analyst*

Daniel Blair *CIMB – Analyst*

Craig Stafford *UBS – Analyst*

304 Mr Brookes made the presentation concerning the full year results announcement for FY14.

305 As part of the presentation he stated:

> Our results for the 2014 year are in line with expectation and as previously broadcast to the market demonstrates significant investment that we have undertaken this year and investment that we will undertake next year. We maintained our total sales as flat, despite significant disruption in the business.
>
> We closed the Dandenong store and closed the Elizabeth store and we undertook four significant refurbishments and these were four of our top 25 stores and they included Indooroopilly, which has just recently reopened, also Adelaide, which has recently reopened and that was a major refurbishment and also Miranda and Macquarie which will open in the last half of this calendar year. We are looking forward to both of those coming back online as well.
>
> The pleasing part was that our like-for-like sales growth grew by 1.2% for the year and in fact in the last quarter, we had a very strong like-for-like sales growth, just on 2.1% and that was pleasing, giving us a good momentum coming into this year.
>
> That means that our like-for-like sales growth has in fact increased eight of the last nine quarters. We made a deliberate plan in the last quarter to push our mid-year sale back a few weeks and that resulted in the best mid-year stocktake sale that we have had in some four years.
>
> Our operating gross profit was down on prior year and that was impacted by several factors and Mark will take you through those today.
>
> It was obviously a deliberate investment by us, particularly as business turned around following the announcement of the budget and the unseasonal warm weather. However, we were impacted mainly by the depreciation of the Australian dollar and Mark will cover that off.
>
> Increased investment that we have had in product development, ensuring that we have a design based business and that for us is really important as we go forward with our Myer Exclusive Brands.
>
> We also had a very strong customer response to a number of loyalty initiatives and they included a lot of points initiatives that drove customers into our store, particularly as the business was a little patchy during the course of the year.
>
> Part of that operating gross profit was also impacted by the investment that we made in the business and specifically investing in Myer exclusive Brands and also the costs

were impacted by both omni-channel investment and investment in store network and Mark will take you through those cost imperatives.

Our EBIT results also demonstrate the flagged increase that we had in cost of doing business, being our investment in wages and omni-channel for the last 12 months.

As the only listed Australian department store, we announced yesterday a dividend of AUD0.055 fully franked and that represents an increased payout ratio. So the Board and management have been able to successfully return funds to shareholders through the dividend and at the same time continue significant investment. And that investment is in the magnitude of AUD80 million capital and up to AUD50 million in Op Ex alone in this year.

The pleasing part is despite that investment and despite the disruption to the business, we have continued comparable store sales growth and at the same time we were able to invest in the future.

The highlights for this year also included the successful and ongoing execution of our strategy. Pleasingly we were once again able to increase the hours allocated in each store for customer service. The customer service announcements are now starting to reflect in the improvements that we get in our Net Promoter Score.

Further growth in our Myer Exclusive Brands now represent 20.3% of mix. There is no doubt it takes a long time to build a good Myer Exclusive Brand business. Back in 2010, our business was 14.3% and today up at over 20.3%. You have to move along with the customer and more importantly it is hard work to get Myer Exclusive Brands established as brands in the business and we are working at that and continue to work at it and we have done quite well this year.

We now have three brands over AUD50 million and some of our best performing brands include Trent Nathan and Tokito, some good success with some of our Myer Exclusive Brands.

We have also seen an enhanced merchandise offer with a number of key new brands that I will call out later and they are actually on show on our mannequins out the back and I will talk about a little bit of those a little bit later as well. We are really pleased with some of the new brands we have been able to secure.

Over AUD50 million in Myer One rewards cards were given out this year so we are really pleased that we were able, at record numbers, to reward our Myer One customers with significant reward cards, over AUD50 million and that now generates over AUD200 million in sales because the multiple factor of spend has gone from 3.8 times to up over 4 times.

Really pleased with the progress we have made with our online offer. The money that we've spent on stability of the site and being able to take large quantities of orders and people visiting our site. The functionality has improved and our 3PL that we have established has given us a great opportunity to improve our fulfilment.

Pleasingly we now have Click & Collect in every store in Australia. I will talk a little bit later about an exciting roll out of our iPads and the ability to make our smaller store our largest store from today.

Significant progress and optimising our store network with the closure of two stores that didn't quite fit our criteria and also a number of refurbishments and the four big refurbishments. In addition to that, the closure of non-performing stores will also stretch as today we've announced the closure of our Hurstville store.

Pleased that we have now got a strengthened leadership team. We are excited by the opportunity to introduce today our strong leadership team and the changes that we have made reflecting the new skills that we needed in the business.

Overall the benefits we have achieved of significant investment in a patchy environment has given us an adequate result.

306 Later he stated:

Let me now in a couple of slides take you through more formally our outlook.

Firstly our sales outlook. We do see anticipated sales growth this year. We get the full benefit of both the Adelaide and Indooroopilly store that have already opened. We get the additional space in the Melbourne store, and that's 7000 square metres for MyKids. I'd also add that the opening of Emporium and H&M next to us has increased foot traffic, also building that store's volume as well.

The opening of two new stores before the very important Christmas and stocktake trading period of Mt Gravatt and Joondalup will be a little bit offset by the closure of Dandenong and Elizabeth, as they circle a full year closure, and also the Hurstville store closure which will be in February as well.

The completion of the remaining two refurbishments in the last half of this year, which is Miranda and Macquarie, will be a little offset – somewhat offset by the major refurbishment of Warringah.

Continued growth in the online business, and again doubling for the last two years and now becoming quite a significant percentage of our business.

New partnerships with Australian designers, some we've touched on today. Alex Perry, L Lisa Ho and by Johnny, and some we're yet to announce. Continued growth in Myer Exclusive Brands, sass & bide, and other national and international brands, and the exciting new Christmas marketing strategy that we're about to implement.

We do see this as a time of opportunity in our sales environment.

We are accelerating our investment in 2015. We are committed to investing in the business. The balance between shareholder return and investment is something that we take carefully, but it's important that we invest in the business with the opportunity that's around us in the marketplace at the moment.

Our underlying cash cost of doing business will increase by approximately 3%. There is ease in the cost of wages, as we've already highlighted to the market many times. In addition to that, easing in our underlying costs. However we do see ourselves investing between AUD35 million and AUD50 million in addition to the business, to firstly accelerate the delivery of our omni-channel strategy. When we can invest in iPads and gain the sort of results that we're starting to gain, it's good investment that will pay us back.

Investing in our people, including training. We're going to re-introduce the graduate program, 160 new service managers in our store, development of our people. We've already heard – I've already mentioned to you about strengthening our leadership group. Performance based rewards and recognition, and a frontline management in stores, all providing an investment that will give us a return.

Some work on the Myer Exclusive Brand strategy, and moving those brands – those core brands to be generally marketed brands. A continued customer service innovation and investment and refreshing the Myer brand. There'll be more to come in that at a later date.

We'll continue to invest in the business, yielding a good long term view and good long term results for our shareholders, particularly in the market today with increased competition and changes that are taking place.

Our outlook in 2015 therefore is that we anticipate sales growth. Modest growth in operating gross profit margin driven by our improved sourcing, particularly through Asia, and a mix benefit as our Myer Exclusive Brands continue to grow.

These will be offset, as Mark has already highlighted, by the changes that are occurring in the average exchange rate. The new brands, such as Scotch & Soda, Herringbone, Alex Perry and the ones we've mentioned will help us drive increased profitability in sales. Also ability to use Myer One insights to be more relevant in the promotions and offers to our customers is another.

We are though, as I've highlighted, committed to re-investing in the business. We have got strong cash generation, expected to strengthen our balance sheet, and supported by our CapEx investment of over AUD80 million. We will therefore not only have anticipated sales growth, but anticipated profit growth this year.

The recent strengthening of the leadership team is expected to contribute to the evolution of our strategy. We'll gain some great new ideas.

Investments are important in our business, to deliver continued operational improvements. It's a very difficult and changing retail world, and the ability for us to invest is not only significant but much needed.

We are happy to take questions from both the webcast and also for the group here. We'll take a couple from here. We've got about a dozen on the phone. So I'll take one from here. If you could introduce yourself as you get the microphone, that would be great.

(Emphasis added.)

307 Later during the Q&A session, the following was said:

Michael Courtney – *Bank of America Merrill Lynch – Analyst*

The profitability isn't as big of a concern as the actual level of profit because if you give up – if – let's say, and this might be bearish but this is just my line of thinking here. If you're taking AUD60 million in higher costs and probably add on a little bit more for depreciation as well, if you can only grow gross profit, which keep in mind when – well it didn't grow this year. If you can only grow that by AUD30 million, that's a huge hole in your earnings.

So how – through the year, if it is a tougher environment, what level of – well what levers do you have to pull to be able to offset that a bit?

Bernie Brookes – *Myer Holdings Ltd – CEO and MD*

I think the reason that we can afford to spend AUD35 million to AUD50 million – which you're right, actually almost AUD60 million – the reason we can afford to spend that amount of money is the sales graph this year. The two new stores combined with the four refurbs coming back on, doubling the online business, the new brands, all provide us with a vehicle – by which the topline growth that we talked about.

Now what we're saying to the market is we're going to get topline growth and net *profit growth. So despite the fact that we're investing a sizeable amount of money to make sure we get those two factors in future years, we're balancing what we return back in net profit to our shareholders with what we think we need to invest in the future to make us a leading edge retailer.*

So the sales growth is the key to it. That's what the driver is obviously of our net profit growth this year. You know, modest GP growth we said.

(Emphasis added.)

308 Later the following exchange occurred:

Rob Freeman – *Macquarie Group – Analyst*

Just to clarify an earlier comment, topline should go up next year, factoring new stores and refurbs. You made a comment, Bernie, that you're guiding for a net profit increase 2015 on 2014 despite this additional investment. Is that correct?

Bernie Brookes – *Myer Holdings Ltd – CEO and MD*

That is correct, yes.

(Emphasis added.)

309 Another exchange then occurred:

David Thomas – *CLSA – Analyst*

Thanks Bernie. Just a quick question around some of the volatility in trading. Obviously the consumer confidence numbers have been bouncing around. They were negative yesterday particularly if you looked at the skewed drill downs for females. I was just wondering if you can give any colour on current trading or if you're prepared to just – or how volatile trading has been over the last two to three months.

Bernie Brookes – *Myer Holdings Ltd – CEO and MD*

Yes, I know you don't like me using this word and some of the journos asked me to define it, but the answer is patchy. The scenario is that the – you've picked it very well. I mean, the announcements that take place in government policy, issues in regard to international issues of everything from terrorism to good news bad news for the international banks, whatever it is it does have an impact on the mindset for our customer, as evidenced by the Consumer Confidence Index again declining. It's not down to a level that reflected post-the budget.

So immediately you've seen a dump down in consumer sentiment and that does reflect almost daily if not weekly in our sales. So patchy at the moment but they are, I would add, in line with our expectations at the moment. So we're not concerned that anything we've presented today is at [either] a risk because of our current trading environment.

310 Finally, for present purposes, he said:

Bernie Brookes – *Myer Holdings Ltd – CEO and MD*

Just to help you break that down I think the two new AUD30 million sales performance in year two, so you can take a little bit off for year one. One will open in October, the other one opens in November.

So hence there's probably AUD40 odd million in sales to come during that period for

> both of those. With a little bit of cannibalisation of existing stores, Mt Gravatt cannibalising Carindale and in Western Australia there's less cannibalisation of Joondalup, but a little bit so you've got to take a net figure after cannibalisation.
>
> The AUD40 million is the return for those stores. Now they're not returning for the full year. Miranda returns in about October/November and similarly Macquarie about the same time. But the other stores we'd gain basically the full year of them.
>
> *So we're going to get most of that AUD40 million back. Where you get the AUD100 million from is remember you've got to add in on line, which will be doubling again this year. So that gives us the rest that gets you up over AUD100 million in sales growth.*
>
> (Emphasis added.)

311 The applicant said that this last statement should have triggered a review and correction, but I disagree. The statement says "…up over…".

312 There was then a later conference call with the media at 11.45 am. The conference call was with various financial journalists. Let me note a few highlights.

313 In commenting on the FY14 results, Mr Brookes said the following:

> And we're very comfortable that we've been able to get into a situation where we've got the business positioned for future growth. Our overall sales were solid and flat despite four significant refurbishments at Miranda, Macquarie, Indooroopilly, and Adelaide. And also two store closures that we experienced; one being at Dandenong, and the other one being at Elizabeth in South Australia.
>
> The pleasing part is that our like-for-like store sales were up 1.2 percent. And the last quarter pleasingly was up just on 2.1 percent. And that was despite the reasonably subdued customer confidence levels following the federal budget and the unseasonable warm weather.
>
> This is now eight of the last nine quarters where we've achieved like-for-like sales growth. And that's being driven by a number of components, but particularly our online sales, which doubled this year. We have – our result was expected and planned on the basis of the investment we made this year.
>
> We forecasted to the market that the reduction in profitability would come about because we were investing heavily in online, in Myer Exclusive Brands, and also investing heavily in four significant refurbishments. And they were four of our top 25 stores. And the benefits will come not only this year, but in future years from that.

314 Now some of these comments were problematic, but I do not need to linger on this.

315 Later he said:

> We're confident that sales will grow this year.

316 Then he said:

> This reflects the confidence that the business has and the Board have. But over the next 12 months, we'll see an improvement in sales and an improvement in net profitability.

317 Then the following exchange took place between Mr Brookes and Ms Sue Mitchell:

Sue Mitchell:	Good. In terms of your outlook, is it fair to assume that it's a little bit weaker than it was this time last year? I think last year, you were suggesting that the new stores and the refurbishments would help boost the topline by about $100 million. Is that still the case?
Bernie Brookes:	No. Yes, it's still the case. I mean, this is a – the – if I look at last year's announcement. We advised the market that would be making less profit than last year because we said we're – we had four stores under refurbishments. And also, we advised the market that we would be investing significant sums in service, Myer Exclusive Brands, and online. And that's exactly what we did. And it's certainly no surprise to us that the profit delivered sort of 20 percent down. It was exactly in line with what we expected and what we broadcast to the market. So …
Sue Mitchell:	Well, I mean the guidance for 2015; I mean, last year you were saying that this is the year …
Bernie Brookes:	Yes.
Sue Mitchell:	That – 2015 was the year …
Bernie Brookes:	That's right.
Sue Mitchell:	That it was all going to come to head.
Bernie Brookes:	So, that hasn't changed either. That hasn't changed. The scenario is that the – that refurbishments affected our business by about $40 million. So, we'll get that back in a staged way as the refurbishments open. The two new stores are going to generate – they're not open for the full year – but they're going to generate about 30 to $40 million. The two just joined together less cannibalisation. Our online business is going to continue to double. So, if you add all of that together, you get $100 million quite comfortably in additional sales this year. So, we're still standing behind that. And in fact, we're very confident now that we've got firm dates for the store openings and firm dates for the refurbishments to reopen and we're starting to get significant growth in online. So, those three factors, we stand behind that $100 million in extra sales; which will be quite exciting for us. In regard to the GP, we've seen a modest increase in GP. And we've said to the market that we're going to increase our net profit this year. So, we're getting increase in sales, an increase in net profit.

318 Then later Mr Brookes had the following exchange with Ms Elizabeth Knight:

Elizabeth Knight:	Hi, Bernie. I was just going to – obviously you're saying in your outlook statements that you're going to get a better net profit result in 2005. Obviously that's gone back – sorry – 2015. Obviously it's gone backwards this year. How long do you think it's going to take before you even get back up to basically where you were last year? I mean, given that we've seen a couple of years now of going backwards in terms of sales growth? How long will it take to claw that back?
Bernie Brookes:	Yes. I think if we give you an exact sort of year, we're actually giving you a forecast, which we can't do from a market point of view. It's called a selective briefing. So, we actually can't say that. But I would add a couple of things.

319 Further, later in the call Mr Brookes made some problematic statements concerning the sales in the first eight weeks of the financial year.

320 It is clear that the 11 September 2014 representation was made. Moreover I am in no doubt that it should be taken to have been made on behalf of Myer. Several features of the 11 September 2014 representation can be noted.

321 First, the 11 September 2014 representation was a forecast of anticipated NPAT. Moreover, of its nature, it was the expression of an opinion.

322 Second, the comment was made in the context of disclaimers contained in accompanying written material which cautioned that forward-looking statements, such as the forecast, are not guarantees of future performance, involve known and unknown risks, and that actual results may vary from such statements. However, not too much emphasis should be placed on that context.

323 Third, the intended audience of the statement was principally the sell-side analysts and media who were present on the call when the statement was made. And it must be said that most of the analysts and media were sophisticated members of the business and commercial community. Moreover, investors more generally who might have accessed the transcript of the call or reports of it were also not likely to be naïve. And that audience would also likely understand the qualifications attending such a statement including the inherent uncertainties attending forward-looking statements of that type.

324 Fourth, the context is also important. The comment was made only six weeks after the start of the financial year. Accordingly, the comment was prior to the significant trading periods for

the year. Such a statement may be contrasted with a statement made a long way into a financial year, which may be taken to carry with it a greater degree of certainty or precision.

325 Fifth, as Myer points out, Mr Brookes' statement did not identify a firm number or a specific range for NPAT which may have carried with it, if it did so identify, the implication of a greater degree of certainty.

326 Sixth, the formal ASX release of 11 September 2014 itself did not include any forecast in relation to NPAT.

(b) The market reaction to Mr Brookes' comment

327 Now the reaction of analysts to any disclosure is not necessarily irrelevant to understanding market expectations. But of course consensus forecasts do not necessarily reflect the views of all investors.

328 Immediately following the 11 September 2014 representation, Bloomberg consensus was below \$98.5 million, being \$96.85 million. Further, a review of the reports that analysts produced following the 11 September 2014 representation demonstrates that analysts did not treat what was said by Mr Brookes as Myer having provided formal or specific guidance.

329 The material before me exemplifies the following analysts' responses:

- UBS: "While management did not provide guidance, they did say that FY15 NPAT is expected to be up y/y, underpinned by …";
- Macquarie: "Whilst no formal guidance was provided as expected, MYR indicated it is positioned to deliver an improvement in sales in FY15 … 'modest growth' in operating gross margin and 'underlying' cash CODB to increase 3%.";
- Deutsche: "As expected, the group refrained from providing formal earnings guidance. However, in a similar manner to recent results, the group provided qualitative guidance on sales and gross margins as well as the usual guidance range for cost growth";
- Goldman Sachs drew a distinction between Mr Brookes' comment and "guidance": "MYR did not provide specific FY15 guidance, although on the conference call the CEO advised that they expect growth in NPAT";
- JP Morgan made no mention of Mr Brookes statement;

- CIMB did not refer to Mr Brookes' statement as constituting "guidance", whilst noting that other statements in the published ASX documents were "guidance". Also, CIMB said "we believe MYR is unlikely to achieve its target of NPAT growth in FY15";
- BofA Merrill Lynch noted that Myer management commented that they believed NPAT growth was achievable, but didn't characterise this as guidance or understand the comment to be any more than a comment from management as to their belief. Notably, BofA Merrill Lynch said "we applaud the optimism of management who expect NPAT to grow in FY15 despite guiding to increases in fixed costs that with [sic] pose a 41% ($65m) headwind to earnings growth. We are forecasting FY15 NPAT to decline by 11%" and "In spite of the Management's optimism today about positive NPAT growth in the coming year, we continue to forecast double digit decline in FY15";
- Morgan Stanley noted that other statements in the published ASX documents were "guidance", but did not refer to Mr Brookes' comment as such. Morgan Stanley said "MYR stated that it expects profit growth in FY15. Based on guidance for 'modest gross margin expansion' and effectively A$66-A$81m cost growth, MYR needs both strong sales growth and *significant* gross margin expansion to maintain current profits" (original emphasis);
- Citi referred to Mr Brookes' comment as Myer budgeting for net profit growth and planning for profit growth, but did not refer to it as guidance. More specifically, Citi said "Myer is budgeting for net profit growth in FY15e" and "While the company is planning for NPAT growth in FY15e, we are concerned the gross margin expansion will be insufficient";
- Credit Suisse simply said: "Myer is guiding towards an undefined increase in profit in FY15" and "MYR is indicating net profit growth in FY15";
- CAN referred to Myer's expectation of bottom line growth, but did not refer to this as guidance whilst referring to other statements in the published ASX documents as guidance;
- CLSA referred to Mr Brookes' comment but did not suggest that it was guidance. CLSA said "The company is confident it can grow sales, gross margins and NPAT in FY15"; "Myer's CEO Bernie Brooks was clear. He expects decent sales growth in FY15, gross margin expansion and NPAT growth"; and "our new FY15 NPAT forecast

of A$90.4m … does not match what Myer's CEO Bernie Brooks said on the call, which was that he expects NPAT growth in FY15".

330 Further, whilst Mr Brookes' comment was reported in several newspaper articles, his comment was usually accompanied by the journalist's own comment or comments from analysts that questioned the likelihood of profit growth in FY15.

331 The following examples were given in evidence:

- "Tough sell on Myer turnaround", 11 September 2014, *Australian Financial Review*;
- "Brookes sticks to $160m revival plan", 11 September 2014, *Australian Financial Review*;
- "Myer spend pledge sparks shares slump", 12 September 2014, *Sydney Morning Herald*;
- "Fortress Myer is looking defensive", 12 September 2014, *Sydney Morning Herald*;
- "Myer mauled by 20 per cent selloff", 13 September 2014, *The Age*;
- "Troubled Myer share slide turns to a rout", 13 September 2014, *Canberra Times*;
- "Analysts cut Myer ratings as shares fall", 13 September 2014, *The Australian*.

332 Myer made much of the distinction between what Mr Brookes said and the concept of formal or specific guidance. I must say that there was imprecision in what was meant by the latter concept but it is fair to say that relatively speaking the latter was given greater weight by the market as being a more formal position of the particular company.

(c) Events after 11 September 2014 – general

333 The applicant alleges that as a result of additional matters that became known to Myer after 11 September 2014, it can be inferred that Myer knew of the paragraph (a)(xxvii) information, which I have set out earlier, at various later dates.

334 The details of the matters relied on by the applicant in its particulars of knowledge in relation to the period after 11 September 2014 fall into three categories.

335 The first concerns trading results which were received during this period which showed that sales and other matters were behind budget.

336 The second concerns reforecasts which were undertaken because sales and profit were under budget.

337 The third concerns the outcome of the reforecasts, in which the applicant alleges that Myer identified that it was unable to forecast for NPAT in excess of its FY14 NPAT.

Trading results

338 Some of the trading results relied on by the applicant included:

(a) the week 7 trading results received by management on 15 September 2014;

(b) a document sent to Mr Ashby around 22 September 2014, which set out the "September Preliminary Result";

(c) an email dated 25 September 2014 which contained a review of September 2014;

(d) a weekly sales report from Mr Brookes to the board dated 8 October 2014;

(e) a weekly board sales report to the end of week 11;

(f) reports given to the board by the CEO and CFO on 16 October 2014; and

(g) the receipt of week 13 sales results around 26 October 2014.

339 I note that various Myer witnesses accepted that whilst the results set out in some of these documents were in certain respects behind budget, they did not consider and did not recall thinking that those figures indicated that the NPAT figure in the FY15 budget was unlikely to be achieved, or that Myer could not maintain an NPAT in excess of that in FY14. Moreover, each of Myer's witnesses gave evidence as to the relative insignificance of Myer's results in the early part of a financial year, and prior to the December/January period.

340 For example, Mr Ashby explained why the early trading in Q1 did not and would not have changed his view that the budgeted NPAT of $107 million was achievable and realistic. So, he gave evidence that:

(a) "August is the first month of Myer's financial year and a small sales month in the context of the first half of the financial year. For this reason, being behind budget in August was no reason for thinking that Myer could not achieve the NPAT in the FY15 Budget";

(b) as at early September "[i]t was far too early in the year to form a view that the FY15 Budget was unlikely to be met";

(c) "Week 7 is still early in the financial year and long before the key trading period of December and January";

(d) "By 25 September, Myer is only two months into its financial year. In addition, as already noted, the months of August and September are low volume months and often trade at a loss. Although a trend may have emerged over those two months, that did not mean that the trend will continue during the key trading months of December and January when Myer makes a large portion of its annual profit. Further, any trend can be addressed by taking corrective measures such as reducing costs. In my email sent on 25 September 2014, I ask for the recipients' views on the outlook for H1 of FY14 and opportunities to reduce costs";

(e) as at 26 October 2014, "The sales trend was behind the FY15 Budget, but a different trend could emerge in December and January, which were the most significant months for Myer";

(f) Q1 (being August, September and October) in terms of sales *and* profit is "relatively speaking, a small quarter" in the context of the full year, had "historically accounted for only about 21-22% of yearly sales" and "recorded a loss in FY14, and was budgeted for a loss in the FY15 Budget"; and

(g) historically, Q1 has not provided a clear or reliable guide for performance for the remainder of the year due to its relatively small size.

341 Mr Brookes gave evidence that:

> Based on my experience and knowledge of Myer's business, it was not a matter of significant concern if, in the early part of a financial year (August to November), Myer was not fully meeting budget for those months. Only a very small proportion of Myer's profit is made in the first four months of a financial year. The majority of Myer's annual profit, historically around 65%, would be earned in December and January. Department stores generally and Myer in particular make most of their profit in the two trading periods of December/January and June/July. These are the key months for profit, and a number of the other months are unprofitable. Accordingly, a 1% movement in sales in December or January could make a huge difference to the end NPAT results, whereas missing sales budget's [sic] in the early part of the year would not make much difference to NPAT.
>
> Accordingly, I was not overly concerned about sales in the period August to November tracking 4% or 5% below budget. I took the view that there was a long way to go, that any impact on NPAT of these slightly lower than expected sales could easily be made up in December and January, and that I still had a number of costs 'levers' to pull if necessary (described in further detail below). If sales (and profit) are not tracking as budgeted, the business has a number of 'levers' to pull to still achieve the budgeted profit. For example, I instituted a process called executive 'hot tubs' that were used, as the year progressed, to seek to identify achievable costs savings. Also, as stated earlier, a major driver for the forecast increase in sales for FY15 was the opening of two new stores. However, I did not expect the uplift in sales from these new stores to make an

> impact until after November. The new store at Mt Gravatt only opened in October, and the new store in Joondalup did not open until mid-November.
>
> For the above reasons, even though the months of August to November were relatively tough and the budget was not being met, throughout that time I still considered that the Budget was likely to be achieved and in particular that an NPAT figure of $107 million for FY15 remained realistic and achievable.

342 Mr Brookes gave more specific evidence in relation to particular dates and documents identified and relied on by the applicant, including that as at 25 September 2014, "At this stage, again based upon the Final FY15 Budget, the fact that we were only two months into the year, with the most important months of December and January to come, and the costs levers and buffers I had available to me, I continued to hold the view that the budgeted NPAT of $107 million was achievable".

343 Such evidence was supported by the evidence of various of the non-executive directors of Myer. For example, Mr McClintock gave evidence that the results in August were not of particular significance or concern because:

> …Myer's financial year ends on the final Saturday in July. August is not a significant month for Myer's full-year performance. It contributes a very small part of Myer's total sales for any year. It is usually a loss-making month. The insignificance of August 2014 can be seen by comparing the total sales it contributes to the total budgeted sales for FY15. The total budgeted sales for August 2014 were $190.1 million (being $180.5 million plus $9.6 million). The total budgeted sales for FY15 were $3,325 million … Hence, August represented approximately 5.7% of budgeted sales for FY15. Myer makes most of its profit over Christmas and New Year, and a lesser but still substantial amount in the mid-year sales in June and July. The remaining months in the financial year are far less significant.

344 Mr Myer, upon being shown a copy of the document titled "August 2015 Financial Results – Board Meeting September 10, 2014" that would have been provided to the board ahead of the board meeting, said that:

> …I believe that I would have read this document, although I do not now specifically recall what views I formed when I read this document. However, I do not believe that I would have formed the view that the results for August which are summarised in this document meant that the FY15 Budget was unrealistic or was unlikely to be achieved, or that it was in significant doubt. August is only the first month of a 12-month financial year, and it is an insignificant trading month relative to other months. In particular, December and January are the dominant months for Myer in terms of when most of its profits are made. Sales in these months are critical to the full year result. Sales in August to November are not.

345 Further, although I will come to these matters later in the chronology, it is convenient to record here that although Mr Myer could not specifically recall what he thought about the weekly sales reports for FY15 week 10 and FY15 week 11 in October 2014, he did not believe he

would have thought that they indicated the FY15 budget was unrealistic or unlikely to be achieved. As he said, "October was far too early in the year to form such a view, as the main trading months of December/January and June/July were yet to occur".

346 I have no reason to doubt either the reliability or commerciality of evidence of this type.

Internal forecasting within Myer

347 It would seem that within Myer there were reforecasts of different sorts conducted at different levels, as Myer correctly submitted.

348 The first type of reforecast was a replan or reforecast conducted by the Merchandise team to the BGP level. Such a replan would only look at sales and not, inter-alia, costs. This form of replanning or reforecasting work was referred to as a "merchandise KPI" or "KPI" process, or a "merchant reforecast".

349 The second type of reforecast was a sales replan which could be conducted in relation to a specific area or areas of the business (e.g. furniture), which would generate a new forecast for those specific areas only. This was typically referred to as a "general replan" or "general forecast".

350 The third type of reforecast was a full sales replan conducted three to four times each year, which replan would then be used to produce a forecast for the year which, from that point in time, would become the main reference point looked at by management and the directors. The information from such a sales replan could then be combined with information on costs to create a forecasted P&L. It would seem from the evidence that the first replan or forecast of this nature conducted and finalised in FY15 was on 9 December 2014.

351 The fourth type of reforecast was a "high-level" P&L forecast.

352 I enquired of Mr Ashby as to the reforecasting process and received the following response:

> HIS HONOUR: Can I just ask you about the forecasts at this time. So you've got your budget. You start the new financial year. Do you have forecasts quarterly or half-yearly or for the full year? What sort of forecast? I don't have quite a grip on that?---Thank you, your Honour. There's multiple layers to a forecast. So for good inventory management and working-capital management, you tend to keep an eye on categories that maybe are not performing. And I had a team that would do that with the merchandise team. And they would typically update their forecasts. As a matter of fact, I think one of the poor-performing areas was women's wear – for argument's sake. So you start to look at women's wear. If you assumed everything else was on line, you would just focus on women's wear. So that's a general forecast. So where do you think that's going to head; so you adjust your inventory levels. The next layer down is when

> you say, "Well, actually we want to do all merchandise. We want a complete forecast", and that's called a re-plan. So that's a big exercise, and that goes down to a very low level of detail and rebuilds it. And - - -
>
> How frequently would you do that? Is that something regularly done or done on a cycle basis, or is it done on a one-off when people are aware that there's some great disparity between, say, the budget and what's happening at the start of the financial year?---It's more as required. So be unusual, to do one in the first quarter. A, it's a big job, and B, you would have to be – have to have really good reason to go through that. That's not to say it couldn't be done. But normally – sort of – as required. If – for argument's sake – if everything is on budget and all the KPI – everything is being met, there's no real need to do a re-plan. The second components of the re-plan is – once you have the forecast in, then you look at the cost structure of the business; you go out to the stores, and you reconstruct the whole - - -
>
> But just on the merchandise; that would be just on the sales line. You wouldn't be looking at costs necessarily, the first description?---No. That's correct, your Honour. It's down to gross-profit level and then what they call trading terms, which is where you receive funding from suppliers for markdowns and the like.
>
> Thank you for that?---Thank you.

353 And further:

> HIS HONOUR: Yes. So we've got three types of what I will describe as forecasts. And we've got a sales forecast. We've got a much more in-depth replan, and you say there is also a high-level forecast that's done for the P and L?---So – yes, your Honour. Sorry. You would get an analyst in the finance team to talk to the analyst in the different teams and say "All right; if we had these numbers, what would it look like", and they would pull it together, and they produce a forecast. That's before you go through and start to scrub of the some inputs on the – for the cost, which is what the hot-tubs document is actually about.

Forecasting during September 2014

354 There are several documents that the applicant has relied upon. Let me deal with each in turn.

355 The applicant has referred to an email dated 14 September 2014 between Mr Maillet and Mr Daniel Bracken, which evidences an initial discussion and consideration by the Merchandise team of a "merchandise KPI" which involves considering sales to the BGP level. But neither Mr Brookes nor Mr Ashby saw or should have seen this document. Further, all that the document shows is that "after backing out the new stores from future growth", and prior to contemplated "mitigation", there was sales risks as compared to the budgeted sales figure. This document does not take the applicant far.

356 Further, in the applicant's closing submissions in relation to its no reasonable grounds claim, the applicant placed significant emphasis on an email from Mr Brookes to, inter-alia, some of the directors dated 14 September 2014. The 14 September 2014 email stated the following:

> There are a large number of Broker reports but rather than send them to you Davina

> has put together a summary of the major themes and share price review.
>
> The pleasing news is that the median NPAT consensus has fallen 14% to $92m and this reflects in the share price.
>
> They have estimated a sales consensus of 3.6% where our budgets are 5%.
>
> A reminder that our overall net profit budget sits at $107m.
>
> Despite the significant number of issues that are covered well in the summary the news (good or bad) is that we now have a consensus of $92m with a budget of $107m.

357 The applicant contended that this email confirmed several matters. Mr Brookes had no real confidence in the FY15 budget of $107 million, otherwise the $92 million "median NPAT consensus" could not possibly have been "pleasing news" or "good". Mr Brookes did not genuinely believe that Myer would earn $107 million in FY15. And Mr Brookes did not genuinely believe that Myer would earn more profit in FY15 than it had earned in FY14.

358 Further, the applicant submitted that Mr Brookes' evidence that as at 25 September 2014 he continued to hold the view that the budgeted NPAT of $107 million was achievable was inconsistent with this 14 September email.

359 Now none of the above propositions were put to Mr Brookes when he first gave evidence. Indeed, the applicant did not refer to or tender the 14 September email until after Mr Brookes had been cross-examined, and after the conclusion of Myer's evidence. Further, the 14 September email had not been relied on by the applicant in its pleadings as forming part of its no reasonable grounds case. But by its amendment to the particulars to paragraph 15 of the further amended statement of claim made after the conclusion of all evidence at trial, and after it had presented its oral closing submissions, the applicant sought to rely on the 14 September email as part of its no reasonable grounds case.

360 In light of the contentions advanced by the applicant after Mr Brookes had given evidence at trial, Mr Brookes addressed the 14 September email in his second affidavit dated 14 November 2018. He explained what he meant by his comments in the email, and gave evidence confirmatory of his earlier evidence that:

> As at 14 September 2014 when I sent the Email, I continued to hold the view that Myer was likely to achieve the budgeted NPAT figure of $107 million or a figure relatively close to this, and certainly a figure above the FY14 NPAT of $98.5 million.
>
> In the Email I said that "the news (good or bad) is that we now have a consensus of $92m with a budget of $107m". I also referred earlier in the Email to the news being "pleasing".
>
> I considered the news to be "good" or "pleasing" because even if there were poorer

> than expected trading during the forthcoming months, and in particular over the significant December/January trading period, then Myer had some “wiggle room” and was unlikely to have to make a profit downgrade announcement. That is, the news of a lower consensus figure was pleasing because it meant that a profit downgrade was unlikely even if it became clear that the budget would not be achieved. At that time, I still considered that Myer would achieve its budgeted NPAT of $107 million or a figure close to that.
>
> I believed that the news might be considered “bad”, from an alternative perspective, because if the consensus figures remained at such a relatively low level and it became increasingly certain as the year progressed that the forecast set out in the budget would be achieved or exceeded, particularly after the significant trading period in December/January, it would become increasingly likely that that a corrective announcement, based on actual results, might be required.
>
> I did not, however, think that there was any need to consider an announcement at this time (14 September 2014) concerning Myer’s expectations as to its NPAT being higher than any consensus figure. In particular, I did not know what Myer would have said other than to repeat my comment, made three days earlier, that Myer anticipated NPAT growth in FY15. That was certainly still the case and hence there was in my view no basis for considering a corrective disclosure.

361 Mr Brookes explained why he had referred to news of the consensus drop as being “pleasing” or “good”. At the hearing on 5 December 2018 Mr Brookes was cross-examined about the 14 September email and his evidence in relation to it. But he was not directly challenged on his evidence that as at 25 September he continued to hold the view that the budgeted NPAT of $107 million was achievable. All that Mr Brooks was cross-examined on was why he considered the drop in consensus to be “bad”. I agree with Myer that there is no basis on which I should reject Mr Brookes’ evidence in this regard.

362 Further, the applicant relied on various other emails which I should briefly mention.

363 On 15 September 2014, Mr Ashby sent an email to Mr Kocovic, Mr Lauder and Mr Mike Sampson. He stated in the first two paragraphs:

> I think given we have been trading now for nearly two months into the year, it’s time we reforecast the business against budget. This needs to take place considering the merchandise sales trend. I would also like to get a view as to the current expectations and costs.
>
> Mike has also identified the potential gap in the Online business therefore, I would like to throw that into the mix so we can understand what that means in the context of the half and the year and what actions we need to put into play.

364 So, a process of reforecasting the business against budget was to commence. Mr Ashby gave evidence that:

> A reforecast as against budget would be prepared as a matter of course each year. It was important to start preparing a reforecast so it could be completed ahead of the Christmas trading period. This was necessary so that inventory levels could be set to

> maximise the key trading season in December/January, as well as aligning costs appropriately. As I have mentioned earlier in this affidavit, setting the right inventory levels is important. An excess of stock is undesirable because that leads to mark downs, and a lack of stock is undesirable as it might mean that demand is not met. The aim is to only commence marking down stock for the Boxing Day sale, and certainly not before Christmas, as that will harm margins during the key trading month of December.
>
> It is also important to start preparing a reforecast early so that corrective measures can be taken sooner rather than later to stay on track to achieve budget. As referred to in my email at tab 36, sales were below budget by mid-September. Reforecasting did not typically commence in Q1, as it was often considered too early based on the actual sales data available at that time. However, but if sales were tracking below budget, a view might have been formed that this could indicate a trend that might carry into the future, and that a reforecast should therefore be undertaken. I cannot now recall if this is the view that I held at the time.

365 In the second paragraph of his email that I have set out above, Mr Ashby referred to "what actions we need to put into play". In this context he gave evidence that:

> It was not simply a case that a reforecast would be done and that we would simply accept where that reforecast indicated the business may be headed. Instead, a reforecast would be used to consider what "corrective measures" might be taken to steer the business back towards budget. That is why my email refers to "what actions we need to put into play".

366 Mr Ashby further clarified that the reforecasting process at this point in time only related to the merchandise side. That is, the email was contemplating a merchant reforecast / merchandise KPI, and not a full or approved replan, which would lead to a reforecasting of the P&L including NPAT.

367 I have no reason to doubt any of this evidence.

368 Further, I note that in evidence was a table showing budget vs actual comparisons for sales and BGP up to the end of week 7, showing a negative variance to budget albeit in single digit percentages, whether cumulative or month to date. This was also reflected upon in a document on or around 22 September 2014 titled "September Preliminary Result – variance to budget".

369 Further, there was an email of 25 September 2014 from Mr Ashby to the EGMs. The email was entitled "Costs". In the email Mr Ashby asked the EGMs for their views on the outlook for the half, and on opportunities to reduce costs. In the email Mr Ashby also noted that he and Mr Brookes would like to understand this by Monday (i.e. 29 September 2014) "in order to re forecast the half".

370 The email stated the following:

> All, Mark and I have

> now completed the review of the September month, with sales $9m under budget and profit under by over $3m.
>
> In addition to the focus on driving the top line, we now need to turn to costs to protect our profit position for the first half.
>
> We have significant cost growth coming over the next few months, and need to reign it in.
>
> Vicki has asked for a forecast, can we please have your views urgently on the outlook for the half, on opportunities to reduce.
>
> Bernie and I would like to understand this all by Monday in order to re forecast the half.
>
> Any questions / suggestions appreciated.

371 In his evidence, Mr Ashby explained that this was a "high-level" forecast, meaning that it was not a detailed merchandise replan and was only an "outlook" conducted without the significant work that would go into a replan. Now the applicant suggests that this email should have caused Myer to consider whether it might have been necessary to warn the market that FY15 was not looking as "rosy" as Mr Brookes had represented it to be two weeks earlier. But the document does not of itself suggest that Myer's NPAT in FY15 might be less than $98.5 million or even that the budget was unlikely to be achieved.

Summary of the position as at the end of September 2014

372 Several things can be noted about the position as at the end of September 2014.

373 First, there is no evidence to suggest that there was any reforecast of any sort indicating a forecast NPAT of less than $98.5 million let alone materially less than $98.5 million.

374 Second, as Myer points out, Mr Brookes' specific evidence, by reference to these documents up to 25 September 2014, was that:

> At this stage, again based upon the Final FY15 Budget, the fact that we were only two months into the year, with the most important months of December and January to come, and the costs levers and buffers I had available to me, I continued to hold the view that the budgeted NPAT of $107 million was achievable.

375 Third, Mr Ashby also said that at no time during Q1 had he formed the view that Myer could not achieve an NPAT for FY15 higher than or around the same level as FY14, let alone that NPAT for FY15 would be materially lower than FY14.

376 Fourth, the evidence of each of the directors, who in my view were all credible and commercial, albeit that some had better recollections than others, was consistent with the proposition that they did not hold the view during September that Myer's NPAT for FY15 would be less than

$98.5 million. As Myer points out, Ms Brennan's evidence was that at the board meeting on 10 September 2014 she was "not involved in any discussion to the effect that … the FY15 Budget was unrealistic or was unlikely to be achieved, or that it was in significant doubt, and I did not think these things". Mr Cornell's evidence was that he did not recall forming a view at the board meeting on 10 September 2014 that the FY15 budget was "unrealistic or was unlikely to be achieved, or that it was in significant doubt". Mr Thorn's evidence was that he did "not recall thinking in September 2014 that the FY15 Budget was unrealistic or was unlikely to be achieved, or that it was in significant doubt and I do not believe that I did". Mr Myer's evidence was that he did not recall thinking at the board meeting on 10 September 2014 that the FY15 budget "was unrealistic or was unlikely to be achieved, or that it was in significant doubt". Ms Froggatt rejected the proposition that the board believed at the meeting on 10 September 2014 that the FY15 budget was unreliable. Mr Thorn's evidence was that if the ASX approached Myer regarding Mr Brookes' comment and asked Myer whether it was willing to confirm it, he would have confirmed it. Ms Froggatt's evidence was to the same effect, as was that of Mr McClintock.

377 In my view it has not been established that Myer was aware or ought to have been aware at any time during September 2014 that its NPAT for FY15 would be less than $98.5 million, let alone that it would be materially less than $98.5 million. I would state the same conclusion concerning Mr Brookes and Mr Ashby concerning what they knew or ought to have known.

378 Let me now turn to the month of October.

OCTOBER – NOVEMBER 2014 EVENTS

379 Let me begin with a draft forecast that was in evidence and attached to an email from Ms Reid to Mr Ashby (with Mr Lauder, Mr Kocovic and Mr Sampson copied in) dated 2 October 2014. That document contained a forecast NPAT of $101 million. The draft document identified a number of opportunities that could increase NPAT beyond $101 million and risks that could decrease NPAT below $101 million that were being considered.

380 Let me set out the email:

> Please find the updated draft forecast, which has an npat of $101m for FY15.
>
> This includes
>
> - * a sales impact in H2, based on the merchandise replan for the 1st half (which is 1% down on their H1 budget). I have applied this to their Winter budget, which results in a $9m reduction against the Board budget.

- * the forecast has been updated for the sass & bide submission
- * Mike has provided a preliminary estimate for online – but he wants to review this again in the morning. At this time, I have not included the number in the forecast, but I have called it out in the summary document, and what the impact would be to the consolidated sales and npat. The preliminary estimate is $7m at npat. The assumptions are listed in the document – but essentially this is being driven by a reduction in the sales forecast (FY15 forecast $69m), and the mix of those sales.

> Mike is going to do a separate briefing paper for you.
>
> I wasn't sure from your note below whether you wanted the unidentifed savings included or removed – so I have left them in the forecast, but again I have called them out in the document, and what the impact would be if removed.

381 There are various observations that should be made.

382 First, the document is a draft, which was incomplete and subject to further consideration. Mr Ashby said that this was simply a draft reforecast. Similarly, Mr Brookes' evidence was that "you're looking at work in progress, not something that has yet been presented to the board, and the numbers would be pressure-tested by Mark and his team. But this is Vicki Reid's first cut of what she has been told by the EGM members".

383 Second, whilst the document had been sent to Mr Ashby, there is little to suggest that Mr Ashby or any other officer of Myer held any view based on this document that NPAT in FY15 would be less than $98.5 million.

384 Third, Mr Ashby's evidence was that it contemplated that it would or could be followed by action to protect the budgeted NPAT, and that it was not a statement of what anticipated NPAT would be for FY15. Further, Mr Cornell noted in relation to this document:

> I can only say in my working experience this is a relatively typical document that gets done within the team to talk about the moving parts, things that are – and the opportunities – and highlighting issues that need to be resolved. And the costs lever is a significant one. So it would depend on how this then went through the management team to the CFO and to Bernie to be able to make other management decisions before forecasts were finalised.

385 Fourth, the NPAT in this draft forecast is $101 million, which is inconsistent with the proposition that Myer had formed a view that its NPAT would be materially less than $98.5 million.

386 Fifth, whilst the draft NPAT of $101 million was before cost savings and risks, it was also expressly said to be before opportunities. The document identified around $15 million worth

of opportunities that were not taken into account in the NPAT figure. Of course, if these were added to the draft forecast NPAT figure of $101m, the NPAT might be as high as $116m.

387 Sixth, insofar as the document refers to “unidentified savings”, Mr Ashby’s evidence was that in his experience as Myer’s CFO “unidentified savings” when referred to in internal workings were usually able to be achieved. Similarly, Mr Brookes’ evidence was that “[i]nsofar as the document referred to ‘unidentified savings’, I would have had no reason to think that those savings could not be achieved”.

388 Seventh, the document also noted some downside risk to the $101m figure. These included removing certain savings that had been assumed, which posed a $5.5m risk at the NPAT level, and a risk to forecast from Online, which posed a further $7m risk at the NPAT level. So, there were risks of a similar magnitude to the opportunities that had been identified. The most that can be said is that the draft $101m forecast may have been higher or lower depending on further work done to assess the opportunities and risks identified.

389 Now the applicant’s pleaded case was that Myer had formed an opinion by this time that FY15 NPAT would be materially less than $98.5 million, and that it was the formation of this opinion that constituted its awareness for the purposes of ASX listing rule 3.1. But by its closing submissions, the applicant’s case had shifted. It was said that Myer through its senior executives including Mr Ashby was aware at this time, not of the fact that its NPAT in FY15 would be materially lower than $98.5 million, but of the very significant risk that Myer would not earn greater profits in FY15 than it had earned in FY14.

390 Further, the applicant submitted by reference to this document that once you have got to an NPAT of $101 million in a draft forecast, it is clear that the representation that there are going to be increased profits over FY15 is under very serious threat indeed. Now at the most one might say that by this stage, absent corrective action being taken, achieving an NPAT of greater than $98.5 million may have been under threat. But that is a different thing from what is alleged against Myer, namely, that it knew and had formed a concluded view that NPAT would be materially less than $98.5 million. Further, I would also note the following exchange between myself and the applicant’s counsel:

> HIS HONOUR: But the upshot is she [Ms Reid] is now saying a realistic NPAT for the full year is 101 million.
>
> MR O’BRYAN: Yes.
>
> HIS HONOUR: Which is still above 98.5.

MR O'BRYAN: It is.

HIS HONOUR: Yes, yes.

MR O'BRYAN: Yes, it is.

HIS HONOUR: Yes.

MR O'BRYAN: But there are risks identified.

HIS HONOUR: All right.

391 Further, Mr Ashby gave the following evidence concerning the document:

> MR O'BRYAN: So your view was there was no occasion to update the market, assuming for the sake of argument – just ask you to assume this; assume that what Mr Brookes had said was taken seriously by people and they were anticipating increased profits for 2015. Is your position that there was nothing in this documentation which would suggest to you a need to advise the market that that forecast might no longer be reliable?---Not in this document; no.

392 Further, some of the directors were also asked about these documents, albeit principally by way of hypotheticals that had problematic foundations. They assumed, contrary to the evidence, that this forecast represented some final or considered view of Myer's anticipated NPAT and that risks should be deducted from the $101 million figure but opportunities should be ignored. But in any event these were documents that they did not recall seeing.

393 Further, and generally Mr Brookes' evidence was that this document was a "first cut" and a "work in progress, not something that has yet been presented to the board, and the numbers would be pressure-tested by Mark and his team". Further, Mr Ashby's evidence was to the effect that this document was not a statement of what anticipated NPAT would be for FY15 and that the forecast would ultimately depend on input from Mr Brookes and was "not the detailed work required to generate a complete forecast of the kind presented to the Board".

394 In summary, and contrary to the applicant's submissions, the 2 October 2014 draft forecast was not "a methodically prepared and carefully considered document which presented a considered view of Myer's most senior management of Myer's likely performance for the remainder of FY15".

CEO board update

395 Further, in or around mid-October 2014, the CEO provided the following board update:

> **Results August/September**
>
> The first two months have been disappointing and poor in a number of ways.
>
> Sales are the main concern and after two months we are below expectations, marginally

> below gross profit expectations but better than forecast cost control.
>
> Specifically sales are down $19.1m to forecast (0.3% down on last year).
>
> Gross Profit is down $13.1m on budget and $3.2m down on last year.
>
> Costs are up $5.7m on last year, but $4.8m behind expectations (favourable).
>
> Net Profit is nearly $6m behind budget.
>
> The key issues after two months are:
>
> - MEB's at $79.9m YTD (Mix up 40 bps at 20.15% up from 19.75%) but 90 bps down on budget. This result includes a $3.8m fall out on womenswear and a $1m fallout in Miss Shop – both against budget.
> - First Margin has not grown
> - Markdowns $1m higher than last year
> - We wrote back the MAIP provision of $3.1m, which assisted our result.
>
> The concern is that the extra pressure on December/January is significant.
>
> The poor performance of MEB's and specifically women's wear is a concern with the investments in staff and "design led" resources.
>
> Sales have not met the trend in the last quarter (+2.1% comp growth) and run relatively flat.
>
> The Apparel sales have been disappointing also affecting the mix.
>
> I will provide an update on our actions being taken at the Board meeting, but the Mid-Season sale will be an important driver of Quarter one sales.

396 NPAT was reported as being nearly $6 million behind budget. Although even making that adjustment does not take it below $98.5 million.

Hot Tubs Document of 16 October 2014

397 The applicant has relied on a document circulated internally on 16 October 2014. At 12.01 pm on 16 October 2014, Ms Reid emailed Mr Ashby and Mr Tom Coleman a document which she referred to as "the overview document proposed for tonight's Hot Tubs meeting". The document was a working document to be considered at a meeting involving management of Myer that evening. Clearly the document does not reflect the outcome of any management meeting, but is rather a document for the purpose of discussion at such a meeting.

398 Mr Ashby's evidence was that a high-level forecast without the merchandise replan would have been done at this stage. He said that the document contained a draft or incomplete forecast which was the subject of ongoing work, and which had not yet been discussed by management. He said that "Hot Tub" meetings were forums where corrective actions were taken to steer the business back towards budget. In relation to reforecasts, his specific evidence was that: "a

reforecast is followed by corrective measures. [The Hot Tubs] document indicates that H1 was forecast beneath budget, but actions were being considered to not only return to budget but exceed it for H1". He explained further:

> [T]he forecast, P and L forecast had not been completed, and the following pages actually go through the opportunities that address the cost to amend that forecast.
>
> …
>
> This is a document prepared for the purpose of going through and evaluating decisions you're going to take to try and improve the trading performance of the business. It's not a conclusive document about where you now expect to land.

399 Mr Brookes' evidence was to similar effect:

> …The Applicant's Particulars state that this document shows that, as at 16 October 2014, Myer had explicitly identified that it could not maintain an NPAT forecast in excess of its FY14 NPAT. I disagree with this statement. This document indicates a forecast NPAT of $94 million if further steps are not taken. However, further steps were being considered and discussed (including at the 'Hot Tub' meetings), and these steps would form a part of any further forecast…

400 In my view this document was clearly a draft to be discussed by management on the evening of 16 October 2014. Now the applicant has suggested that the document was provided to the board at a board meeting on the morning of 16 October 2014. But this was not the case.

401 First, the document was first sent to Mr Ashby at 12.01 pm on 16 October 2014. This is evident from the email sent by Ms Reid. There is no evidence that it was sent any earlier. Indeed the board meeting commenced at 11.45 am that day and before even Mr Ashby had received the document.

402 Second, the document was for discussion purposes for a meeting of management that evening. I agree with Myer that there is no basis to think that a document first sent to Mr Ashby after the relevant board meeting commenced, and which had not yet been discussed by management, would have been provided to the board.

403 Third, the board minutes for the meeting on 16 October 2014 do not record this document or any forecast having been tabled or discussed.

404 Fourth, Myer's witnesses gave evidence that they do not recall this document as having been provided to the board. So, Mr Brookes' evidence was that he doubted that this document was provided to the board. Mr Ashby's evidence was that insofar as other documents (e.g. the "Good, the Bad and the Ugly" email dated 2 November 2014 discussed below) referred to a "Hot tubs cost reductions" document being provided at board meeting, he understood this to

be referring to something that Mr Brookes "was going to provide to the Board", not something that had been provided.

405 Further, even if this document was provided to the board, there is no evidence to suggest that the board approved or adopted any forecast in this document. This is not surprising given that the document contained only current workings which were the subject of further consideration and development by management. Further, it is apparent from the document that management was considering "sales initiatives" and "cost deferrals/reductions", with cost "opportunities" of around $11 million being listed, which would impact on any NPAT forecast for FY15. Accordingly, all that this document shows is that what had been put up for discussion by management on the evening of 16 October was a possible forecast NPAT of $94m, but with over $11m of opportunities, which opportunities were being considered and which may have led to the forecast being at or close to the original budgeted figure.

406 In summary, the document referred to an incomplete reforecast that was still the subject of ongoing work. Moreover, hot tub meetings were a forum where corrective action was taken to steer the business back toward budget. I agree with Myer that this document did not represent some finalised view of Myer or management as to what its anticipated NPAT would be for FY15.

The board meeting on 16 October 2014

407 As I have said, a board meeting took place on 16 October 2014. Moreover, the board minutes for that meeting do not record the so-called hot tubs document or any forecast for NPAT having been tabled or discussed. Now the applicant correctly refers to a reference in the board minutes to a "forecast" to suggest that a forecast was in existence by this date. But insofar as the minutes refer to a "forecast" in one place, being the first bullet point under the heading "Chief Executive Officer's Report" stating "August and September have been disappointing, with sales down $19.1m to forecast (0.3% down on last year)"), it appears that this reference may have been an error. It appears that this may have been a comparison against budget. In any case, the reference to forecast only related to sales. So, it may be inferred that any forecast at this stage only related to sales and not to NPAT or other metrics. Further, the reference to forecast was that sales were down $19.1 million against forecast. Finally, I would note that the CFO's "September FY2015 Financial Board Report" of the 15 October 2014 says that year to date sales were down $19.1 million on budget and $1.2 million (0.3%) below last year. This either

establishes that the reference to forecast in the CEO's report was an error, or establishes that at this time forecast and budget were the same.

408 On another point, I would note that towards the end of the minutes it was stated that "[t]he Board considered whether there were any issues from the meeting requiring disclosure to the ASX, and the Board recorded that there were no such issues requiring disclosure".

AGM chairman's speech themes

409 In notes from a meeting with the Chairman on 22 October 2014 at which Ms Buckley, Ms Gunn and Ms Reith were present, it was noted:

> When we get into the ~~full year results~~share price, I have to say disappointing. 'I need to use those words if we are at anything less than 2 dollars.'
>
> Paul agreed to maintain messaging of FY results.
>
> Re outlook for FY2015, t~~T~~here is negative sentiment around about the ongoing costs of running the business.
>
> Are we going to stand by increased profit this year? Analysts are more pessimistic than the Board.
>
> The Board is comfortable putting it out again that we expect profit growth – the AGM is the place to re-state it.
>
> We are more optimistic than consensus, we would expect trading conditions to improve, we acknowledge this is not reflected in the sharemarket.
>
> We will have a better idea at the end of the Christmas period.
>
> Confidence about this? I can't give too much. The market is entitled to be a bit skeptical.
>
> I can say the Budget is set for a stronger bottom line ~~based on our view of improved profit~~compared to FY2014.

410 The reference to "Paul" is a reference to Mr McClintock.

411 Further, in an email from Ms Reith to Ms Gunn and others on 28 October 2014, it was stated:

> Unfortunately I don't have my notes from the meeting with me so can't cross reference but nothing jumps out at me as missing.
>
> Just a couple of comments though –
>
> - I have real concerns about comment being made on the share price, I think it's dangerous territory for us to be entering at this point in time. I recognise Paul mentioned it but I wonder if we should counsel against it. Am sure GS will have a view on this.
>
> - Acknowledging that the market is not in agreement with our view of FY15 is highlighting the bear case in my opinion and I think if the Board is willing to state confidence in earnings growth that should be sufficient. Again I recognise this was

> Paul's words but I think we should consider counselling against it.
>
> - Something to add – one of the themes that came out in shareholder meetings on Friday was the need to revive foot traffic and give people more reasons to come into Myer stores. The key challenge is top line growth and all our efforts need to be focused on bringing about change that will 'crack the top line'. This seemed to be well received so might be worth weaving into the speech in some way.

Covenant sensitivity document as at 30 October 2014

412 In evidence was a standard covenant-sensitivity analysis that was provided by Mr Ashby to the audit and finance risk committee on a regular basis. This version was dated 30 October 2014 and was emailed from Mr Ashby to Ms Brennan on this date. The FY15 forecast for NPAT noted in this document was $101 million. I agree with Myer that it is inconsistent with the proposition that management considered that NPAT would be materially lower than $98.5 million for senior management to be sending a document to a director recording a forecast NPAT for FY15 of $101 million.

413 Clearly, this covenant sensitivity evidences that a member of the board, being Ms Brennan was provided with an FY15 forecast NPAT figure of $101 million on 30 October 2014. Moreover, the evidence establishes that it is likely that Mr Brookes either saw the covenant sensitivity document before it was sent to Ms Brennan or had discussed its content with Mr Ashby. Mr Brookes' evidence was that he more than likely saw the document at some stage. He gave evidence that:

> Although I cannot recall this specific document, I would have discussed the FY15 forecast figure in this document with Mr Ashby before it was sent to a member of the Board, and I would not have agreed to a document being sent which contained a forecast figure that did not represent the most up to date and best assessment of management as to FY15 forecasted NPAT…

414 Now the applicant seeks to downplay the significance of this covenant sensitivity document, because its case theory is more consistent with the figures in a draft and incomplete forecast which bore the same date of 30 October 2014 being exhibit A15.

415 In cross-examination of Mr Brookes, the applicant put the different figures in exhibit A15, being an NPAT of $95 million, and in the covenant sensitivity, being an NPAT of $101 million, and suggested that the author of the covenant sensitivity document was unlikely to be aware of the existence of exhibit A15. But this cross-examination confirmed that the author(s) of the covenant sensitivity document were also likely to be aware of exhibit A15. The covenant sensitivity document was produced by Mr Ashby and Mr Lauder (General Manager, Finance), or Mr Lauder based on discussions with Mr Ashby. The document was first sent by Mr Lauder

to Mr Ashby by email at 4.27 pm on 30 October 2014. That email records that "[a]ttached is the covenant sensitivity analysis as discussed". An email from Ms Brennan to Mr McClintock dated 11 November 2014 with the subject line "Fwd: covenant sensitivity", on which the applicant relied in cross-examination, also records that "Mark [Ashby] and Chris [Lauder] have prepared the attached sensitivity analysis". So, the evidence suggests that it is likely that Mr Ashby and Mr Lauder were also aware of the draft and incomplete forecast of $95 million included in exhibit A15.

416 So, the likely inference that arises is that the covenant sensitivity document produced for the purpose of being provided to the board was the then best estimate of forecasted NPAT.

417 I note that Mr Brookes also gave evidence that: "The FY15 forecasted NPAT in this document of $101 million is consistent with the view that I continued to hold at this time that NPAT for FY15 would be higher than FY14 NPAT of $98.5 million".

418 Now the applicant submits that Mr Brookes sought to give undue prominence to the NPAT forecast in the covenant sensitivity sent to Ms Brennan. The first basis on which this submission was advanced is that Mr Brookes would not have recollected the existence of this document if Myer's solicitors had not identified it for him and asked him questions about it. But I agree with Myer that it is not surprising that a witness in Mr Brookes' position would not recollect specific documents four years after the events in question unless asked about them by his solicitors. The second basis on which the applicant submits that this document should somehow be discounted is that elements of Mr Brookes' evidence were shown to be inaccurate. But the so-called alleged inaccuracies in Mr Brookes' evidence were problematic. First, there was no inconsistency between the affidavit evidence ("I would have discussed the FY15 forecast figure"), which deals with discussions between Mr Brookes and Mr Ashby of the forecast figure, and the evidence in cross-examination (it is "more than likely I saw the document at some stage"), which deals with whether Mr Brookes actually saw the document. Second, Mr Brookes' evidence that he could not recall whether he saw the document before or after it was prepared does not make anything said in his evidence inaccurate. Third, the fact that Mr Brookes agreed that there was no documentary evidence showing that he received the document does not make anything said in his evidence inaccurate. Fourth, the fact that Mr Brookes cannot now specifically recall seeing the figures in the document does not detract from his evidence that he would have discussed this figure with Mr Ashby, and that he would

not have agreed to a figure being provided to a member of the board that did not represent the most up to date and best assessment of management as to FY15 forecasted NPAT.

Draft forecasts as at 30 October 2014

419 As I have said, in evidence was a draft reforecast dated 30 October 2014 being exhibit A15. This document, which was an incomplete draft, recorded a draft NPAT forecast of $95 million. Now several specific points can be noted.

420 First, I agree with Myer that there is no evidence to suggest that the figure in this document represented a current best estimate, let alone a final or reasonably certain forecast, of any member of management let alone senior management as to expected NPAT.

421 Further, when Mr Cornell was asked about such a document, he explained that:

> Well, what I can see here is the risks are identified, but it doesn't really go to what other opportunities and up side there is. And certainly – my experience – when you have nine months of the year to go, there are very often significant cost reductions that can be made. So I think a working document is one thing within the business. It's what you then consider after all the analysis has been done by the right people. But certainly – they are identifying potential risks. I can see that.

422 And after counsel for the applicant stated that there were opportunities and risks identified in the document, Mr Cornell went on to say that not all opportunities and risks had been identified, and that based on his experience in retail, decisions could be made to remove many millions of costs from the business, and that "at this early state of the year I would still think that there is plenty of opportunity to move the levers".

423 Second, other contemporaneous documents such as the covenant sensitivity that I have just referred to indicate that management's then current forecast was an NPAT of $101 million.

424 Third, the final page of the draft document contains $6.543 million of opportunities, which if implemented would take the forecast NPAT to over $100 million. I am not able to conclude that at that stage those opportunities were not realistic.

425 Fourth, a forecast NPAT of $95 million, even if it did represent management's then current best estimate of NPAT for FY15 did not represent any then current view of the board. Indeed there is no evidence to suggest that it was seen by the board.

426 Now the applicant submits that Mr Brookes "agreed that the 30 October 2014 'November Forecast' was his 'understanding of the position as at the end of October 2014'". But that was not his evidence. In response to the question whether removing various items in the draft

document, which he had not seen before, would reduce the NPAT to $90 million, and whether that was his understanding of the position as at the end of October 2014, Mr Brookes simply said: "That's what this document reads, yes".

427 Further, the applicant submits that exhibit A15, which records a draft NPAT forecast of $95 million, should be "regarded in the same manner as the 2 October 2014 forecast … namely as a methodically prepared and carefully considered document which presented a considered view of Myer's most senior management of Myer's likely performance for the remainder of FY15". There are a number of responses to this.

428 First, this submission proceeds upon an incorrect premise as to the 2 October 2014 draft forecast. There is no evidence in support of the proposition that the 2 October 2014 draft forecast was a methodically prepared and carefully considered document which presented a considered view of Myer's most senior management of Myer's likely performance for the remainder of FY15.

429 Second, Mr Brookes gave credible evidence that a draft and incomplete document of this type would not become a document with any status other than a draft for further consideration until it had been completed, reviewed and approved by the EGM, including Mr Ashby, and had been presented to and approved by Mr Brookes. Further, he said that it would not have represented his view of likely NPAT, and would not have been used by Myer as a forecast of its likely NPAT.

430 Third, let me say something about the state of forecasting within Myer by around mid-October 2014. By this time, mid-October 2014, all that would have been done was a high-level forecast without a merchandise replan having been done. Further, as Mr Ashby indicated, all that the forecasts at this point would have represented was a statement of "if we had these numbers, what would it look like", prior to proper consideration of issues such as costs. Further, as Mr Ashby also said, the forecast P&L "had not been completed", and what had been prepared "was for the purpose of going through and evaluating decisions you're going to take to try and improve the trading performance of the business. It's not a conclusive document about where you now expect to land".

431 Fourth, exhibit A15 was clearly a draft. The heading of the document is: "November Forecast for FY15: FY15 Forecast P&L – Draft (as at 30/10/14)". Further, the document was incomplete. Risks to the forecast were described as being preliminary. And opportunities were

identified but not yet included in the actual forecast figure. Consistently with this, Mr Brookes gave evidence that the document was incomplete, and was "filtered with a number of what ifs and potentials that are yet to be fully determined".

2 November 2014 "Good, Bad and Ugly" email

432 The applicant has relied on an email sent by Mr Brookes to the board on 2 November 2014, which was titled "The Good, The Bad and the Ugly" (Good, Bad and Ugly email). Whilst that email notes that Myer's financial performance in the year to date had not been in line with its expectations, it also stated that, inter-alia:

(a) "The good part is that sales finished up 9.0% this week …";

(b) "List of trading opportunities identified and being worked on as implemented for this Quarter"; and

(c) "I have more elaborate plans on costs and sales initiatives but have kept this brief".

433 On 31 October 2014, Mr Brookes forwarded a draft of the Good, Bad and Ugly email to Mr Ashby. The text of the email was as follows:

From: Bernie Brookes <bemie.brookes@myer.com.au>

To: Mark Ashby <mark.ashby@myer.com.au>

Date: Fri, 31 Oct 2014 16:23:45 +1100

…

Draft for board for your review

Bernie Brookes

…

From: Bernie Brookes

Sent: Friday, 31 October 2014 4:22 PM

To: Bernie Brookes

Subject: The Good, The Bad and the Ugly

<u>The Good.</u>

Great response to our TV and brand launch. I attach a summary of the major comments we have received.

The good part is that sales are up 16.6% this week and even for timing issues (a sale date move) we are still over 7% up. It is driving traffic.

The second good is we have a signed contract from Julie offer to take Chris Colfer's place at Sass and Bide we will announce on the 22nd November and have a communication plan. I attach Julia's CV, FYI.

The Bad.

The bad is Octobers result sales were up 61% ($295.1m) for the month but $13m behind budget. Gross profit was $117m in line with last year but down $8.7m on budget.

Costs were $3.3m better than budget and hence NPAT was $3.7m some $3.8m behind budget.

Fortunately $1.5m of the result reflect 'deal collect' timing but it is still short $2.3m.

The 'bad result' was caused by

- MEB Mix being behind last year.
- Poor Womenswear results
- Poor Concessions sales
- Poor First Margin
- Savings in Opex and wages.
- No MAIP was booked

The Ugly

The Ugly is now the poor profit in Quarter one and the and the pressure on our next Quarter.

For the Quarter

- Sales $691.6m flat on LY, up 7% comp sales.
- Gross profit 39.19% ($271m) against last year 39.7%
- Cost 38.39% a saving of $12m on budget.
- NPAT loss $16.8m, last year loss to date was $5.5m.
- NPAT to budget $9.7m short
- NPAT to forecast $1.5m short

Note forecast is consensus $95m.

Actions taken:

- Hot tubs cost reductions (full document provided at board meeting) of $6m across all areas.
- List of trading opportunities identified and being worked on as implemented for this Quarter.
- Category by category plans particularly womenswear.

- Overall this is ‘ugly’ and even with $6m of cost reduction we will need the ‘sales start’ to the quarter to continue.

I have more elaborate plans on costs and sales initiatives but have kept this brief.

Thanks

Bernie Brookes

434 On 2 November 2014 at 11.22 am, Mr Brookes sent a modified version of the Good, Bad and Ugly email to Mr Cornell, Ms Judi Cornell, Ms Froggatt, Ms Brennan, Mr Thorn, Mr McClintock and Mr Myer. The text of the email was as follows:

The Good.

Great response to our TV and brand launch. I attach a summary of the major comments we have received.

The good part is that sales finished up **9.0%** this week and even for timing issues (a sale date move) we are still over **3%** up. It is driving traffic.

The second good is we have a signed contract from Julie offer to take Chris Colfer’s place at Sass and Bide we will announce on the 22nd November and have a communication plan. I attach Julia’s CV, FYI.

The Bad.

The bad is Octobers result sales were up **0.6%** ($295.1m) for the month but $13m behind budget. Gross profit was $117m in line with last year but down $8.7m on budget. In percentage terms, GP was 39.6% vs last year 39.9%.

vs Budget costs were $3.3m under and hence NPAT at $3.7m was $3.8m behind budget. Compared to last year costs were up $6.6m, with NPAT down $4.9m

Fortunately $1.5m of the result reflect ‘deal collect’ timing but it is still short $2.3m.

The ‘bad result’ was caused by

i. -MEB Mix being slightly behind last year, with growth planned for this year.

ii. -Poor Womenswear results, in MEB’s, Concessions and wholesale

iii. -This resulted in a poor First Margin

iv. -Offset by savings in Opex across the company.

v. -No STI was booked

The Ugly

The Ugly is now the poor profit in Quarter one and the and the pressure on our next Quarter.

For the Quarter -

- Sales $691.6m flat on LY, up 0.7% comp sales. (down $32m on budget)
- Gross profit 39.19% ($271m) against last year 39.7% (Budget 40.4%)
- Cost saving of $12m on budget, but up on last year $12m.

- NPAT loss $16.8m, last year loss to date was $5.5m.
- NPAT to budget $9.7m short
- NPAT to our forecast tabled at the last Board meeting $1.5m short

Note forecast consensus is $95m for the year.

Actions taken:

- -Hot tubs cost reductions (full document provided at board meeting) of $6m across all areas.
- -List of trading opportunities identified and being worked on as implemented for this Quarter.
- -Category by category plans particularly womenswear.
- -Overall this is 'ugly' and even with $6m of cost reduction we will need the 'sales start' to the quarter to continue.

I have more elaborate plans on costs and sales initiatives but have kept this brief.

Bernie Brookes

435 The Chairman, Mr McClintock responded to the Good, Bad and Ugly email by noting that "I get the *complex* message!" (emphasis added). I will refrain from lingering on this characterisation or its possible interpretations.

436 Let me make a number of observations concerning the Good, Bad and Ugly email.

437 The Good, Bad and Ugly email notes that at this time forecast consensus for NPAT was $95 million. This is consistent with the Bloomberg BEst mean for NPAT, which at this time was $94.892 million. But the email does not suggest that at this time Myer's internal forecast was for an amount less than $98.5 million, let alone for an amount materially less than $98.5 million.

438 Now the applicant's final version of its case was to the effect that Myer should have disclosed to the market that such a draft and incomplete document, which did not represent the views of its senior management as to FY15 NPAT, identified a risk that NPAT in FY15 would not be higher than $98.5 million. But there is no evidence of any officer holding any such view. Further, the evidence is that Ms Reid, who was apparently the author of some (or many) of the draft documents on which the applicant relies, performed a role that was essentially administrative and did not involve making decisions on how Myer might perform in the future.

439 Let me say something further concerning the Good, Bad and Ugly email and how the applicant puts its case on this aspect.

440 As I have said, on 31 October 2014, Mr Brookes prepared his email entitled "The Good, the Bad and the Ugly", in which he identified the bad as "October's result sales were up 61% ($295.1m) for the month but $13m behind budget. Gross profit was $117m in line with last year but down $8.7m on budget. Costs were $3.3m better than budget and hence NPAT was $3.7m some $3.8m behind budget". The Ugly was identified as "the poor profit in Quarter one and the and the [sic] pressure on our next Quarter". At that point Mr Brookes identified an NPAT loss for the first quarter of $16.8m, more than three times the Q1 loss in the previous year of $5.5m. Mr Brookes identified that the consensus forecast at that time was $95m which suggests that he, like the board, was benchmarking Myer's performance for the purposes of its ASX disclosure obligations solely by reference to the consensus forecast, and not by reference to his own representations to the market made in the previous month.

441 At about the same time, the forecast titled "November Forecast for FY15; FY15 Forecast P&L – Draft (as at 30/10/14)" which is exhibit A15 was prepared, being an update of the forecast as at 2 October 2014 and showing a forecast NPAT of $95m for the full year, but again containing unidentified savings and vacancy positions which, if removed, would reduce the NPAT to $90m, and also containing an online risk identified as $6m on page 3. The figures shown on pages 4, 5 and 6 of the November forecast suggest that a profit of no more than $90m might be earned in FY15.

442 It was in the context of exhibit A15 that the final version of "The Good, the Bad and the Ugly" email was sent by Mr Brookes to the directors on 2 November 2014. According to the applicant the circulation of this email ought to have triggered a recognition by Myer that it was necessary at the very least to update the market with the news that it was now highly improbable that Myer's NPAT for FY15 would be greater than 2014, as had been represented by Mr Brookes, and indeed at that point likely that it would be materially less. At that point, Myer's own internal documentation suggested that the Bloomberg consensus forecast was $97m and therefore, Myer having prepared internal forecasts which showed likely NPAT in the vicinity of $90m, meant that the Bloomberg consensus forecast was more than 5% above Myer's best expectations for profit at that time.

443 But instead of announcing anything to the market, despite all of the negative news in the first quarter of FY15 and its internal profit projections showing the unlikelihood of FY15 NPAT above $90m, Myer appears to have thereafter created a series of internal profit projections

which "targeted" profit figures at the same level as the budget had originally proposed in July 2014.

444 A good example is the document dated 17 November 2014 titled "FY15 Target: A Quarter 2 Focus", which I will discuss in a moment, that sets out targets for H1, H2 and the full FY15 which were the equivalent of the NPAT level of those set out in the original budget. But this could only be achieved by adopting assumptions which the applicant submits were unreasonable, that is, that there would be a 3% growth in sales for the balance of FY15, despite the fact that sales had been growing at a much lower rate up to that point and there was no reasonable basis for assuming that the rate would improve. Yet the figures which were targeted in the reforecast document dated 17 November 2014 suggest a total sales improvement over FY14 of 5% in the first half of FY15 and 7% in the second half. The second half was particularly striking because all of the assumptions in the column entitled "H2 latest Merchant Submission" required significantly greater improvements, even over the figures contained in the FY15 board budget, both in the percentage rates of OGP, EBIT and NPAT and also materially larger profit results.

445 The applicant says that most significantly in the reforecast document dated 17 November 2014, the split of sales and NPAT, especially for the second quarter of FY15, was now anticipated to be historically very abnormal. Whereas the first quarter of FY15 had seen a significant decline in the relative proportion of annual sales (down from 22% in FY14 to 20.8% in FY15) and in profit (down from -5.6% in FY14 to -15.5% in FY15), in the second quarter sales were projected to increase as a proportion of the full year's sales, from the 33.3% achieved in FY14 to 34.1% in FY15, and profits to increase even more dramatically as a proportion of the full year, from the 87.6% achieved in FY14 to 98.3% in FY15. In other words, nearly the whole of the FY15 profit was anticipated to be earned in one quarter of the year alone. Further, this document identified that only $6 million of cost reduction initiatives had been identified at that time, which made it clear that there was no realistic prospect of Myer recovering to a position where its FY15 profit would be greater than FY14. All of these matters were spelt out in the document, where it was also noted that if there were a -3% change on the remaining Q2 merchant reforecast growth rate, this would reduce Myer's NPAT by $15m compared with the board budget (i.e. NPAT of $92m, which was identified as a 7% decline on the 2014 NPAT).

446 The applicant says that a similar conclusion can also be observed in the forecast tables on 20 November 2014 titled "FY15 Budget – Merchandise Budget", where an NPAT forecast for

FY15 of $90m is shown towards the bottom of the page and Q2 is by this time anticipated to produce 106.5% of the year's profit. The applicant says that this was an unsustainable proposition having regard to recent history.

447 Further, the applicant says that Myer had many opportunities to explain this situation to its shareholders and to the market, for example at the annual general meeting held on 21 November 2014, but the decision was taken not to do so, despite the fact that evidence existed that consideration was given to addressing the reliability of Mr Brookes' forecast of increased NPAT in 2015 prior to the annual general meeting. Instead the decision appears to have been taken not to address the subject at the AGM at all.

448 Now I will address some of these points later. But for the moment it is sufficient to note that I am dealing with the Good, Bad and Ugly email and the position of Myer on and prior to 2 November 2014. And at that point I do not accept that the applicant has made good any of its claims.

449 I would note at this point that in respect of the position as at 2 November 2014, Mr McClintock said that:

> I do not recall what I thought about the contents of the [Good, The Bad and the Ugly] email at the time. Reading it now, I think Mr Brookes was signalling to the Board that Myer would need to keep costs strongly in check and have a stronger second quarter if it was to achieve its FY15 Budget. Also, reading it now, I do not believe I would have thought that the NPAT figure in the FY15 Budget was unreasonable or unrealistic or that Myer could not maintain an NPAT in excess of the $98.5 million, which was the NPAT for FY14. It was too early in the financial year to be thinking that based on the results to date. In particular, this was because the key trading seasons of December/January and June/July were still to come. Further, as noted above, by this stage my attention was focussed on whether or not NPAT consensus was achievable, not the budget.

450 Further, Mr Brookes gave evidence that as at 2 November 2014, he "still considered … that Myer was likely to either achieve the budgeted NPAT of $107 million or a figure close to this".

451 Let me proceed further with the chronology.

2 to 17 November 2014

452 On 11 November 2014, Mr Brookes and Mr Ashby had a conference call with analysts. Sales results were discussed for Q1. But Mr Brookes said that "we're not going to get into profit dimensions of each individual quarter".

453 The following exchange took place concerning sales, although some aspects were problematic:

Philip Kimber – *Goldman Sachs – Analyst*

Okay. And then one last one just in terms of -- I know you said momentum improved over the quarter. We were hearing August was a pretty tough month. Did you see that as well in yours? Was that the worst month of the quarter?

Bernie Brookes – *Myer Ltd – CEO and MD*

Certainly was. September was better than August and October was much better than September. I think the new stores, refurbs -- mainly the refurbishments because we only got two weeks of the new stores. We have been consistent in saying we expect that to -- that momentum to continue.

454 And again the following exchange also took place, which was problematic:

Grant Saligari – *Credit Suisse – Analyst*

Yeah, okay. Just stepping back from the detail -- thanks for the clarification though -- just stepping back from the detail, just two points would help me.

I guess when you look at the numbers as they're coming through, are they where you're expecting the business to be generally? Because there seem to be quite a few moving parts with obviously the stores coming in and out and the new stores and the refurbishments.

So just to get your view on where the business is at the moment and whether that's generally tracking to your expectations.

Bernie Brookes – *Myer Ltd – CEO and MD*

I think the first point I'd make is the momentum is in line with our expectations. So the momentum coming into October very, very good. We're a little soft below expectation in womenswear and we're a little soft in Queensland and Western Australia (inaudible) as well.

But August was weaker , September we gained and October was very strong driven by the mid-season sale. And so I think the good news is it's in line with our expectation in regard to the momentum gaining and the stores coming back online. But the quarter itself a little down in womenswear is not where we want it to be and we'll see hopefully quarter two as a big one for us.

455 Further, in a board update prepared by Mr Brookes in mid-November 2014 it was said:

<u>Sales & profit update</u>

Sales over the last two weeks have been plus 9% then minus 5.7%, so very erratic.

October's result sales were up **0.6**% ($295.1m) for the month but $13m behind budget. Gross profit was $117m in line with last year but down $8.7m on budget. In percentage terms, GP was 39.6% vs last year 39.9% vs. Budget 40.8%. CODB were $3.3m under budget. NPAT at $3.7m was $3.8m behind budget. Compared to last year costs were up $6.6m, with NPAT down $4.9m

456 Further, in an "Investor Relations" Report prepared by Ms Gunn and Ms Reith on 11 November 2014, "Bloomberg consensus" was reported at $97 million for NPAT, although

in terms of Myer's own analysis of broker forecasts, the range was from $82 million to $104 million, with the median of $92 million.

457 I would say now that there was a lack of clarity as to the methodology used and how to explain the relevant discrepancies, other than the obvious point that Bloomberg may have used a different set and weighting for its analysts. Bloomberg screenshots in evidence for other time frames hardly clarified the matter with any precision.

458 Further, in evidence is a draft forecast dated 13 November 2014. Various figures are reported. But let me set out the figures for Myer itself:

Myer Holding Limited

$m	Q1	November	December	January	Q2	Q3	Q4	FY
Sales								
FY14 Actual	691	244	539	263	1,046	647	759	3,143
FY15 Forecast	692	266	570	283	1,120	675	798	3,284
$ Change	1	22	32	20	74	28	38	141
% Change	0.1%	9.0%	5.9%	7.6%	7.0%	4.4%	5.1%	4.5%
NPAT								
FY14 Actual	(5)	(3)	51	38	86	(15)	33	98
FY15 Forecast	(17)	6	62	29	97	(16)	29	92
$ Change	(11)	9	10	(9)	10	(1)	(4)	(6)
% Change	206.2%	-262.9%	20.4%	-23.8%	11.9%	6.4%	-12.2%	-6.2%

Percentage of Full Year Sales	Q1	November	December	January	Q2	Q3	Q4
FY14 Actual	22.0%	7.8%	17.1%	8.4%	33.3%	20.6%	24.2%
FY15 Forecast	21.1%	8.1%	17.4%	8.6%	34.1%	20.5%	24.3%
NPAT							
FY14 Actual	(5.6%)	(3.4%)	52.2%	38.8%	87.6%	(15.6%)	33.6%
FY15 Forecast	(18.2%)	6.0%	67.0%	31.5%	104.4%	(17.7%)	31.4%

459 Let me linger on these numbers at this point and observe the following.

460 First, the forecast NPAT for FY15 was $92 million. This was well south of the actual NPAT for FY14.

461 Second, 104.4% of NPAT was expected to be earned in Q2. In my view this was quite unrealistic.

462 Third, even to achieve the metrics described in my first and second points, the percentage sales increases for the balance of FY15 were very optimistic to say the least. And this is all against the modest to poor result for Q1.

463 Fourth, reinforcing the NPAT of $92 million is the P&L for FY15 reported in a document dated 14 November 2014 titled "Revised Forecast FY15: Quarter 2 Focus" which forecast an NPAT of $91 million, again well south of the FY14 NPAT of $98.5 million.

17 November approved reforecast

464 Myer says that none of the identified documents prior to mid-November nor any evidence from any witness is consistent with a submission that at some point in time on or before mid-November Mr Brookes or anyone else let alone any of the identified officers on whose knowledge the applicant bases its case, had formed the opinion that Myer's NPAT in FY15 would be materially lower than $98.5 million. Now that may be so.

465 Further, Myer says that reference to documents prepared shortly after mid-November demonstrate that it was not the case that prior to mid-November 2014 Myer had concluded or formed the view that its NPAT would be materially less than $98.5 million. Now that may be so.

466 Let me now turn to the 17 November approved reforecast titled "FY15 Target: A Quarter 2 Focus".

467 The most relevant page contains the following table:

Strictly Confidential

Options to recover budget NPAT

	FULL YEAR '15			
in $m	NPAT	Actions CCODB PRE-TAX	Actions STORE WAGES PRE-TAX	Adjusted NPAT
ACTUALS to wk16 + APPROVED REFORECAST	100	(8)	(3)	107
ACTUALS to wk16 + TARGET (+3% of Q2 of Approved Reforecast)	**108**	**0**	**0**	**108**
ACTUALS to wk16 + SCENARIO (-3% of Q2 of Approved Reforecast)	92	(13)	(8)	107

- CCODB would come via deep cuts (c20%) of support office headcount
- Risk to sales in cutting store labour
- Delivery of CCODB savings will have attached restructuring charges
- Savings of CCODB will only recover H2 by half of annualised savings
- Operational Risk remain high to achieve in quick time

468 Myer says that the important line to focus on is that which refers to "ACTUALS to wk16 + APPROVED REFORECAST". The figure for this line is NPAT of $100 million before actions, and NPAT of $107 million after actions. It is therefore apparent that what is being set

out is a reforecast based on and having regard to actual results to week 16 (week 16 was the week ending 15 November 2014) and an "approved reforecast" for the remainder of the year.

469 The split of the forecast NPAT of $100 million (before actions) is recorded as follows (with a closer screenshot of the notes the bottom of the table included):

SENSITIVITY ANALYSIS	FIRST HALF			SECOND HALF			FULL YEAR '15		
	SALES	EBIT	NPAT	SALES	EBIT	NPAT	SALES	EBIT	NPAT
FY14 ACTUAL	1,737	127	81	1,406	34	18	3,143	160	99
FY15 BOARD BUDGET	1,834	129	83	1,490	44	24	3,324	173	107
Growth on FY14	*6%*	*2%*	*3%*	*6%*	*30%*	*33%*	*6%*	*8%*	*8%*
ACTUALS to wk16 + APPROVED REFORECAST	1,797	116	73	1,499	49	27	3,297	165	100
Growth on FY14	*3%*	*-9%*	*-9%*	*7%*	*46%*	*52%*	*5%*	*3%*	*2%*
ACTUALS to wk16 + TARGET (+3% of Q2 of Approved Reforecast)	1,825	127	81	1,499	49	27	3,324	177	108
Growth on FY14	*5%*	*1%*	*1%*	*7%*	*46%*	*52%*	*6%*	*10%*	*10%*
ACTUALS to wk16 + SCENARIO (-3% of Q2 of Approved Reforecast)	1,770	104	65	1,499	49	27	3,269	153	92
Growth on FY14	*2%*	*-18%*	*-19%*	*7%*	*46%*	*52%*	*4%*	*-4%*	*-7%*

Notes:
1. Market concensus at NPAT $97m FY15 as at 10 Nov
2. Target applied a 3% growth on sales to S17 - S26 reforecast.
3. EBIT impact assumes OGP Forecast margin of 41.21% (against Budget margin of 41.87% and FY14 margin of 41.00%).
4. MAIP of $2.48m is stripped off the Reforecast and Target (FY15)
5. Depreciation held constant to Reforecast and Target
6. NPAT assumes constant interest cost and effective tax rates.
7. Second Half is based on latest merchant submission with growth, impacting sales, BGP and markdowns.

Notes:
1. Market concensus at NPAT $97m FY15 as at 10 Nov
2. Target applied a 3% growth on sales to S17 - S26 reforecast.
3. EBIT impact assumes OGP Forecast margin of 41.21% (against Budget margin of 41.87% and FY14 margin of 41.00%).
4. MAIP of $2.48m is stripped off the Reforecast and Target (FY15)
5. Depreciation held constant to Reforecast and Target
6. NPAT assumes constant interest cost and effective tax rates.
7. Second Half is based on latest merchant submission with growth, impacting sales, BGP and markdowns.

470 The third line shows that NPAT for H1 was forecast at $73 million, and NPAT for H2 was forecast at $27 million. There is further detail on the H2 figures, noting that the sales, markdowns and first margin rate "are based on latest merchandise submission".

471 The document then includes other analysis based on "targets" or "scenarios". One scenario adds 3% growth on the merchandise reforecast. If this assumption is adopted, then it can be seen that NPAT would increase to $108 million. Mr Ashby conceded in cross-examination that the NPAT figure of $108 million was just a scenario. Another scenario assumes a 3% sales decline compared to the merchandise reforecast. If this assumption is adopted, then it can be seen that NPAT will decrease to $92 million.

472 According to Myer, what is clear from the document is that these two figures, namely, \$108 million and \$92 million, are scenarios or "sensitivity analyses". But the actual NPAT forecast at this time, prior to actions, in this document is \$100 million.

473 According to Myer, this document is inconsistent with the proposition that prior to this time Myer's expectation for FY15 NPAT was in fact for some amount below \$98.5 million, let alone that it knew that FY15 NPAT would be materially lower than \$98.5 million.

474 Now the applicant contends, by reference to this document, that Myer created internal profit projections which "targeted" profit figures at the same level as the budget, and which were not therefore forecasts of anticipated profit. But according to Myer, the difficulty with that submission is that it fastens upon parts of the document that set out scenarios and analysis as to what would be required to make certain "targets", whilst ignoring that part of the document which clearly contains the then current forecast of NPAT of \$100 million, which, in comparison with the draft and incomplete documents earlier referred to by the applicant, can aptly be described as the then current best estimate of NPAT in FY15, being based as it was on actuals to week 16 and an approved reforecast for the remainder of the year.

475 Further, insofar as it is suggested that the figures for Q2 in this document were overly "optimistic" or were unreasonable because of Myer's performance during Q1, according to Myer Mr McClintock explained that:

> The – well, because the second quarter is a – is a set of business judgments all – all of its own. The actual trend that you get in August, September, October doesn't tell you very much about November, December and January. So the judgment calls that we made about the strength of those months that we made back when the budget was formed – we didn't think that the first quarter really seriously undermined our view of what we could achieve over that Christmas period. You know, we had a lot of new plans, the Giftorium and so on, where both management and ourselves believed that – that we could make the difference, and, gain, it's a very small difference you are talking about. It sounds big, but – but, you know, in a \$3 billion business, one per cent is \$30 million. You know, you can turn these businesses very, very quickly.

19 November 2014: Board meeting

476 There was a board meeting on 19 November 2014. The minutes for this meeting do not record any reforecast being tabled. It would seem that a full or approved reforecast had not been completed by this time, let alone that one had been tabled at the board meeting.

477 It was put to Mr McClintock that the 17 November approved reforecast may have been presented to the board at this meeting. But he said that this paper would not have gone to the

board, and that if it had gone to the board, it would have been in the board pack. There is no documentary evidence to suggest that this document was in fact provided to the board.

478 Further, the applicant did not put to any other of Myer's witnesses that the 17 November approved reforecast was presented at this board meeting.

479 But what is interesting is that at this board meeting Mr Ashby's October FY15 Financial Board Report was tabled. The minutes record the following:

> The Chief Financial Officer's Report was taken as read. The Board noted that:
>
> - October sales were $295.1m, $12.8m (4.2%) below budget and $1.8m (0.6%) above last year. Comparative sales were up 0.74%.
> - The Mid Season Sale event ran for twenty-five of the thirty-five days in the month generating sales of $223.8m. On a like-for-like twenty-five days excluding new and closed stores it traded up $6.5m (3.1%) on last year's event.
> - Operating Gross Profit was $117.0m, $8.7m below budget and $130k below last year.
> - The Operating Gross Profit rate was 39.64% to sales, down on budget 40.81% and last year 39.92%.
> - CCODB for October was $100.1m (33.91%), down $3.3m on a budget of $103.4m (33.56%) and $6.6m above last year $93.5m (31.87%).
> - NPAT was a profit of $3.7m, $3.8m (50.47%) below budget and $4.9m (56.95%) below last year.
> - The store metrics for October were discussed, and it was noted that conversion is down.
> - The October online statistics were discussed by the Board.
> - The sensitivity analysis for H1 was discussed in detail.

480 The CFO's report stated in the summary:

> **<u>Summary of the Month</u>**
>
> October sales were $295.1m, $12.8m (4.2%) below budget and $1.8m (0.6%) above last year. Comparative sales were up 0.74%.
>
> Mid Season Sale event ran for twenty-five of the thirty-five days in the month generating sales of $223.8m. On a like-for-like twenty-five days excluding new and closed stores it traded up $6.5m (3.1%) on last year's event. (Note: Total event ran for twenty-six days generating sales of $233.8m. On a like-for-like twenty-six days excluding new and closed stores it traded up $6.6m (3.0%) on last year's event).
>
> Operating Gross Profit was $117.0m, $8.7m below budget and $130k below last year.
>
> - Against budget impacted by sales volume down $12.8m. Myer Exclusive Brands represented 22.12% of the sales mix down 169bps against budget of 23.81%. Markdowns represented 11.23% of sales up $812k (73bps) against

budget 10.50%.

Operating Gross Profit rate 39.64% to sales, down on budget 40.81% and last year 39.92%.

CCODB for October was $100.1m (33.91%), down $3.3m on budget $103.4m (33.56%) and $6.6m above last year $93.5m (31.87%).

- Result against budget impacted by MAIP down $1.4m not provided for in October, Merchandise and Marketing down $1.1m impacted by Visual Merchandise costs still to come $564k.
- Against last year Store Occupancy up $870k impacted by increased rental costs for Indooroopilly post refurbishment $426k and Emporium $353k. Other Store Costs up $1.8m, with online fulfilment costs (net of income) up $1.1m and pre-opening costs up $659k comprising Mt Gravatt and Joondalup. Support Office Costs up $3.8m with IT up $1.1m comprising $511k in salaries due to increased headcount and $437k increased across licence fees and data storage costs. CEO Projects up $2.0m, inclusive of $1.5m advertising costs relating to 'find wonderful' rebranding.

NPAT was a profit of $3.7m, $3.8m (50.47%) below budget and $4.9m (56.95%) below last year.

Year to date sales are $691.6m, down $32.0m (4.4%) on budget and $556k (0.1%) above last year. Comparative sales are up 0.65%. NPAT is a loss of $16.8m, $9.7m (137.8%) below budget and $11.2m (200.6%) below last year.

481 It also stated:

Myer Holdings Year To Date Summary

Sales are $691.6m, $32.0m (4.4%) below budget and $556k (0.1%) above last year.

Operating Gross Profit is $271.0m (39.19%), $21.6m below budget of $292.7m (40.44%) and $3.3m below last year $274.3m (39.70% to total sales).

Cost Of Doing Business is $265.5m (38.39%), $7.8m below budget of $273.4m (37.78%) and up $12.3m against last year $253.3m (36.65%).

Earnings Before Interest and Tax is a loss of $18.2m, which is $13.6m below budgeted loss of $4.6m and $16.0m below last year loss $2.1m.

Net Profit After Tax is a loss of $16.8m, $9.7m below budget and $11.2m below last year.

482 Further, on 20 November 2014 another draft P&L was produced, reporting the following figures including a forecast NPAT of $90 million:

Myer Holding Limited

$m	Q1	November	December	January	Q2	Q3	Q4	FY
Sales								
FY14 Actual	691	244	539	263	1,046	647	759	3,143
FY15 Forecast	692	266	570	283	1,120	675	798	3,284
$ Change	1	22	32	20	74	28	38	141
% Change	0.1%	9.0%	5.9%	7.6%	7.0%	4.4%	5.1%	4.5%
NPAT								
FY14 Actual	(6)	(4)	51	38	85	(16)	33	96
FY15 Forecast	(17)	5	61	29	96	(17)	28	90
$ Change	(11)	9	10	(9)	10	(1)	(4)	(6)
% Change	186.0%	-249.8%	20.5%	-24.0%	11.9%	6.3%	-12.5%	-6.4%

Percentage of Full Year							
Sales	Q1	November	December	January	Q2	Q3	Q4
FY14 Actual	22.0%	7.8%	17.1%	8.4%	33.3%	20.6%	24.2%
FY15 Forecast	21.1%	8.1%	17.4%	8.6%	34.1%	20.5%	24.3%
NPAT							
FY14 Actual	(6.3%)	(3.7%)	53.1%	39.6%	89.0%	(16.6%)	33.9%
FY15 Forecast	(19.3%)	5.9%	68.4%	32.2%	106.5%	(18.8%)	31.6%

483 This was similar in format to the draft forecast produced on 13 November 2014 that I have set out earlier. I should note that I did not get to the bottom of who prepared these draft forecasts and for what use or purpose.

484 On 21 November 2014, Myer held its annual general meeting. The Chairman made an address, but said nothing concerning likely NPAT for FY15. He said:

> **Looking to the future**
>
> I would like to comment briefly on our priorities for the year ahead.
>
> As we move into financial year 2015 we expect to begin realising the benefits of recent investments and a number of strategic initiatives. We see this very much as a time of opportunity and will continue to invest in the important areas of omni-channel, our people, Myer Exclusive Brands, customer service innovation, and refreshing the Myer brand.
>
> It is important to note that in our exhaustive research over the past few years, the loyalty and affection for the Myer brand continues as one of our greatest strengths, and this is something we will be building on as we evolve our strategy.
>
> We are proud of the initiatives we are undertaking to set us up better for the future, initiatives such as Giftorium which are designed to revive foot traffic and give people more reasons to come into Myer stores or shop with us online.
>
> Our clear aim is to position Myer at the forefront of the rapidly changing and competitive retail environment. We look forward to leveraging the experience and insights of our new executives combined with the experience of the leadership team as we evolve the strategy.
>
> We remain confident in the strength of Myer, the quality of our team and in our ability to capitalise on the significant opportunities ahead.
>
> Before I hand over to Bernie, I would like to show you a video that encapsulates some of the key initiatives and areas of focus for the business over the past 12 months.

485 In my view and at this time, Myer ought to have corrected the representation made by Mr Brookes on 11 September 2014.

486 It should have stated that its NPAT for FY15 was not likely to be materially above the FY14 NPAT.

487 Indeed, if Myer is to be taken at its word that it was tracking Bloomberg consensus in terms of its market disclosure obligations, on one view it should have also said that its forecast for NPAT FY15 was not materially different to the Bloomberg consensus, which at the time was down in the depths around $91 million (see the Investor Relations report dated 28 November 2014).

488 Let me make a few points as to why I have chosen 21 November 2014, notwithstanding Myer's points concerning the 17 November approved reforecast.

489 First, in terms of the failure to correct concerning the misleading or deceptive conduct case, it seems to me given the 20 November 2014 draft forecast and other information in Myer's possession at that time that Myer ought to have known that the 11 September 2014 representation was no longer sustainable. This is fortified by the lack of any convincing explanation of Myer concerning the 20 November 2014 draft forecast.

490 Second, I very much suspect that Myer chose to keep all balls in the air so to speak and to deliberately refrain from *expressly* crystallising its views as to the likely FY15 NPAT in an endeavour to get beyond Myer's annual general meeting so that the Chairman could avoid any detailed or embarrassing interrogation on these matters.

491 Third, in terms of whether any relevant opinion was formed as at 21 November 2014 to the effect that FY15 NPAT was not likely to be materially above the FY14 NPAT, I have no direct evidence of this. But I am prepared to infer it for the purposes of the s 674 case. Indeed and at the least, if a minimum threshold for materiality is equal to or greater than 5%, the $100 million NPAT in the 17 November approved reforecast is *not* materially above the FY14 NPAT of $98.5 million.

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492 It was not until 9 December 2014, and conveniently after the annual general meeting, that the first reforecast of NPAT was completed and on this date presented to the board.

493 The evidence as to forecasting NPAT after this time as set out in reforecasts tabled at Myer's board meetings is, in summary, as follows:

(a) 9 December 2014: $92m;

(b) 22 December 2014: $89m;

(c) 5 January 2015: $90m;

(d) 21 January 2015: $90m;

(e) 9 February 2015: $90m;

(f) 27 February 2015: $91m prior to one-off strategic review costs, and $87m after strategic review costs; and

(g) 18 March 2015: $75m to $80m.

494 In my view, given that Mr Brookes had made the 11 September 2014 representation, it should have been corrected by disclosing by no later than the said dates such likely NPAT figures putting to one side sub-paragraph (g).

9 December 2014: The first reforecast presented to the board

495 Work occurred on a full reforecast during the latter part of November and early December.

496 On 8 December 2014, at 5:59pm, Mr Ashby sent an email to Mr Brookes which attached an updated forecast. The forecast shows that as at this time the full year forecast for NPAT was $98 million.

497 The next day a board meeting occurred. The minutes record that "The FY15 full year forecast was discussed by the Board". This is the first occasion on which a full year forecast is recorded as having been provided to the board.

498 It is evident that at some time after 5:59pm on 8 December 2014 the full year forecast was updated to include a forecast NPAT of $92 million.

499 According to Myer, this is consistent with Mr Ashby's evidence that the first NPAT forecast completed and presented to the board was on 9 December 2014, and that work conducted prior to this time and earlier draft documents were not the detailed work required to generate a complete forecast of the kind presented to the board. Further, he thought that it was by the first week of December that "we had come to the conclusion that we were going to be down on last year".

500 There are several things that can be noted about this reforecast, and the position at this time.

501 First, Myer says that it was not put to any of the directors that this figure of $92 million represented their final or concluded view as to what NPAT would be in FY15, or that it was

sufficiently certain given the impending Christmas trading period such that a disclosure should have been made based on this reforecast.

502 I would say now that I reject such an artificial submission of Myer. That figure was sufficiently certain and considered that it ought to have been disclosed. At the least by this time there was a failure to correct the 11 September 2014 representation. But in my view there was a breach of the continuous disclosure requirements by this time. At the least Myer was aware by 9 December 2014 that FY15 NPAT was likely to be materially less than FY14 NPAT.

503 Second, at this time, Myer says that consensus however it was calculated was not materially different from the forecast figure of $92 million. So, for example:

(a) the Bloomberg BEst mean was $91.308 million;

(b) the Bloomberg BEst median was $90.7 million;

(c) the Bloomberg consensus as recorded in Myer's most recent investor relations report was $91 million; and

(d) the median and the average of the 12 broker forecasts recorded by Myer was each $89 million.

504 So what? In my view this is no defence to any of the applicant's alleged contraventions, although it may be relevant to causation and loss and damage.

505 Third, Myer says that the NPAT forecast of $92 million was approximately 6.5% below $98.5 million. But in my view that was material as it was greater than 5%.

506 Fourth, Myer points out that the forecast noted that: "December/January sales performance remains critical". Further, it noted that there was scope to increase the forecast figure by extending costs actions taken in H1 into H2. And that there was scope to extend the types of cost savings implemented in H1 into H2 is evident from the sensitivity analysis and the comment that "Actions to protect full year NPAT are 'ready and able' but will carry operational and strategic risk". It is also evident from subsequent documents showing the contemplation of and implementation of additional actions. For example, the forecast for 9 February 2015 shows that the recruitment freeze and a reduction in project opex were applied to H2 when those measures were not seen as necessary on 9 December 2014. These cost reductions for 9 February 2015 are referred to in the board minutes; see the third dot point under the heading "Forecast". The forecast also noted that "the next 8 weeks remain critical to full year earnings guidance".

507 Now all of this may be so. But it seems to me that the *likely* position was clear. On that basis the likely position ought to have been disclosed particularly given the context of the 11 September 2014 representation having been made.

508 Fifth, a sensitivity analysis was presented in the document which showed the position in three different scenarios where there was a falloff in sales growth and/or the OGP margin assumption, and:

(a) what that would mean for NPAT if no costs actions were taken; and

(b) what costs actions would need to be taken to retain NPAT at or around the $92 million level.

509 Sixth, the sales forecast for H2 was based on the latest merchandise submission.

510 Mr Ashby explained that the sensitivity chart was to show the board that if sales went down, what actions would be required if the board wished to seek to hold NPAT at about the level of $92 million. As Mr Ashby said, the sensitivities were prepared:

> Because I was anticipating questions from the board to say, "All right. If sales come off, what cost actions could you take," and to demonstrate also that we had looked to say, "Look, if costs come off, sales come off, if we're incorrect in the forecast, then if you only have two per cent growth, then if we wanted to hold that same number, this is the type of actions you would have to undertake."

511 Seventh, the applicant submitted in relation to this document that the principal objective of its author was to maintain or provide to the board a forecast of FY15 profit at or above the level of Bloomberg consensus so that Myer did not have to make a continuous disclosure update to the market. Now Mr Ashby denied that the reforecasts were created in this way, but in my view there is force in the applicant's submission. But Myer says that even if they were, there is nothing untoward about Myer managing its business so as to meet or even exceed the expectations of its investors. I tend to agree.

512 Eighth, in cross-examination Mr Brookes said that the costs actions listed could be extended into H2 dependent on trading through the end of Q2. That is, for example, the recruitment freeze could be extended which would result in a similar cost saving ($2.5 million) in H2. This had the effect that the forecast, if those actions were not extended into H2, was $92 million. In this context, Mr Brookes' evidence was that:

> The 9 December Forecast did not have factored into it cost actions which had been taken in H1 and which could be extended into H2. Those cost actions are listed on page 4923, and if implemented had the potential to lead to a forecast NPAT in excess of $92

million and also in excess of $98.5 million.

513 Further, Mr Brookes' evidence was that:

> Because of the ability to adopt these cost savings and given that much would depend on trading during the next 6-8 weeks, it was my expectation that NPAT of more than $98.5 million was still achievable, and that Myer was likely to achieve NPAT of greater than the $92 million included in the forecast, and likely in excess of $98.5 million.

514 Now Myer says, brazenly in my view, that the evidence is that as at 9 December 2014 Mr Brookes continued to anticipate likely NPAT of more than $98.5 million. In my view there is an air of unreality to this submission. Absent extra-ordinary steps or wishful thinking, it seems to me that the view was that the NPAT was likely to be $92 million.

515 Ninth, around this time, the full results for November became available. These are recorded in the "November FY2015 Financial Board Report". November sales were $3.4m (1.4%) above forecast which, given the date of this document, must be the recently completed forecast of the same date. Sales were $11.5m (4.7%) above last year, and comparative sales, that is, sales ignoring the new stores in the network, and which is also referred to as like for like (LFL) sales, were up 4.1%. OGP was also up $724,000 against forecast, and up $3.3m against FY14. CCODB were $740,000 below forecast, that is, better than forecast. NPAT was a loss of $2m, which was 36.96% better than forecast. The report then discusses the month of November in the context of Myer's Outlook for FY15. It notes that there was a positive trend in the last two weeks of November with sales exceeding budget and positive impacts from the launch of Myer's new branding ("Find Wonderful") and Christmas campaigns (including "Giftorium").

516 The minutes of the board meeting on 9 December 2014 are revealing on another aspect which I should refer to at this point.

517 It was noted as part of the CFO's report that:

> - The FY15 full year forecast was discussed by the Board;
> - The fully year revised forecast is slight above consensus;
> - The key sales initiatives support the assumptions for growth through the key trading period;
> - The Board discussed in detail the current trading conditions, and the current financial results. The key trading period ahead will be very significant in assessing the full year position. The Board agreed it would have telephone conferences later in December and in January to discuss the results.

518 Attached to these minutes were minutes of a meeting on 8 December 2014 of the Audit, Finance and Risk Committee. On the topic "15. Continuous Disclosure" it was noted:

> The Committee noted that there were no disclosures to be made to the ASX from the meeting.

519 Now all of this was problematic. First, Myer recognised that its most up to date forecast gave an NPAT "slightly above consensus". But this was all well south of $98.5 million. Second, Myer wrongly thought that it did not have to make any disclosure or correction of what Mr Brookes had said on 11 September 2014 because there was no material difference between its own forecast and consensus.

22 December 2014

520 The next forecast that was prepared and provided to the board was dated 22 December 2014.

521 This document indicated that the forecast at this date when regard was had to proposed costs actions to address the decline in sales was $89 million. The board minutes noted that "the forecast for FY15 is NPAT of $89 million".

522 Now the document also recorded a forecast of $68 million prior to cost actions being taken. But it was not suggested to any witness that $68 million in fact represented Myer's anticipation of what its NPAT in FY15 would be, or that the identified $21 million of cost actions was unreasonable or unrealistic. For example, Mr Brookes gave evidence that he would have been involved in working with Mr Ashby to determine these cost savings. It was not put to him that this was not properly or reasonably done, nor that the cost savings did not form part of his realistic view as to the full year forecast.

523 Let me discuss another matter. It was put to Mr Ashby that the $89 million figure for NPAT was "reverse engineered" simply to get as close as possible to Bloomberg consensus and avoid the need to make an announcement. Mr Ashby refuted that allegation. As to this "reverse engineering" submission that the $89 million was not in fact a genuine forecast of Myer's NPAT in FY15, several points can be noted.

524 First, it was never specifically alleged that the cost savings which formed part of the forecast were unreasonable or unrealistic.

525 Second and significantly, the forecast as at 22 December 2014 was around the start of the most significant two weeks of trade for Myer for the entire year. Given this, and reflecting this, the board minutes for 22 December 2014 recorded as follows:

> The Board also noted that the next 2 weeks of trade can have a significant impact on the result, and that last year, the week before Christmas and the first week of the stocktake sale had a significantly positive impact on the results.
>
> The Board considered carefully whether it had information that should be disclosed to the market. The Board concluded that any statement in relation to results and trading would have a high degree of uncertainty at the moment and would be premature, given the impact that the next 2 weeks of trading could have. It would be extremely difficult and potentially misleading to provide any type of guidance at this time, when there are two very significant weeks of trade ahead.
>
> The Board concluded that it would not be prudent to make any statement to the market at the moment. The Board will have a more reliable basis on which to assess the results on 5 January and will discuss trading at that time and reassess whether a statement should be made.

526 Given that there would potentially be a need to make an announcement in early January if the result for the critical two weeks of trading was less than expected, management prepared an initial draft of an ASX announcement for early January if an announcement was required.

527 On or about 23 December 2014, the following draft statement was prepared by Ms Lynch and sent to Mr Brookes and Mr Ashby:

MYER ASX & MEDIA RELEASE

For immediate release **xxday xx January 2015**

Trading update for November and December

Myer Holdings Limited (MYR) today provided an update on trading conditions experienced in November and December 2014.

At the company AGM in October the business confirmed it anticipated sales growth and modest operating gross profit margin growth in FY2015.

Since that time consumer and business confidence has deteriorated significantly as a result of a number of factors. Consumer sentiment has been reported at the lowest level since August 2011, with households clearly concerned about the outlook for the economy and job security.

Trading for the Christmas and early stocktake period from [x to xx] December 2014 has not met the expectations of management. The two weeks prior to Christmas and the first week of Stocktake Sale are the biggest trading weeks of the year for the company, with the majority of second quarter sales achieved during this period.

Despite a number of positive initiatives, including: new stores and refurbishments; Giftorium; customised iPads for customer orders in store; and new brand positioning; and sales trending above last year throughout November, the significant sales fallout of December is very difficult to recover.

As a result of this sales are expected [to be flat] and we [no longer expect earnings growth on last year].

With [x] weeks of trading for the second quarter still to come, the company is not yet in a position to provide any meaningful update to full year guidance. [Further analysis will be undertaken with an update on guidance provided in due course.] OR [However, FY2015 net profit after tax is now expected to be in range of x-x percent lower than FY2014].

As a response to the challenging trading conditions Myer had instigated a review of all costs and the acceleration of the evolution of the strategy. An update will be provided to the market [in February / on 13 March 2015].

528 As Mr McClintock explained when the draft document was drawn to his attention:

> I don't think that's in any way unusual. In looking at the judgment calls we were making, the speed of which they were being made, the team, obviously, prepared itself for whatever should take place, and this would have been the sort of announcement that you might have made if in fact you had felt that there was a disclosure requirement, which, the board resolved – on the advice of management, I might say – there was not.

529 Mr McClintock accepted after saying this that the said advice of management was based upon market consensus not being too far from what was expected. Similarly, Mr Brookes' evidence was that whilst he did not specifically recall asking for the draft to be prepared:

> That doesn't say that I hadn't asked for the statement to be prepared. I don't recall getting it prepared but, again, in line with being prudent in case January was a disappointing month or the board decided at the January board meeting to make an announcement, we wanted to be well prepared, and that's not an uncommon thing. We prepare a number of draft statements accordingly.

5 January 2015

530 Given the importance of trading in late December and early January, the next board meeting took place on 5 January 2015. For the purpose of this meeting a further board update/forecast was prepared. This document summarised trading results over the period between 22 December and 5 January. Under the heading "Latest December/January view" it stated: "1. December month sales finished +$5m against prior sales forecast."

531 Accordingly, it is apparent that December in total finished ahead of the forecast prepared on 22 December 2014.

532 The document then noted that: "2. Week 23 trend continued – sales up $9m (+11.4%) on last year vs forecast (+3.9%) …". Week 23 is the first week in January.

533 So, for December as a whole sales were up on forecast, and that trend continued, but even more positively, into the first week of January. This was stated expressly in the document: "An improvement against the trends of weeks 3 and 4 of the December month and has continued into week 1 of January".

534 Further, it was noted that the December actual results were at the NPAT level $6 million better than the December forecast. In the document it can be seen that the full year NPAT forecast without any actions was at $74 million. But a forecast, with actions, of $90 million was set out. This forecast as compared to the $89 million forecast as at 22 December 2014 had less risk because it included lower cost reductions.

535 The board minutes for the meeting on 5 January 2015 recorded that, inter-alia:

> MA stated that the December result is close to being finalised and that trading has been positive. The gross profit rate has been good, and there have been fewer markdowns. The sales trend over the last 21 days has been 9.1% above last year. Sales are trending well, and subsequent to 19 December 2014, the forecast sales have been achieved.
>
> Based on the current forecast, we expect the first half result will be NPAT of between $60m and $65m (v last year H1 NPAT result of $81m). Further, the full year forecast NPAT is $90m, with cost actions, although the full year forecast is still being finalised. The full year Bloomburg [sic] consensus NPAT is $90m. It was noted that there is no consensus number currently for the half, only for the full year.

536 So at this time Myer's internal expectation as to FY15 NPAT was $90 million.

537 I should note at this point that it is not in doubt from the chronology that I have set out that Myer appears to have abandoned its budget no later than 9 December 2014.

538 Let me say something further about the 5 January 2015 meeting.

539 The Myer board received an update in advance of its meeting on 5 January 2015. This document showed that the December NPAT was $49m, 5% below the previous year, and the then current FY15 NPAT forecast was $74m, which the document suggested could be brought up to $90m with actions assuming $16 million worth of additional actions were taken in the second half. Those actions included a $5 million reduction in marketing spend, a $5 million reduction in “discretionary opex” and a $3 million “continued recruitment freeze to H2”. It was noted that “[t]he second half cost reductions are reasonable and can be achieved to protect the year forecast”. The “year forecast” referred to is presumably the Bloomberg consensus because the cost reductions were necessary in order to bring the anticipated FY15 current forecast profit up from $74 million to $90 million. There was a breakdown of the then budgeted $74 million NPAT for the year.

540 At its meeting by telephone on 5 January 2015, the board minutes record that the board noted this paper and that first half NPAT would be between $60m and $65m, compared with the previous year’s $81m. The full year forecast NPAT was noted as $90m with cost actions “although the full year forecast is still being finalised”. The full year Bloomberg consensus NPAT was reported to be $90m. The board minutes record that the board “considered carefully whether it had information that should be disclosed to the market. The board concluded that given the positive sales and results, and the current forecast NPAT result being in line with the Bloomberg consensus, an announcement was not required to be made to the market at this time”. Accordingly no announcement was then made.

541 In my view this decision not to make any announcement was incorrect.

21 January 2015

542 The next forecast was dated 21 January 2015, and there was a board meeting the same day at which the forecast was discussed.

543 The 21 January 2015 forecast recorded that sales in Week 24 were again better than forecast (up $2 million / 2.8%), as were sales in Week 25. Consistently with this, the forecast noted that “January trade has continued to improve our previous forecast position”. In this document the full year forecast without cost actions had increased to $76 million, meaning that an NPAT of $90 million could be achieved with even less cost actions thereby further reducing risk. The executive summary of the document records the following two matters.

544 First, it stated that "[t]he forecast assumes growth of 3.3% on last year for the last week of the half. With January to date up 7.6% on last year; 3.3% for the remaining week should be achievable". Myer's witnesses were not cross-examined to suggest that this was not a reasonable forecast.

545 Second, it stated that "[t]he second half cost reductions are reasonable and can be achieved to protect the full year forecast". Myer's witnesses were not cross-examined to suggest that the cost reductions in H2 were not reasonable or achievable.

546 Before the board meeting, Mr Brookes sent an email to the directors in the following terms:

> Our belief is that we have no need to disclose any updates to the market out of our normal cycle on the following grounds.
>
> 1. Consensus is now below $90m. Our forecast shows $90m with even less cost reductions than prior view presented to the Board (cost in half two is now to be reduced by $14m not $21m.
> 2. January trade is up 5% on last year and 3% ahead of forecast with good momentum.
> 3. Split of 68% average in first half profit is in line with this year but 2014 was a one off.
> 4. Sales for Q2 will be 2.5% up significantly better than half one of .08%. Half two forecast is 1.55% only.
> 5. The analyst first half forecasts will not be issued until between our March announcement but the one issued has first half of $64m (on forecast of $63.6m).
> 6. The first half forecast has already moved from $58m to $63m and is strengthening.
> 7. Based on Marion's paper with limited guidance and nil first half consensus last year 1st half was $81m and full year $99m. This year will be "north" of $63m (half one) and full year $90m.

547 I would note at this point that point 3 of that email was quite incorrect in terms of the relevant split.

548 The board minutes for 21 January 2015 recorded that "the Bloomburg [sic] consensus NPAT figure is currently $90m, which is in line with the FY2015 NPAT forecast with cost actions, although the full year NPAT forecast is being finalised". In relation to the potential need to make a disclosure, the board noted, inter-alia, that "a statement at this time may also cause confusion to investors, given the positive sales trend". But so what given the fact that the 11 September 2014 representation had been made. There should have been a disclosure which corrected the 11 September 2014 representation.

9 February 2015

549 The next forecast was presented at a board meeting on 9 February 2015. The minutes for the meeting record that:

> **<u>Forecast</u>**
>
> - MA made a presentation to the Board on the NPAT forecast for the full year and the Board discussed it in detail.
> - The Board considered the H2 forecast. The forecast assumes growth on last year of 3%, and that cost reductions previously discussed with the Board are implemented. This then results in a full year NPAT forecast of $90m.
> - MA discussed the second half cost reductions, including the reduction in marketing spend, the recruitment freeze, and the operating expenditure reduction. MA noted that the reductions are reasonable and achievable.
> - The Board discussed the H1: H2 NPAT split, and noted that based on the current forecast, whilst the split is different to last year, it is in line with the historic split over the past 5 years, being a split of two thirds: one third.
> - The Board noted that the Bloomberg NPAT consensus for the full year is $88m.
> - The Board considered whether it had information that should be disclosed to the market, and concluded that given that the current forecast full year NPAT result is in line with the Bloomberg consensus, an announcement was not required to be made to the market at this time.

550 The forecast itself records that the full year forecast of $90 million remained unchanged from the 21 January forecast. It was noted that the Bloomberg consensus was $88 million.

551 I would note at this point that some of the statements concerning the H1/H2 split were quite inaccurate.

27 February 2015

552 The forecast NPAT for 27 February 2015 had increased to $91 million excluding one-off strategic review costs. The board minutes for 27 February 2015 record that this forecast was presented to the board and discussed in detail.

553 The applicant made another point out of the fact that Mr Brookes was not present at this meeting and that it was because the board was considering the role of the CEO. The applicant sought to put a case that the board had lost confidence in Mr Brookes and Mr Ashby and had sacked them. And it was put to Mr McClintock that the decision to appoint Mr Umbers as CEO was a result of the board's dissatisfaction with the performance of Myer in FY15. But Mr McClintock explained that this was not the case:

> No, the – the timing of this change, which, as I said earlier in evidence, we had been – we had been working on for – for a year and a half and we had had a full global search. There had been a great deal of work done with – with the full knowledge of Mr Brookes. The – the timing came largely through the strategy work that – the strategy work was reaching a point where we had to lock in on – on something firm that we wanted to put out at the end of the – of the year – end of the financial year or into the next year, and – and it was becoming untenable to have a managing director who was on a limited tenure conducting that process. So the board had those discussions leading up to February, and then the other bit of the jigsaw puzzle was we had to decide whether any of the three people that we had hired as potential successors were ready to be appointed. And we took the view that Mr Umbers had demonstrated that ability and was ready to be appointed. And that's– that's what drove that timing.

554 And as Mr Brookes confirmed in giving his evidence:

> I had had discussions with Paul [McClintock] back much earlier that year at the Wentworth Hotel on the basis of talking with him about future plans. Paul had requested on behalf of the board that I go forward to manage the potential merger of equals with David Jones, which fell over later in that year, and then we recruited three potential CEO replacements. So it was quite well managed from the perspective of me exiting the business sometime during that year, but there was no defined timing put on it.

555 Further, the applicant's contention that Mr Ashby left Myer because of the FY15 results was also without any basis. Mr Ashby confirmed in his evidence that he had resigned about a month before the 19 March 2015 disclosure was made, and that he had done so to pursue an overseas role.

556 I do not need to dwell on any of these collateral themes.

The Myer board was mistaken about the anticipated split of profits in H1 and H2 of FY15

557 I have already touched upon this earlier but let me say something further about it. But first let me set out a table.

Table comparing H1:H2 split for the forecast presented to the Myer board on 21 January 2015 with the forecasts presented on 22 December 2014 and 5 January 2015

Tab 284, 5140 - H1 vs H2 Historical Split (21 January 2015)						
NPAT $m		**H1**		**H2**		**FY**
		$m	**% of FY**	**$m**	**% of FY**	**$m**
FY10	**Actual**	119	71%	49	29%	169
FY11	**Actual**	109	67%	54	33%	163
FY12	**Actual**	87	63%	52	37%	139
FY13	**Actual**	88	69%	39	31%	127
FY14	**Actual**	81	82%	18	18%	99
FY15 CF + Actions	**Forecast**	62	69%	28	31%	90

5 Year Average (excluding FY14)			68%		32%	
Tab 274, 4997 - H1 vs H2 Split (22 December 2014)						
FY15 Current Forecast (CF)	**Forecast**	53	78%	15	22%	68
FY15 CF + Actions	**Forecast**	53	60%	36	40%	89
Exhibit R2, pg 4 - H1 vs H2 Split (5 January 2015)						
FY15 Current Forecast (CF)	**Forecast**	58	79%	15	21%	73
FY15 CF + Actions	**Forecast**	58	65%	31	35%	89*
***Note rounding error.**						

558 Now the documents considered at the 5 January 2015 board meeting show a current forecast for the full year with a $58m/$15m NPAT split, or 79% in H1 and 21% in H2; inclusive of "actions", it shows a $58m/$31m NPAT split, or 65% in H1 and 35% in H2. However, the email sent by Mr Brookes to the board members on 21 January 2015 gave as one reason why Mr Brookes considered that Myer had "no need to disclose any updates to the market out of our normal cycle" that the Myer forecast showed an FY15 NPAT of $90m "with even less cost reductions than the prior view presented to the board (cost in half two is now to be reduced by $14m not $21m)" and that the split of "65% average in first half profit" was said to be "in line with this year … 2014 was a one-off". The applicant says that there is no basis for that assertion, having regard to the split of profit shown in the forecast prepared in October 2014 which showed an approximately 80:20 split. Nevertheless the board at its meeting on 21 January 2015 was apparently convinced by Mr Brookes' email. The minutes record:

> The Board discussed the NPAT split between H1 and H2, and compared it to the historic split. Whilst last year the NPAT split between H1 and H2 was 82%:12%, in the previous four years the split has been around two thirds:one third. The current forecast for the split for 2015 will be approximately two thirds:one third. Further, it was noted that the Bloomberg consensus NPAT figure is currently $90m, which is in line with the FY2015 NPAT forecast with cost actions, although the full year NPAT forecast is being finalised.

559 For these reasons, the board considered that there was no obligation to inform the market about any of the adverse developments in the FY15 year to-date.

560 The applicant says that the version of the FY15 forecast prepared for the board in February 2015 was practically unchanged from the January 2015 version. The full year NPAT forecast was still $76m and required $14m of actions to bring it up to $90m. Those actions for H2 again required a $5m reduction in the marketing spend, $3m of continued recruitment freeze and $3m from each of discretionary and project opex.

561 At the board meeting on 9 February 2015, Mr Ashby is recorded as having made a presentation to the board on the NPAT forecast for the full year. The board considered the H2 forecast (which assumed growth on the previous year of 3% and that cost reductions previously discussed were implemented), which then resulted in a full year NPAT forecast of $90m. The board is said to have discussed the H1:H2 NPAT split noting that "based on the current forecast, while the split is different to last year, it is in line with the historic split over the past 5 years, being a split of two thirds: one third". The board also noted that the Bloomberg NPAT consensus for the full year was said to be $88m. The board then considered whether it had information that should be disclosed to the market and concluded that "given that the current forecast full year NPAT result is in line with the Bloomberg consensus, an announcement was not required to be made to the market at this time". Again, it appears that no consideration was given to the question whether the discrepancy between the then NPAT forecast of $90m and Mr Brookes' representation of increased profits in 2015 might require qualification or correction by ASX announcement. The applicant says that the percentage improvement in Myer's business performance which was required in the version of the FY15 forecast which was prepared in February 2015 was extraordinary. H1 had shown a negative change in NPAT of -23%, but this was anticipated to be converted into a positive 61% change in NPAT (from $18m to $29m) in H2. But the actual performance in FY15 H1 can be compared to FY14. The second quarter earnings of $79m were in fact approximately correct in predicting that the whole of FY15's profit would be earned in the second quarter.

562 There is some force in some of the points made by the applicant. But whether good or not, the fact is that Myer had no excuse not to make disclosure of its updated position by no later than 9 December 2014.

Myer's forecasts of NPAT with or without "actions"

563 Before proceeding further with the chronology I should make another general point at this stage.

564 Various forecasts provided to the board in late December 2014 and during January and February 2015 contained a forecast figure which presented a forecast of NPAT if adjustments to Myer's business plans in response to current trading including in relation to costs were not taken into account; this was typically described as the "Current Forecast". Another type of forecast figure presented a forecast of NPAT if adjustments to Myer's business plans in

response to current trading were taken into account; this was typically described as the "Current Forecast + Actions".

565 Myer says that it was this latter figure which represented management's forecast of anticipated NPAT based on how the business would actually be run, and which was treated by the board as the forecast of expected NPAT.

566 Before proceeding further, let me set out another table.

Table comparing "current forecast", "cf + actions", and Bloomberg consensus figures for forecasts presented on 22 December 2014, 5 January 2015, 21 January 2015, 9 February 2015 and 27 February 2015

	Current Forecast	CF + Actions	Bloomberg Consensus
22 December 2014	$68m	$89m	$90m
5 January 2015	$74m	$90m	$90m
21 January 2015	$76m	$90m	$90m
9 February 2015	$76m	$90m	$90m
27 February 2015		$91m	$89m

567 Now the applicant suggests that the "true internal forecasts" of NPAT from time to time were those amounts described as "current forecasts" before changes in the business plans ("actions") were taken into account. But I agree with Myer that the applicant's submission is inconsistent with the evidence and should be rejected.

568 First, it is apparent from the documents that the "Current Forecast" figure did not represent an anticipation of what NPAT would actually be, but only what NPAT would be if actions were not taken.

569 Second, it was planned that actions would be taken. For example, in each of the relevant documents the "actions" identified are not merely something to be considered, but are stated to be "Actions/Levers to be taken". That is, the actions are now part of the business plan as to how the business will be conducted. The forecast adopted by the business as to where it expects to end up at the end FY15 is therefore represented by the item in the forecast that is "FY15 CF + Actions". What is referred to in these documents as the "Current Forecast" is not the forecast as to what the result in FY15 is expected to be, but is rather only one-half of the picture being what the result is expected to be if certain steps are not taken. But certain steps were to be taken.

570 Third, the ASX Guidance Note 8 recognises that when one is considering disclosure obligations surrounding earnings, it is necessary to have regard to the fact that an entity may adjust its business plans in response to its current performance. This would include adjustments in relation to issues such as costs. This reflects the proposition that a business's expected performance must have regard to its most up to date business plans.

571 Fourth, Mr Brookes' evidence was that it was the figures which had regard to the way the business was to be run, and which therefore included the "actions" which represented "the then best forecasts by me and the EGM as to NPAT".

572 Fifth, Myer's contemporaneous documents, and in particular its board minutes, record that senior management and the directors treated the "Current Forecast + Actions" figure as the "forecast for FY15". See for example the board minutes of 22 December 2014: "the forecast for FY15 is NPAT of $89m"; and the board minutes of 5 January 2015: "the full year forecast NPAT is $90m". Consistently with what was seen to be the forecast, in his contemporaneous email of 21 January 2015, Mr Brookes said that "Our forecast shows $90m". This related to the forecast of 21 January 2015, which had a forecast NPAT of $76 million if no actions were taken or changes made to the way the business was run, and an actual forecast NPAT of $89/90 million based on actions "to be taken".

573 Sixth, Mr Brookes' evidence was that the approach taken by Myer, of considering its forecast of what the business would achieve based on its expectation as to how the business would be run as opposed to a figure based on what might be expected ignoring changes to the way the business was to be run was:

(a) an approach that had been taken at Myer since June 2006;

(b) consistent with the approach taken when he was CEO of Edcon in South Africa; and

(c) consistent with the approach taken at Woolworths, where he was a senior executive for around 20 years.

574 Seventh, at no stage was it suggested to Mr Brookes, or any other witness, that the cost "actions" taken into account by management and the board in arriving at the forecast figures were not reasonably based. Indeed, Mr Brookes' evidence was that the actions were "numbers that had been worked through with the EGM and discussed at EGM meetings and hot tubs to

ensure that we don't disappoint out shareholders", and that he would have worked with Mr Ashby to determine these cost savings.

575 Eighth, that the "actions" were presented in the documents separately to the forecast without those actions was merely an internal presentational issue. This is demonstrated by the fact that the 27 February forecast had only one forecast figure (described as "Current Forecast"), which figure on this occasion included all of the actions, and came to $91 million. Management and the board were both clear that they considered the forecast to be the figure which included matters concerning how the business would be run including the actions.

576 Accordingly, I agree with Myer that the applicant's submission that Myer's "true internal forecasts" were the lower figures without any reference to actions is problematic. But having said that, the realistic forecast did not necessarily embody *all* actions with an assumed 100% success rate in terms of the quantification of benefit.

577 Further, the applicant submits that the actions included in each of the forecasts were introduced to bring the current forecast figure up to or approximately to the Bloomberg consensus. But even if that is the case, there is nothing remarkable or untoward if Myer was keen to try to, at a minimum, meet shareholders' expectations. There was no suggestion that Myer was not actually planning to implement most of the actions that were identified, that those actions did not form part of its business plan, or that those actions were not realistic or achievable, albeit that the quantified benefits may not be fully achievable.

578 Further, Mr McClintock gave evidence that prior to the 19 March 2015 announcement, the board still had the view that Myer had the ability to run its business in a way that would deliver a result of about the level of consensus and which, in this respect, would be "acceptable to the market". Mr McClintock then made the point that:

> It is a completely valid way of running a business to actually say that to the extent to which you do not get the bottom line results that you hope you get from sales that you actually trim your costs. I think any one of my companies would do that.

579 The strategy is justifiable, except where trimming costs in the short term is highly artificial to the extent that its only motivation is to meet market expectations, at the expense of the business' interests in the medium to long term.

The 2 March 2015 reaffirmation of NPAT in line with consensus

580 On 2 March 2015, Myer conducted a conference call with analysts. During that call, Mr McClintock made clear to the market that Myer was measuring its continuous disclosure obligations as against consensus.

581 The reason for the call was explained by the Chairman in the following terms:

> **Paul McClintock** – *Myer Holdings Ltd – Chairman*
>
> Thank you very much and good morning everyone. Thanks for joining the call. I know it's short notice, but it's a big day for Myer and we were keen to share it with you. I have with me today the newly-appointed CEO of Myer, Richard Umbers; the CFO, Mark Ashby; Davina Gunn and Olivia Reith from Investor Relations.
>
> As you will already be aware, we have announced to the market that after almost nine years at the helm of Myer, Bernie Brookes is handing over the leadership brains to Richard Umbers. Before I talk about Richard and the changes, I'd like to very much acknowledge the extraordinary role that Bernie has played in leading the Company through the creation of the modern Myer out of the Coles Myer Group.
>
> …
>
> So that's what the timing's about. I know there are some concerns out in the market that -- about the timing. The truth is that in a company, you can build your decisions around announcing results and so on, but that's the wrong way of running a company. You run a company when the time is right; we've got a lot of people working here who rely upon us to actually make the decisions in a timely way.
>
> And the Board has a sense of urgency. This is not the sort of thing that you can put on hold until a convenient moment; you basically have to take the opportunity when you're ready. As I said earlier, it was right for the Company, we had strong candidates and basically we made the call.
>
> If anybody has any doubts, this is a Board with great experience that knows the responsibilities of the ASX Disclosure Rules and if we believed that there was any need to actually make any further disclosure before March 19, which is when we are doing our half-yearly, obviously we would have made that. In fact we would have made that some weeks ago. So this is not a discussion and this is not a decision that relates to those results; it relates to the ongoing future of the Company.

582 The following exchange later took place:

> **Michael Courtney** – *BofA Merrill Lynch – Analyst*
>
> Congratulations to Richard. Paul, you mentioned around continuous disclosure so I guess I'm just a little bit confused. The fact that there hasn't been any announcement around impairments today or around earnings for this current year in line with any cost investments that would need to be made, am I to take that as you're significantly far enough through what needs to be done that you know you won't have to make any impairments or revisions to guidance? Or you're not yet far enough through the decisions that need to be made to come to those conclusions?
>
> **Paul McClintock** – *Myer Holdings Ltd – Chairman*

I think it's fair to say, you know how the disclosure system works. We're aware of our obligations and trying to micro-manage to what extent we are through the process. Clearly if we had got to the point where we knew that there was disclosable information it would be out there and there isn't and it's not.

Michael Courtney – *BofA Merrill Lynch – Analyst*

Okay, so when we hear from Richard at the half year or even the full year will the strategy have been completed, in terms of the transformation that needs to occur?

Paul McClintock – *Myer Holdings Ltd – Chairman*

Well, the strategy -- the half-yearly results are on March 19 which is two weeks, so let's be realistic. Richard got the job today. But as far as when we will speak more fully, my expectation is it will be later in the year and that does mean that certainly by the full-year results, I would expect there would be more information out in the market by then, yes.

583 Later another exchange took place:

Thomas Kierath – *Morgan Stanley – Analyst*

Well done. I understand that you don't need to provide any earnings update. Paul, I was wondering if you'd be prepared to stand behind Bernie's comments that he thought that profits could rise, or would rise this year.

Paul McClintock – *Myer Holdings Ltd – Chairman*

Anything that I say at this point is, in fact, giving profit guidance and I think with the announcement coming out on March 19, I won't make any further comment in relation to it.

Our disclosure obligations are linked to the Bloomberg consensus. That's my understanding of my obligations under the ASX and that's broadly the benchmark that we are using in telling you that there is no need for a disclosure now and there hasn't been in the past week.

584 Then later it was said:

David Thomas – *CLSA – Analyst*

Maybe some context, I know there's been a lot of talk about consensus and that sort of stuff, so I hate to harp on it, but Myer did AUD98 million of NPAT last year; consensus was expecting them to do AUD91 million or circa AUD91 million in FY15. Are they the numbers that you and the Board have in mind when you say that you don't need to update the market and that you're aware of your continuous disclosure obligations?

Paul McClintock – *Myer Holdings Ltd – Chairman*

Again, if we start to micromanage the thing, I think we start to cross the line. But broadly, it is the Bloomberg consensus that we track in relation to our continuous disclosure obligations and that is the reaffirmation that I have given you today.

585 Relevantly, let me emphasise two statements.

586 The first statement has Mr McClintock saying that "[o]ur disclosure obligations are linked to the Bloomberg consensus. That's my understanding of my obligations under the ASX and

that's broadly the benchmark that we are using in telling you that there is no need for a disclosure now and there hasn't been in the past week".

587 The second statement arises from the following exchange:

> **David Thomas** – *CLSA – Analyst*
>
> Maybe some context, I know there's been a lot of talk about consensus and that sort of stuff, so I hate to harp on it, but Myer did AUD98 million of NPAT last year; consensus was expecting them to do AUD91 million or circa AUD91 million in FY15. Are they the numbers that you and the Board have in mind when you say that you don't need to update the market and that you're aware of your continuous disclosure obligations?
>
> **Paul McClintock** – *Myer Holdings Ltd – Chairman*
>
> Again, if we start to micromanage the thing, I think we start to cross the line. But broadly, it is the Bloomberg consensus that we track in relation to our continuous disclosure obligations and that is the reaffirmation that I have given you today.

588 As to how these comments were understood, commentary from analysts following the statements being made is instructive.

589 In a report from Mr Andrew McLennan and Ms Roshenka Madanayake at Commsec they said:

> The key short-term risk is the lack of ownership of FY15 earnings. We have made no earnings changes. Notably, the Chairman called out consensus as a reasonable earnings guide. This implies a 10% NPAT decline in FY15, which contradicts previous management expectations for profit growth (CBAf -13%).
>
> …
>
> The share price rollercoaster continues. Underperformance appears likely for MYR's share price in the short term, despite the confirmation of consensus earnings for FY15.

590 In a report from Mr Grant Saligari and Mr Troy O'Dwyer at Credit Suisse they said: "The Chairman has reaffirmed that trading performance is in line with Bloomberg consensus (FY15 NPAT $90mn, EPS 15.1cps)". And further:

> The Chairman has reaffirmed MYR's performance is in line with current market consensus – NPAT $90mn and EPS 15.1cps for FY15, which suggests that underperformance to short-term expectations, if it exists, is not of a material nature.

591 It would seem that analysts understood that as at 2 March 2015 Myer's expectations for its NPAT for FY15 was in line with, or around, the consensus figure of $90 million. And it would seem that the comments of analysts showed that they had understood at this time that Myer's expectations for its NPAT was broadly in line with consensus. Let me give some examples.

592 Mr Bryan Raymond and Mr Elijah Mayr of Macquarie, said: “No earnings update confirms current consensus expectations”. It is therefore evident that Macquarie considered what Mr McClintock said not to be an “earnings update”.

593 Mr Thomas Kierath and Ms Monique Rooney of Morgan Stanley commented on 2 March 2015 that “MYR has an obligation to update the market if profits were different to consensus – so today’s announcement could actually be a confirmation of existing consensus expectations”. There are two points to note from this. Macquarie’s analysts, like the others, understood what Mr McClintock had said as confirming “consensus expectations” of around $90 million. Second, their understanding was that Myer’s obligation was to update the market if profits were different to consensus.

594 Mr David Thomas and Mr Richard Barwick of CLSA did not comment on Mr McClintock’s statement in their report, but at the subsequent earnings call on 18 March 2015, an analyst named David, that is, Mr Thomas, said “your Chairman two weeks ago suggested that AUD91 million of EBIT – sorry NPAT – was a number he was comfortable with”.

595 According to Myer, none of the commentary in any of the analysts’ reports suggested that they considered the reaffirmation or confirmation that Myer was trading in line with consensus to be new or material information. Save for a brief comment in the UBS report, none of these other analysts commented on Mr McClintock’s statement. This is indicative of the fact that none of them considered it to be significant for the reason that they all already knew or assumed that Myer was using consensus as its disclosure benchmark and/or were paying no regard to the comment of Mr Brookes six months ago. Consistently with this, Myer’s internal documents said: “The feedback from the market can be summarised as follows: … The announcement confirmed that a 10% earnings drop (Bloomberg) consensus is Myer’s continuous disclosure reference point”. Mr Greg Houston, an expert called by the applicant whose evidence I will discuss later, also gave evidence that, by reference to the 2 March 2015 announcement, and the commentary of analysts following that announcement, he agreed that at this time analysts understood that Myer’s internal expectations were broadly in line with consensus, and that: “at least at this stage, if anyone had been thinking about Mr Brookes’ earlier comment, by 2 March it was clear to them that Myer was now tracking in line with a much lower figure of $90 million”.

596 The second point to note is the reaction by analysts in terms of their forecasts for NPAT in FY15 following Mr McClintock’s statements. Those reactions can be summarised as follows:

	Analyst	FY15 NPAT forecast as at 4 February 2015	FY15 NPAT forecast as at 9 March 2015
1.	BofA	$88m	$88m
2.	Citi	$89m	$89m
3.	Commsec/Commonwealth Bank	$86m	$86m
4.	Credit Suisse	$89m	$88m
5.	Deutsche	$91m	$87m
6.	Goldman Sachs	$91m	$92m
7.	JP Morgan	$84m	$84m
8.	Macquarie	$88m	$90m
9.	Morgan Stanley	$91m	$91m
10.	CIMB	$85m	Not available
11.	CLSA	$88m	$88m
12.	UBS	$91m	$91m
Bloomberg Consensus		$90m	$89m
IBES Consensus		$88m	$88m
Average		$88m	$88m
Median		$89m	$88m

597 Of the 12 analysts whose reports were considered:

(a) eight do not change their NPAT forecast for FY15 in any way;

(b) two increased their NPAT forecast for FY15 (Goldman Sachs and Macquarie);

(c) two decreased their NPAT forecast for FY15 (Credit Suisse and Deutsche). Deutsche was the only analyst whose forecast moved in any significant way. It is evident from the Deutsche report that this change was not linked to Mr McClintock's comment, but to a view as to increased CODB that would be needed by way of strategic investment.

598 Movement in consensus or average/median figures were non-existent or immaterial.

599 Mr Houston gave evidence that analysts in their reports typically discuss the announcement of new, material information about a company's future prospects. Further he said that looking at analysts' valuations and reports represents an insightful, objective basis for determining whether any statements by a company were considered to be new. Further, he said that when analysts consider information to be new and material they tend to revise their earnings estimates.

600 Accordingly, the absence of any change by analysts to their forecasts indicates that they did not consider anything said by Mr McClintock to be new material information. Consistently with this, Mr Houston gave the following evidence:

MR LIONDAS: Now, we saw just a moment ago that on 2 March an announcement to the effect that Myer was in line with consensus that $90 million didn't cause consensus to move. You would agree with that?

MR HOUSTON: Yes.

MR LIONDAS: And, therefore, if what analysts do is a reasonable indication of whether they consider information to be new or material, you would agree, wouldn't you, that that would indicate that on 2 March none of those analysts saw the announcement of NPAT being in line with $90 million as being new or material information?

MR HOUSTON: I think that the evidence suggests that that – that was what their expectations already were. Yes.

MR LIONDAS: And so then, when we come to the 19 March announcement, the new information that has caused consensus to move down must be the announcement of a forecast that is below consensus?

MR HOUSTON: Yes.

MR LIONDAS: So what these events, effectively, tell you is that in order for consensus to move down – and on your analysis, for there to be a corresponding decline in the share price – you need an announcement of NPAT of less than consensus.

MR HOUSTON: Generally speaking, yes. That – I mean, we're only just talking about it – one year here, but yes, generally speaking.

601 Dr Stephen Prowse, an expert called by Myer whose evidence I will discuss further later, gave the following evidence to a similar effect:

MR O'BRYAN: I see. Yes. So you don't regard the abnormal returns on the 19th as any indication of the market's disappointment to find that what Mr Brookes had said seemed to be completely unreliable six months later?

DR PROWSE: You're talking about the March 19 reaction?

MR O'BRYAN: Yes.

DR PROWSE: … [E]ven before the March 19 announcement, the market had understood that, regardless of what was said earlier, the market's expectations were that Myer was not going to perform anywhere close to what it did in fiscal year 2014, let alone better than.

MR O'BRYAN: And do you understand that was connected with a statement made by the chairman to the analysists on 2 March?

DR PROWSE: No. That was understood by the market well before March 2, because if you look at the Bloomberg consensus estimates of earnings, it's approximately 90 prior to the announcement on March 2.

MR O'BRYAN: Yes.

DR PROWSE: So analysts had already factored into there and understood and come to an expectation that Myer was not going to perform as well as it did in 2014 well before March 19 and before March 2 as well.

MR O'BRYAN: As measured by your Bloomberg Best index?

DR PROWSE: As measured – well, it's not my index. It's not my index. It's the index

> Mr Houston uses to measure market expectations.
>
> MR O'BRYAN: Yes.
>
> DR PROWSE: And that - - -
>
> MR O'BRYAN: Well, the index. Yes.
>
> DR PROWSE: What that tells me is that the market by – certainly, by March 2 and before, had already understood that Myer was going to significantly underperform relative to 2014.

602 There was then a further exchange as follows:

> MR O'BRYAN: Now, you will see in the response that the chairman declined to respond in the first line, and then he said this in the next line, "Our disclosure obligations are linked to the Bloomberg consensus. That's my understanding of my obligations under the ASX. That's broadly the benchmark that we are using in telling you there's no need for a disclosure now, and there hasn't been in the past week." And you will see, if you turn to page 6548 that Mr Thomas, who is, in fact, that analyst from CLSA that you looked at one of his reports earlier on, he's the one who had the comparator or peer companies, Mr David Thomas, he also asked a similar question about where Myer was tracking to and Mr McClintock repeated, in effect, saying in answer to that, "Broadly, it is the Bloomberg consensus that we track in relation to our continuous disclosure obligations." That's the reaffirmation I've given you today. Now, could you make the assumption this is the first occasion on which Myer has ever said to anybody in any public setting, if you call an analyst conference call a public setting, that the company was, as the chairman put it on that day, tracking to the Bloomberg consensus in respect of its continuous disclosure obligations. And would you agree that that is likely to have influenced the analysts in respect of their reconsideration of Myer's likely profit expectations when that statement was made by the chairman?
>
> DR PROWSE: No, because I've studied this and, as I've said before, market expectations prior to this announcement on 1 March, or this discussion, this conference call, were approximately 90, $91 million for fiscal year 2015. So analysts have already determined independently, and based on other information coming out, that Myer wasn't going to make anywhere close to in their expectation what they made in fiscal year 2014. So this information, while it did come from Myer, was not new information in the sense that analysts had already figured out and decided collectively that their expectation collectively, sort of the market expectation for earnings was approximately 90, 91 million. So this track – this discussion by Mr McClintock – and if you look after 2 March, analysts didn't change their expectations about earnings. The Bloomberg consensus stayed at about 90, 91. So there was no real effect on how market analysts were thinking about what is Myer going to make in 2015 because they had already figured – they had already come to that conclusion.

603 Further, there is no evidence to suggest that any share price movement on 2 March 2015 was connected to anything other than information on that date that the CEO and CFO were to be changed. The simultaneous departure of the CEO and CFO would be a significant event for any business, but it was particularly significant for Myer since the CEO had been in that role for approximately nine years and the CFO for approximately seven years.

604 Therefore, according to Myer, the first piece of objective evidence that I have as to how analysts and the market would have reacted to a disclosure of expected NPAT around the level of Bloomberg consensus is that analysts' expectations and Bloomberg consensus would not have changed in any material way and the share price would not have changed in any material way. I tend to agree that this is some evidence at least.

605 Now the applicant notes that Mr McClintock's comment stated two things for the first time: (a) first, that Myer was assessing its continuous disclosure obligations only against the Bloomberg consensus; and (b) second, "that there is no need for a disclosure now and there hasn't been in the past week".

606 The applicant says that the fact that the analysts did not materially change their FY15 NPAT forecasts as a result of what Mr McClintock said tells little about the question whether Mr Brookes' representation of increased NPAT for FY15 was or was not still influential in forming the investment views of market participants other than the stockbroking analysts who were present on that call. That is a fair point, but it may not ultimately assist the applicant given the way it sought to utilise market-based causation and prove loss.

607 In any event, according to the applicant, all that this evidence could show is that on 2 March 2015, nearly six months after Mr Brookes' profit forecast, as a result of what Mr McClintock said, the analysts on that call alone were informed about the basis upon which Myer was then assessing its continuous disclosure obligations ("there is no need for a disclosure now and there hasn't been in the past week") and Myer erroneously considered on 2 March 2015 that it had nothing to disclose to the market about its actual expectations in respect of FY15 NPAT.

608 Further, according to the applicant, the latter proposition proved to be unreliable a little over two weeks later, when Myer announced the updated FY15 NPAT range of $75m to $80m. And the former proposition is irrelevant to the question whether what Mr Brookes had represented on 11 September 2014 was or was not misleading to the market and did or did not require correction or clarification at any time thereafter until it was contradicted on 19 March 2015. I agree with the applicant on these points.

609 Further and in any event, as the applicant points out, the analysts' consensus and/or the Bloomberg consensus is only one aspect of the information which it might reasonably be assumed is influencing investment decisions in the marketplace. And Myer made no effort to examine or explain the extent to which the so-called consensus figures, whether in the form in

which they were reported to the board of Myer or in the form which was considered by Mr Houston and Dr Prowse being the Bloomberg BEst, were known to or understood by ordinary market participants. Again, the applicant makes a fair point. But where it takes the applicant is another matter.

610 Finally and before proceeding further, I would note that Ms Gunn sent on 3 March 2015 an email to the Chairman and the directors in the following terms:

> Pls see attached the analyst reports published overnight and in summary below.
>
> The feedback from the market can be summarised as follows:
>
> - The change in leadership was not a surprise but the timing was very suspicious (being so close to results)
> - The news that Mark was leaving was unexpected and exacerbates the concerns about the result
> - There is now further scepticism surrounding the 1H2015 result
> - The announcement confirmed that a 10% earnings drop (Bloomberg consensus) is Myer's continuous disclosure reference point, not the EPS growth referenced by Bernie prior to Christmas
> - Not enough meat on what the new strategy actually is. Appears to be business as usual.
> - New CEO represents risk around re-basing the earnings and potential enquiry raising to fund the strategic review
> - Further downside risk to the share price

611 On 10 March 2015, the Bloomberg consensus for NPAT was $89 million.

16 and 17 March 2015

612 On 16 March 2015, draft Q&A responses were prepared in anticipation of the release of the H1, FY15 results.

613 The following was stated:

> **Key message sound bites**
>
> 1. Disclosure criticism
>
>   As the Chairman said at the time of the CEO succession announcement, we monitor Bloomberg consensus forecasts to ensure our expected performance is in line with market expectations. We are well aware of our continuous disclosure obligations and are confident in the guidance we have provided today for FY15 NPAT of $[89] million.
>
> …

Top Qs – 1H Result

Issue	Messages
Should you have updated the market before now on this result? - 23% drop on pcp and management has previously verbally flagged expectation of FY15 earnings growth *Richard/Mark*	• Myer is aware of its continuous disclosure obligations and we are comfortable we have complied at all times • As the Chairman said at the time of the CEO succession announcement a few weeks ago, we monitor Bloomberg consensus forecasts closely to ensure our expected performance is in line with market expectations • We are saying today that we expect FY15 NPAT to be $[89] million • We are confident in the guidance we've issued today and have nothing more to add
You are predicting [x%] NPAT growth in 2H – is that really achievable? *Mark*	• Our guidance for the second half of FY2015 reflects a full 6 month contribution of 2 new stores, 4 completed major refurbishments, and continued online sales growth • Well prepared for significant trading months of June/July • In 1H we invested $20m in strategic initiatives, $12m of that will not be repeated in 2H, and we now expect to invest $25m-$35m during FY2015 rather than the $35m-$50m previously flagged • Continued prudent approach to costs and cash management *If pushed* • NPAT guidance reflects typical 1H/2H earnings split of 65%/35% (FY14 split of 82%/18% was atypical due to increased costs in 2H2014 associated with major store refurbishments and a tough 2H trading environment)

614 On 17 March 2015 a directors' Strategy Meeting was held, chaired by Mr McClintock. The following was said:

> **1. H1 announcement and subsequent activity**
>
> The Board noted the draft H1 announcement.
>
> The Board discussed the February trading result as contained in the Board papers, and as against the forecast that was presented on 27 February. The Board was concerned to understand in particular both the OGP result and the NPAT result for the month as against the forecasts for each on 27 February. Whilst the Board paper noted timing differences had some impact, the Board expressed concern with the results when compared with the 27 February forecast, and requested that the current result be considered urgently. In addition, the Board wanted to understand whether the sales result through February and March indicated a concern with the sales trend.
>
> MA said the recent sales results required further investigation, particularly if they were indicative of an adverse sales trend. The sales result for February was such that it had required almost all of the sales "buffer" that had been allowed for in the full year forecast. MA said the GP trend also required further investigation and work. MA said that the KPI process, being the detailed merchandise build-up of the forecast by business, based upon sales trajectory, marketing plans, and product range performance, had commenced last week, and has subsequently flowed through to the profit and loss process in the last 24 hours, and provided visibility of the impact of the decrease in sales on OGP. This has caused further reason to review the forecast. Whilst work has been done to provide a reforecast for the rest of the financial year, the process will also need to include considering the impact of the new initiatives that are planned and that are intended to positively influence sales. To obtain a view of the impact of the positive impact of initiatives on the full year forecast, OGP needs to be considered by the stores and merchandise teams, to establish the impact the initiatives will have on sales and OGP, and whether this will impact the trend for the balance of the financial year. The forecast work that is in process has not incorporated this, and when the stores and merchandise work has been completed, it will be included in the forecast. The impact on the full year results of the significant months of June and July also need to be

> considered.
>
> The Board noted that the shrinkage for the month had been $1.1m worse than expected.
>
> The Board restated that at the 27 February meeting, the full year forecast presented by Management was $91m. The Board requested that Management urgently undertake detailed work to consider the impact of the information that it had concerning the sales trend and the resultant impact on OGP and NPAT.

18 March 2015

615 On 18 March 2015 a board meeting was held. The board minutes for 18 March 2015 record that a detailed review had been conducted of the current forecast for the balance of FY15. As to what had changed, the minutes noted that:

> The previous forecast was prepared on the basis of stronger expected sales results, particularly given that comparative sales for January were up against last year. However, the recent February trading performance result and March sales are concerning. OGP was at 39.28%, down 162 bps against a forecast of 40.90%. In addition, the shrinkage result was also up $1.1m for the month.
>
> …
>
> The review of the forecast for the balance of FY15, based on the trend, resulted in a reduction in sales, and a decline in OGP of $13 m, compared with the forecast on 27 February…
>
> The revised sales and OGP figures, when applied across the store network, has resulted in the expected forecast for FY15 being lower. The range recommended by Management to the Board for the forecast NPAT for the year was a NPAT of $77m to $83m, excluding the costs of the strategic review.
>
> …
>
> The Board considered the analysis presented by management in detail, and discussed their concerns given the sales and deteriorating OGP through February and March. The positive trend that had emerged through the end of December and through January had not continued, which caused the Board concern for the balance of the financial year. The Board considered that in its judgment, taking into account the trend of the previous 6 weeks and the impact on OGP, that the forecast for full year NPAT was $75m to $80m, excluding the costs of the strategic review.

616 What those minutes record was that trading performance in February and March had been lower than forecast.

The 19 March 2015 Announcement

617 The ASX and market announcement on 19 March 2015 was that: “The Company now expects FY2015 NPAT to be between $75-80 million (excluding one-off costs)”.

618 The H1 results were announced in the following terms:

First Half Overview

- 1H FY2015 total sales up 1.5% to $1,763 million, up 0.9% on a comparable store sales basis
- Q2 total sales up 2.5% to $1,072 million, up 1.0% on a comparable store sales basis
- January total sales up 3.9%
- Continued strong growth in online sales
- Operating gross profit[1] up 0.9% to $714.9 million
- Operating gross profit margin down 24 basis points (bps) to 40.54%
- Cash cost of doing business (CCODB)[1] up 6.2% to $569.6 million
  - Underlying costs up 2.4%
  - $20 million investment in the business
- Earnings before interest, tax, depreciation, amortisation (EBITDA) down 15.6% to $145.3 million
- Earnings before interest and tax (EBIT) down 20.8% to $100.2 million
- Net profit after tax (NPAT) down 23.1% to $62.2 million
- Interim dividend of 7 cents per share, fully franked, to be paid on 7 May 2015 (Record Date is 30 March 2015)

FY2015 Outlook

- Recent sales have been ahead of last year but below expectations and the Company now anticipates operating gross profit margin pressure to continue during the second half
- We anticipate total costs to grow by approximately $15 million in the second half compared to 2H FY2014
- One-off costs in 2H relating to the strategic review are expected to be approximately $7 million
- The Company now expects FY2015 NPAT to be between $75-80 million (excluding one-off costs)

619 There was a similar statement concerning NPAT made under the heading outlook.

620 The announcement was in terms of Myer's expectation as to its FY15 NPAT. It is therefore a statement of its opinion in this regard.

621 According to Myer, a difficulty for the applicant in this case is that at no relevant earlier point in time did Myer hold an expectation of NPAT of this amount, or anything like it. According to Myer, at no time prior to 18 March 2015 did Myer hold an expectation that its NPAT would be less than consensus. And Mr McClintock's unchallenged evidence was that "[a]t the Board meeting on 18 March 2015 I was presented for the first time with a measureable and reasonably certain view that Myer's FY15 NPAT would likely be materially less than consensus". Further still, it was not suggested to any of Myer's witnesses that they in fact held an expectation of NPAT of less than consensus at any relevant time. Now all of that may be so. But I do not accept that consensus was the *sufficient* benchmark to assess materiality and Myer's continuous disclosure obligations.

622 But I do agree with Myer that prior to this time it was not obliged to disclose an NPAT in the range of $75 to $80 million whether as part of its continuous disclosure requirements or as part of any correction of the 11 September 2014 representation.

623 Before proceeding further, let me note aspects of the earnings call that took place after the announcement.

624 The following Q&A took place:

> **Shaun Cousins** – *JP Morgan – Analyst*
>
> Just in regards to the guidance, I'm not sure if the Chairman's here, but under continuous disclosure regulations, I would have thought that at the end of March, you would have had an idea of sales in February and maybe gross profit dollars in February. If you don't have an eye on gross profit dollars in February why are your systems inadequate in that manner?
>
> I'm just sort of curious why -- given that that much of the call related to; are you comfortable with guidance? Consensus is below what management have said, are you comfortable with that number, but the Chairman was silent on that issue and actually -- and hence agreed and almost that didn't change guidance.
>
> Why didn't you change guidance then, given that it only takes 19 days and the market's looking at around a 10% to 15% downgrade. But obviously your share prices of today are kind of reflecting some of that.
>
> I'm just curious, given consumers disclosure guidelines why you didn't make that change or why the Chairman didn't make that change on March 1?

625 He was referring back to 2 March 2015.

626 Mr Umbers responded:

> **Richard Umbers** – *Myer Holdings Ltd – CEO and MD*
>
> As I mentioned earlier, January was actually a very strong month for us and the Stocktake sale was very positive. That gave us every confidence in the Bloomberg consensus measure that we use.
>
> Having said that, when we actually saw the result of February, which of course the P&L for that has only just come in and when it did come in, we triggered a full review of the outlook for the rest of the year.
>
> The reason we did that is because the key lever that sits within that, the GP, came off and we needed to understand that better in the context of the competitive environment and then extrapolate that forward.
>
> That has happened very recently and we're well aware, obviously, of our continuous disclosure obligations and as a result of that, we're releasing the reforecast today. Anyone else in the room?

627 Then the following took place:

> **Unidentified Participant [Mr David Thomas]**
>
> Yes. Hi guys. I'd like to put a couple of numbers around your guidance if possible. So -- and I know this question has been explored a little bit -- but your Chairman two weeks ago suggested that AUD91 million of EBIT -- sorry, of NPAT -- was a number that he was comfortable with.

Two weeks later you're at the mid-point which is AUD77.5 million which is down 15%. I just don't see how that can -- how you can defend that in terms of continuous disclosure based on a couple of weeks of trading. I know you may not have had February but I would remind that -- 80% of your earnings are made in the first half.

Richard Umbers – *Myer Holdings Ltd – CEO and MD*

The Chairman made clear our view on the Bloomberg consensus which is--

Unidentified Participant

--which was AUD91 million--

Richard Umbers – *Myer Holdings Ltd – CEO and MD*

--if you like, that we were following. There was no reason why we were obligated to make a declaration at that point because we were within the consensus range. So there was no requirement there.

Unidentified Participant

How could it have been in consensus range?

Mark Ashby – *Myer Holdings Ltd – CFO*

David, it's Mark here. We're not going to get into a debate on this. We are very aware of our disclosure obligations--

Unidentified Participant

--well I don't believe that--

Mark Ashby – *Myer Holdings Ltd – CFO*

--and we have met those disclosure obligations. So there's no purpose to getting into a debate.

Unidentified Participant

To have hit the guidance for the full year you would have needed to increase your second half profit year-on-year by 70%. I don't see how you could say that that's in line with your expectations.

Mark Ashby – *Myer Holdings Ltd – CFO*

Well, that's your opinion. It's not ours.

Unidentified Participant

Well, it's the numbers. It was clear that AUD91 million was NPAT. You knew AUD62 million was your first half performance.

Mark Ashby – *Myer Holdings Ltd – CFO*

David, I'm going to -- all I'm going to do is give you exactly the same answer each time. We're aware of our disclosure obligations and we believe we've met the obligations. So we're not going to get into a debate on it.

628 Let me note how analysts reacted to this announcement. The evidence is that the Bloomberg consensus moved from $88.7 million to $78.65 million following this announcement.

Accordingly, based on an announcement of expected NPAT of $75 to 80 million, consensus settled within and toward the upper end of that range.

629 Now given that consensus was at $89m, and the announced expectation was NPAT of $75 to 80m, what the market was being told was the NPAT was expected to be around 10 to 16% below consensus. So, I agree with Myer that it is that information, which was not already factored into the share price, to which the market and the share price reacted. To put it another way, with which I agree on the evidence, if the market had been told on 19 March 2015 that Myer expected NPAT of around $89 million, then there was no evidence to suggest that the share price would have fallen.

630 I agree with Myer that the objective evidence appears to disclose that:

(a) an announcement of an NPAT expectation by Myer in line with consensus would not have moved Bloomberg consensus; and

(b) an announcement of an NPAT expectation by Myer below consensus would have moved Bloomberg consensus into line with the newly stated expectation but not below it.

631 So, according to Myer and with which I substantially agree, there are several important points that can be made when one considers the 2 March 2015 and 19 March 2015 disclosures, the analysts' reactions to each, and regard is had to the applicant's evidence as to price inflation/loss, which evidence is premised and dependent upon Bloomberg consensus decreasing in order for any share price inflation to be established.

632 First, in order for consensus to move down, there would have to have been an announcement of an expectation by Myer of NPAT which was less than consensus.

633 Second, there is no probative and compelling evidence that Myer had an expectation of NPAT of less than consensus at any time prior to 18 March 2015.

634 Third, even if Myer had an obligation to disclose at some point in time that it had an expectation of NPAT that was less than $98.5 million, all that would have been disclosed in light of the uncontradicted views held by and within Myer was that its NPAT expectation was now of an amount that was the same as or not materially different from consensus.

635 Accordingly, even if the applicant succeeds in demonstrating that Myer should have made a disclosure of a different expectation as to NPAT at some point in time earlier than 19 March

2015, on its own analysis and model used to demonstrate loss, no loss has been demonstrated. I will discuss this question in more detail later in my reasons.

636 For the moment, let me just re-state my principal conclusion concerning what Myer should have disclosed.

637 In the context of and given the fact that the 11 September 2014 representation had been made, Myer should have disclosed to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 would not be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

638 Now in a sense these are cascading possibilities because making any one disclosure *may* have removed the need for any later disclosure in the sequence that I have just outlined.

639 In my view on the evidence, Myer can be taken to have held such an opinion as to the likely FY15 NPAT on each of the above dates and accordingly there should have been disclosure of such an opinion under listing rule 3.1 and s 674. But in any event in the context of the 11 September 2014 representation, such a disclosure should have been made at these various points in time in order to correct the 11 September 2014 representation. By not having so corrected at each of these points in time, Myer engaged in misleading or deceptive conduct in contravention of s 1041H.

EVENT STUDY FRAMEWORK

640 Before getting into the detail of event studies, it is convenient at this point to say something about the expert evidence.

641 Three experts were called, two of whom gave evidence during a concurrent evidence session. Relative to the time taken up with the lay evidence, the concurrent evidence and the time taken up with the separate cross-examination of another expert was short and efficiently run. In the present context, to have fragmented the process by any delegation to a special referee would have been inefficient and expensive. Moreover, it would have denied me the benefit of having the relevant debate play out in real time in the theatre of trial so that questions of mixed fact and law concerning materiality, causation, loss and damage could properly be considered. In complex commercial class actions it is desirable to have experts available for the trial judge to prod and poke in order to achieve a competent understanding of the technical issues.

642 Let me make some preliminary observations concerning the three experts.

643 Mr Houston, an expert called by the applicant, is a financial economist and founding partner of Houston Kemp.

644 Mr Houston has extensive experience in the economic analysis of markets and the provision of expert advice in litigation, business strategy, and policy contexts. His career as a consulting economist was preceded by periods working in a financial institution and for government.

645 Mr Houston has directed a wide range of financial, competition and regulatory economics assignments during his consulting career. His work in the Asia Pacific region has principally revolved around the activities of the enforcement of regulatory agencies responsible for these areas. He has advised on merger clearance processes, competition proceedings involving allegations of anticompetitive conduct ranging from predatory pricing, anticompetitive agreements, anti-competitive bundling and price fixing. He also has considerable experience of infrastructure access regulatory matters, and intellectual property and damages valuation. In his securities and finance work he has advised on a large number of securities class actions, and on cost of capital estimation.

646 Mr Houston has acted as an expert witness in valuation, antitrust and regulatory proceedings before the courts, in various arbitration and mediation processes, and before regulatory bodies in Australia, Fiji, Malaysia, New Zealand, the Philippines, Singapore, the United Kingdom and the United States.

647 Prior to April 2014, Mr Houston was a director of the global firm of consulting economists, NERA Economic Consulting, where for twelve years he served on its United States' Board of Directors, for five years on its global Management Committee and for sixteen years as head of its Australian operations.

648 I found his evidence on event studies to be very thorough and of significant assistance.

649 Now I note that some objections were taken by Myer to the admissibility of his evidence, but they lacked substance. Mr Houston had sufficient expertise for the purposes of expressing admissible opinions under s 79 of the *Evidence Act 1995* (Cth). Further, in terms of the content of his evidence I was well able to distinguish between the assumptions that Mr Houston had made and the opinion evidence.

650 Dr Prowse, a US expert called by Myer, is a financial economist and a director of FTI Consulting, based in Dallas, Texas. He has been a senior economist and policy advisor in the Federal Reserve System, where he provided economic and financial policy advice to the chairman of the Federal Reserve Board and the President of the Federal Reserve Bank of Dallas on financial matters, including securities and credit markets. Dr Prowse has also served as a consultant economist for a year at the Bank for International Settlements in Basel, Switzerland. Dr Prowse has also served as an adjunct professor and has taught finance. He has published numerous articles on financial topics in solid academic journals such as the *Journal of Finance*, *Journal of Financial Economics* and *Journal of Banking and Finance*. Dr Prowse has extensive experience in securities, antitrust, intellectual property, breach of contract, and class action litigation. He has written a number of articles on the structure and operations of private equity funds.

651 Dr Prowse has had extensive experience in providing economic, financial and valuation analysis in valuation and securities-related litigation. He has experience in the valuation of public and private securities, including corporate and government bonds, equities, convertible preference shares, options, mutual fund shares, limited partnership interests, private equity funds, mortgage-backed securities, collateralized debt obligations, and other exotic instruments. He has also analysed loss causation, conducted event studies, estimated the statistical significance of stock price movements on particular event days, and calculated damages in a large number of securities-related cases, including shareholder class actions.

652 Like Mr Houston's evidence I found his evidence on event studies of considerable assistance.

653 Both experts were well matched and the debate and competitive tension between them during the concurrent evidence session considerably assisted my comprehension and analysis of the real issues concerning the appropriate event study analysis. Contrastingly and contrary to suggestions made in other simpler cases, to have just had one court appointed expert would have impoverished the process. Competing views would not have been fully exposed. And any competitive tension that could have assisted to resolve such views would have been lost. In complex commercial class actions, the best mode of forensic testing should be adopted rather than the Holden Commodore variety.

654 Let me say something about the third expert who was separately dealt with.

655 Mr Andrew Molony, an expert called by the applicant on the question of materiality, is an equity capital markets advisor to institutional investors. He is a director of Molony Advisory Pty Ltd. Since 1995 he has worked in the securities industry and financial markets, principally on equity capital market related matters.

656 Mr Molony has considerable experience in investments and financial markets in Australian and international markets, including holding positions at Credit Suisse, Goldman Sachs JBWere and Transurban. In those positions his focus was originating equity financings for corporations, private equity firms, infrastructure funds and governments. He also managed relationships with institutional investors and external wealth advisory firms.

657 Mr Molony is a member of the Investor Representative Committee for the GPT Wholesale Office Fund and was a member of the Investor Committee for the Lease Australian Prime Property Fund, the AMP Australian Diversified Property Fund and the AMP Infrastructure Equity Fund from 2016 to 2017.

658 He has specialist expertise in listed equities including valuation and portfolio construction and management.

659 I found his evidence on questions of materiality to be helpful, although there were some limitations on the value of some of his evidence given that he had not been a research analyst and did not have direct experience on such matters.

660 Let me now turn to the evidence on event studies.

(a) Overview

661 Let me begin with an overview of the technique drawn from Mr Houston's evidence which was not the subject of any contest.

662 An event study is an empirical technique that measures the effect of a particular "event", such as the release of information to the ASX, on the price of a company's shares. The technique analyses the different factors typically affecting the daily movement in share prices, by reference to observed changes in the price of a particular share from one day to the next. Share price returns may be expressed in terms of the percentage movement in the share price or the log change in the share price, which is close to the percentage change for small movements. A log return is the ratio of the natural logarithms (log to base **e** rather than base 10) of two daily closing share prices. For example, the daily log return on day *t* is equal to: $\ln(\text{price}_t/\text{price}_{t-1})$, where "ln" is the natural logarithm, "price_t" refers to the security price on day *t* and "price_{t-1}" refers to the security price one day prior to day *t*. Such analysis is then used to determine the proportion of the movement in a share price on a particular day (or days) that is likely to have been due to changes in conditions affecting the market in general, or the sector of the market in which the particular company operates, and that which was due to the release of company specific news. This may be referred to as a news event.

663 The proportion of the share price movement on any particular day that is likely to have been due to the release of company specific news can be estimated by reference to the difference between the observed price movement and that which would have been expected in the absence of any company-specific news. The extent of movement in a share price beyond that which would have been expected on account of market-wide, sector specific and/or random influences can be described as the abnormal return.

664 Where a statistically significant abnormal return arises on the day (or days) following the release of company specific information, it is reasonable to conclude that the relevant portion of the price movement that cannot be attributed to market-wide or sector specific influences was caused by the event of interest. Providing no other company specific news was released at the same or similar time, the abnormal return can be taken as a reliable estimate of the effect of the disclosure on the value of a company's shares.

665 Event studies are widely used in the United States to measure the effect of alleged misconduct in securities markets. The technique has been accepted as meeting the standard for the admission of expert evidence established under the well-known *Daubert* standard. The

technique provides testable results that may be replicated by other analysts, is supported by published literature, produces estimates with a known rate of statistical error, and has generally been accepted by the scientific community.

666 The event study framework is founded upon two long standing principles of financial economics, both of which can generally be presumed to be valid for actively traded securities.

667 First, at any particular point in time, the price of an actively traded security reflects all publicly available information; this is known as the semi-strong form of the efficient capital market hypothesis.

668 Second, the price of an efficiently-traded security reflects the present discounted value of the future cash flows expected to be generated by the underlying asset or the "true value".

669 The efficient capital market hypothesis describes the relationship between available information and the current price of a traded asset, such as a share in a publicly listed company. The semi-strong form of the efficient capital market hypothesis holds that at any particular time, the price of a company's shares incorporates all publicly available information relevant to the valuation of that company. It follows that as new information becomes available, investors' perceptions as to the net present value of the company's future cash flows may change, thereby creating an imbalance of willing buyers and sellers of the company's shares at the existing price. This imbalance results in a correction to the share price.

670 But not all new information about a company will necessarily be expected to have a material effect on the price of its shares. Some information is not "price sensitive". Information that is inconsequential to a company's future earning potential cannot be expected to change investors' collective valuation of the company, and so its share price. Alternatively, sometimes information that can be expected to cause investors to alter their valuation of a company, for example, movements in the market price of a particular product or service supplied by the company, may be inferred from publicly available data, and so will often be reflected in the price of a security ahead of any formal disclosure of those effects, say, in the form of a profit announcement.

671 Similarly, not all share price movements are caused by the release of company specific information. Share prices fluctuate daily in light of market-wide and/or sector specific events such as changes in interest or exchange rates and the macroeconomic environment in general, or changes in economic activity or trading conditions within a particular sector. Share prices

also fluctuate due to random events that affect the balance of supply and demand for a particular stock. The change in a company's share price on any one day therefore reflects investors' collective response to a number of different factors including, but not limited to, company specific news.

672 Now there are three forms of the efficient capital market hypothesis.

673 The weak form suggests that only information on past prices is incorporated in the current price of an actively traded asset.

674 The strong form suggests that all public and private information is incorporated in the current price of a traded asset.

675 The semi-strong form suggests that all publicly available information is quickly and fully reflected in the price of a traded asset.

676 As Mr Houston has pointed out, the weight of evidence in the academic literature is that well developed securities markets in general, and the ASX in particular, exhibit price behaviour that is consistent with the semi-strong form of the efficient capital market hypothesis.

677 But if trading in a company's shares is relatively illiquid, say due to the concentration of its shareholdings, or the company is only closely followed by a small number of investors or potential investors, then new information may not always be quickly reflected in its share price. In these circumstances, it is possible that share prices will not change in response to the release of significant news or, conversely, that share prices may move substantially even in the absence of any news. Where trading in a company's shares is not consistent with semi-strong capital market efficiency, care must be taken before attributing significant share price movements to the release of company-specific news.

678 But where semi-strong capital market efficiency applies, the consequence is that share prices adjust quickly to reflect the discounted value of expected future cash flows, and investors' expectations as to future cash flows and the appropriate, risk-adjusted discount rates, reflect all publicly available information. This means that an investor in a company's stock armed with all publicly-available information will not be able to earn a rate of return that is persistently higher than the risk-adjusted return on a market-wide basket of stocks, such as the S&P/ASX 200.

679 Let me say something further on market efficiency.

(b) Market efficiency

680 As I say, the event study technique is founded on the presumption that trading in the relevant security conforms with the efficient capital market hypothesis, and so the public release of new information is quickly incorporated into a company's share price consistent with the posited semi-strong form of market efficiency. Mr Houston assessed the extent to which trading in MYR ED securities was likely to have been efficient over the relevant period.

681 He examined trading in MYR ED securities to assess whether the presumption of at least semi-strong market efficiency was valid for its securities during the control period, being 19 March 2014 to 18 March 2015 inclusive, that he adopted for the estimation of his market model. Further, he examined the particular question of the trading price responsiveness of MYR ED securities over the period between 1 January 2013 and 18 March 2015; for the remainder of the analysis I will use the expressions "MYR ED securities", "Myer shares" and "Myer stock" interchangeably.

Cammer factors

682 In *Cammer v Bloom* 711 F Supp 1264 (DNJ 1989), the US District Court for the District of New Jersey adopted a set of guidelines for examining market efficiency in securities litigation. The court discussed five factors which it said support the presumption of efficiency in the market for a particular security. These five factors are the following.

683 The first factor is average weekly trading volume. A high average weekly trading volume contributes to the efficiency of a stock by allowing individual investors to buy or sell shares quickly and at low transaction costs. This concept is often referred to as the liquidity of the market in a particular asset. If willing buyers and sellers are not readily available and investors have to search or advertise for trading partners, these transaction costs impede the incorporation of new information into share prices. Weekly trading volume greater than one per cent of the total shares outstanding justifies a substantial presumption of efficiency and that a volume greater than two per cent a strong presumption; see *Cammer* at 1286 citing Bromberg A and Lowenfels L, *Securities Fraud and Commodities Fraud* (1988).

684 The second factor is the number of security analysts. The court considered the number of security analysts who report on a stock as another indication of market efficiency, on the following two bases. First, analyst reports can help disseminate information and provide informed analysis of the value of shares to market participants. Second, the number of analysts

reflects the interest of investors in a stock. More investors produce more trading volume, which in turn allows new information to be incorporated more quickly into the stock price. There is no standard number of analysts that is said to imply market efficiency in relation to a particular stock.

685 The third factor is the existence of market makers and arbitrageurs. The court considered the presence of market makers and arbitrageurs in the market for a particular security as a factor supporting the presumption of market efficiency. Sophisticated and large investors are expected to detect even small deviations of a share price from its true value and to act immediately. Institutional investors have often been assumed to take the role of arbitrageurs since they employ sophisticated and complex valuation methods.

686 The fourth factor is the eligibility to file S-3 registration statements. In the United States, a publicly traded company may file an S-3 registration statement if it meets certain market capitalisation and filing requirements. The court considered the eligibility to file S-3 registration statements as a factor supporting the presumption of efficiency. The rationale was that only companies with a large market capitalisation and orderly filings qualify to file S-3 registration statements. Since this is not directly applicable in Australia, Mr Houston examined market capitalisation directly, as well as the number of shares available for active trading.

687 The fifth factor is the cause-and-effect relationship between news and stock price. By definition, stock prices in efficient markets quickly incorporate new information. Such a cause-and-effect relationship between news and prices implies that price reactions on days on which information about a company was released, either positive or negative, will typically be larger than price reactions on days without company related disclosures. *Cammer* highlights the importance of this factor stating that “[t]his, after all, is the essence of an efficient market and the foundation for the fraud on the market theory”.

688 Mr Houston noted that the first four *Cammer* factors did not of themselves provide conclusive answers to the question of whether or not prices react quickly to reflect new information and, consequently, whether or not trading in the security at issue was efficient, or otherwise. In contrast, the fifth factor, price reactions to unexpected news, uses statistical analysis to examine directly whether Myer’s share price movements respond to company-specific information in a timely manner. For these reasons, he placed particular emphasis on the fifth *Cammer* factor.

689 Let me discuss each of these factors in turn.

Average weekly trading volume

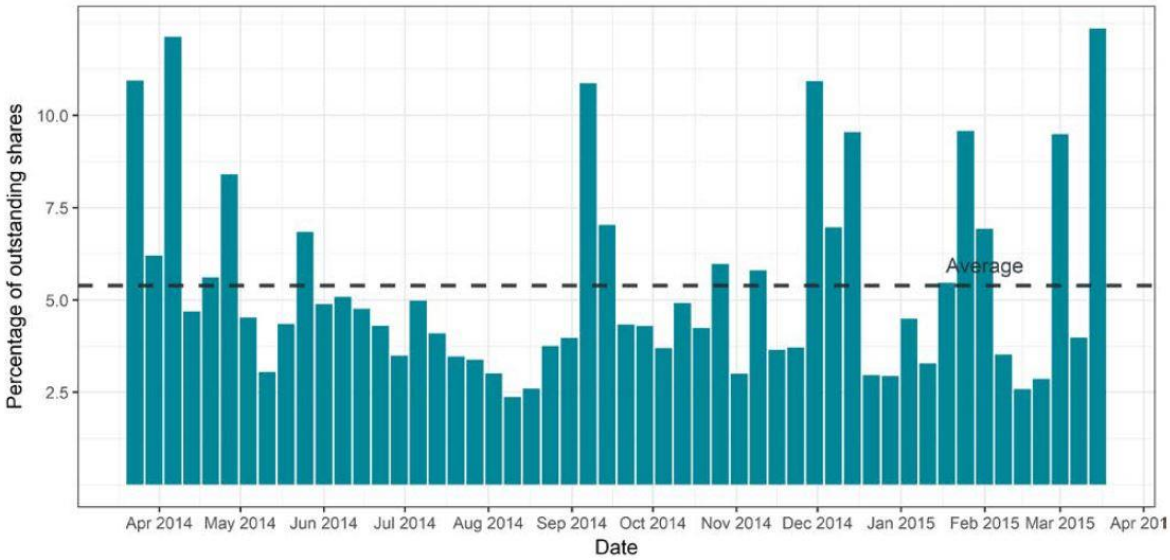
690 A stock's liquidity refers to the ability of investors to buy or sell shares quickly without incurring high transaction costs, including the costs of causing significant movements in the security price. If willing buyers and sellers are not readily available and investors have to search or advertise for trading partners, such transaction costs impede the incorporation of new information into the share price.

691 Trading volume indicates the depth of the market and is a measure of market liquidity. In the US, weekly trading volume in excess of one or two per cent has been used as a legal standard in support for the presumption that a company's shares were traded in an efficient market.

692 The average weekly trading volume for Myer during the control period was approximately 5.4 per cent of Myer's total outstanding shares. This result lies above the threshold often cited in US court decisions and so provides support for the presumption of efficiency.

693 Mr Houston presented average weekly trading volume graphically as follows:

Weekly trading volume over the control period



Notes: Data on shares outstanding and trading columns are from Bloomberg. The volume of trading in weeks with less than five trading days is proportionally increased to five trading days.

Analyst coverage

694 The number of security analysts who report on a stock is an indication of market efficiency for two reasons. First, analyst reports can help disseminate information and provide informed

analysis of the value of shares to market participants. Second, the number of analysts reflects the interest of investors in a stock. Although there are no clear rules as to how many analysts are necessary to determine if a presumption of efficiency should be made, US authority implies that more than four analysts lends weight to such a presumption. In *Lehocky v Tidel Tech., Inc.* 220 FRD 491 (SD Tex 2004) it was determined that the four analysts who covered the stock during the class period and who had an impact on the stock price had had a relatively neutral effect on the stock's efficiency.

695 During the control period, at least 11 financial analysts covered Myer. These analysts were: APP Securities, Commonwealth Bank, Credit Suisse, EVA Dimensions, Evans & Partners Pty Ltd, Goldman Sachs, J.P. Morgan, Macquarie, Morgan Stanley, Octa Phillip Securities Ltd, and UBS. Each of these analysts published valuations/price targets and provided financial data regularly in their reports including forecasts of Myer's earnings and financial positions.

696 The level of analyst coverage suggests that Myer was relatively well covered over the control period and the relevant period.

Institutional investors and arbitrageurs

697 The presence of institutional investors is an important factor contributing to the efficiency of trading in a company's stock, with institutional investors considered to be market participants employing sophisticated and involved valuation methods. Such market participants are likely to detect even small deviations of a security price from its true value and act on them immediately.

698 The list of the top twenty security holders from Myer's annual report provides some information on the number of shares held by institutional investors. Mr Houston presented the composition of the top twenty shareholders as at 23 September 2014, in the Table below. A significant percentage of Myer's shares were held by institutional investors identified in the top twenty security holder listings (57.76 per cent) at this time.

Percentage ownership by top twenty shareholders

Shareholder	Number of shares	Percentage of shares outstanding
Institutions	329,212,976	56.21
Nominees	0	0.00
Private companies and individuals	2,835,000	0.49
Executives, Directors &	6,225,782	1.06

Related Entities		
Total	**338,273,758**	**57.76**

Source: Myer annual report 2014, p 117.

Notes: (1) Institutions includes institutional nominees. (2) Nominee is defined as a person or company – not the owner – in whose name a stock is registered. (3) Total percentage of shares outstanding (57.76 per cent) represents the percentage of shares outstanding that are held by the top twenty shareholders.

699 The substantial presence of institutional investors supports the presumption that Myer shares traded in an efficient market.

700 Now all that is so. But Myer went further for another purpose. Myer referred to the proportion of Myer's shares which were held by the top 20 shareholders and by institutional investors and asserted that there was well known economic literature suggesting that institutional rather than retail investors make the trading decisions which impact the market and affect the retail price of securities. It cited in support of that proposition *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [106]. All true. But I would also flag for yet another purpose that in that case I also said (at [72] and [73]):

> [A]s the applicant has contended, the data reveals that the *vast majority* of actual and potential Newcrest shareholders held, or would have been expected to buy, small parcels of Newcrest shares, and were unlikely to have at their disposal the "information advantages" available to an institutional investor.
>
> In fact, when one looks at *shareholders* and claims, the applicant is more representative than any institutional investor.
>
> (Original emphasis).

701 A similar point can be made by reference to the profile of the Myer share register, which was at the relevant time similar to Newcrest's share register.

702 As I have said, Myer's 2014 annual report sets out shareholder information as at 23 September 2014. The distribution of shareholders and shareholdings shows that as of that day Myer had 52,981 shareholders. Of them:

(a) 25,235 or 47.6% held between 1 and 1,000 Myer shares;

(b) 18,989 or 35.8% held between 1,001 and 5,000 Myer shares;

(c) 4,333 or 8.2% held between 5,001 and 10,000 Myer shares;

(d) 4,220 or 8.0% held between 10,001 and 100,000 Myer shares; and

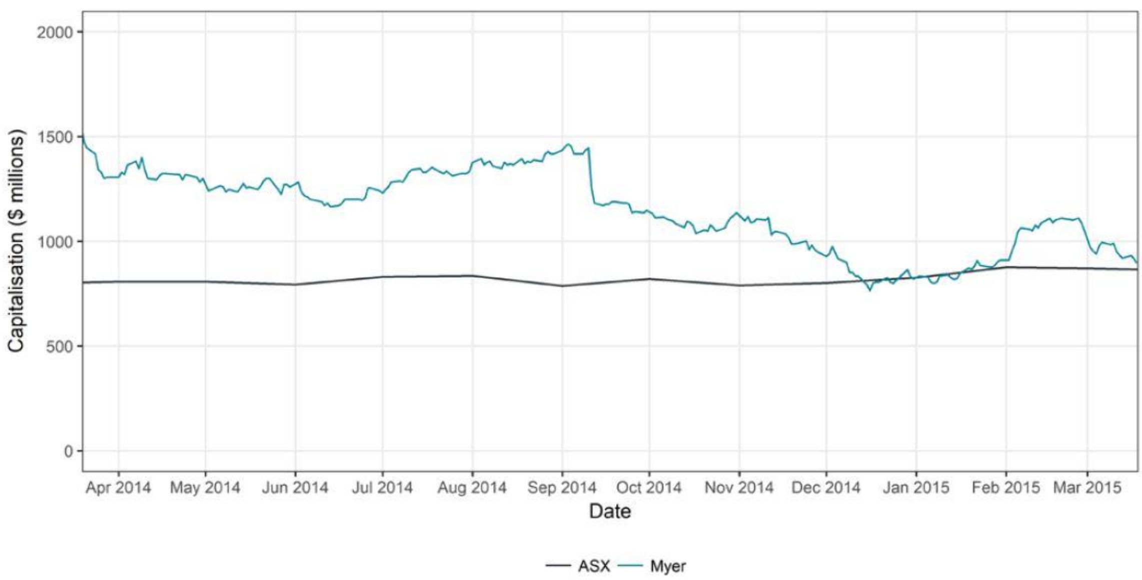
(e) 204 or 0.4% held 100,001 or more Myer shares.

703 If one takes the closing share price for Myer shares on 23 September 2014 for doing the basic arithmetic, approximately 91.6% of Myer's shareholders held a parcel of Myer shares with a total value of $20,200 or less, 83.5% held a parcel of Myer shares with a total value of $10,100 or less, and 47.6% of Myer's shareholders held a parcel of Myer shares with a total value of $2,020 or less.

Market capitalisation and insider holdings

704 Larger companies with widely held shares tend to be actively followed by informed market participants, which enhances the efficiency of trading in those shares. During the control period, Myer's market capitalisation, that is, the total number of shares on issue multiplied by the current price, ranged from approximately $764 million to $1,558 million, averaging approximately $1,151 million. By comparison, during the same time period, the average market capitalisation for domestic companies listed on the ASX was between approximately $787 million and $876 million. This can be graphically illustrated as follows.

Market capitalisation of Myer and ASX-listed companies over the control period



705 By way of reinforcement, directors held only approximately 2.3 per cent of Myer's shares. Where such holdings are both substantial and not actively traded, they tend to indicate a reduced pool of shares available for public trading. But this was not the case in relation to Myer.

706 These tests lend significant support to a presumption of market efficiency in the trading of Myer shares. The level of Myer's market capitalisation was consistent with the average of

domestic companies listed on the ASX. Further, insider holdings that may not have been actively traded were minimal and unlikely to create a constraint on active trading.

Price reaction to unexpected news

707 The price of shares traded in efficient markets quickly incorporates new information about the company. This implies that the price reaction on days on which information about a company was released, either positive or negative, will typically be larger than price changes on days without company-related disclosures, assuming those releases were made before the close of the market. It follows that the trading price of Myer shares can be analysed to assess whether it responds to company specific news, thereby providing empirical support for the presumption of market efficiency.

708 There are two principal steps involved in such analysis.

709 The first step is to identify those days on which information about the company was released (i.e., news days) as opposed to those on which there was little or no company specific news (i.e., no news days).

710 The second step is to estimate the statistical significance of the abnormal return on each day and test whether the market responded differently on news days as compared with no news days.

711 Mr Houston undertook this analysis in relation to Myer over the period the 1 January 2013 to 18 March 2015 inclusive.

712 First, he defined as a "news day" each day on which Myer made an announcement that was filed with the ASX and which was deemed by the ASX to be "price sensitive". Normal trading on the ASX closes at 4.00 pm. He therefore treated all such announcements to the ASX that were made after 4.00 pm as occurring on the following business day. However, he repeated the test using 3.30 and 4.30 as the cut-off point, and the results of the test remain unchanged. The ASX identified (on an *ex ante* basis) with a dollar sign, "$", each of those announcements that it considered to be price sensitive. The ASX classification therefore represented an objective means of identifying "Myer specific news days", i.e., news releases that related directly to the operation of Myer.

713 Second, he analysed the statistical significance of the abnormal return on each day of the 1 January 2013 to 18 March 2015 period.

714 He calculated the abnormal returns in the same manner as described above, i.e., he estimated the predicted return on each day of the control period based on the log return of the All Ordinaries and ASX 200 Consumer Discretionary indices, with dummy variables to control for days on which half and full year financial results were released, and the calculated the abnormal return as the difference between the actual return and the predicted return. He then tested for statistical significance by calculating the t-statistics of the abnormal returns. These are calculated by dividing each day's abnormal return by the standard error of the regression. A t-statistic greater than approximately 1.96 indicates that the share price movement was significant at the five per cent level of significance with 552 degrees of freedom.

715 He then tested whether the fraction of "news days" with statistically significant price movements is significantly different from the fraction of non-news days with statistically significant price movements. This is known as a "z-test", since it tests the statistical significance by means of a z-statistic. The z-statistic is similar to the t-statistic used in the t-test. A z-statistic greater than approximately 1.96 indicates the difference between proportions is significant at the five per cent level of significance.

716 He presented the results of a "z-test" for the existence of a statistically significant difference in the abnormal return on news days, as compared with non-news days, over the period he identified above as set out in the Table below.

Results of z-test for news and non-news days, 1 January 2013 to 18 March 2015

	News days	**No news days**
Number of days with statistically significant price movements	6	29
Total number of days	8	516
Percentage of days with statistically significant price movements	42.86%	5.32%
z-test statistic	5.72	
p-value of difference	0.00	

717 There were 14 news days in the period from 1 January 2013 to 18 March 2015. Statistically significant abnormal returns were observed on six of these 14 news days, or 43 per cent. In contrast, of the remaining 545 trading days in the period, 29 days (or five per cent of days) had statistically significant abnormal returns.

718 After obtaining the percentage of both news days and non-news days with significant abnormal returns (i.e., 43 per cent and five per cent respectively), Mr Houston performed a z-test to see whether the difference between these two percentages was statistically different from zero. The p-value resulting from the test was 0.00, less than 0.05, and so he concluded that the percentage of news days with statistically significant reactions was different from the percentage of no news days with statistically significant price reactions, at a five per cent level of significance. The results of this test confirmed that, on average, the trading price of Myer shares responded to price sensitive company announcements.

719 He also conducted this same analysis over the control period by way of an additional check as to the robustness of the market model and abnormal returns he developed. He undertook the same steps he described above to identify news days and the statistical significance of the abnormal return on each day, and presented as set out in the Table below the number of days with statistically significant price movements, delineated by whether news was released on that day.

Proportion of news and non-news days, 19 March 2014 to 18 March 2015

	News days	Non-news days	Total days
Number of days with statistically significant price movements	4	14	18
Number of days with no statistically significant price movements	4	231	235
	8	245	253

720 Since the number of news days during the control period was low, and the number of news days with statistically significant price movements was less than five, the central limit theorem did not apply and a normal distribution of the data could not be assumed. Mr Houston therefore could not use the z-test. Instead, he uses the Fisher exact test, a nonparametric test, to test the difference in the proportion of statistically significant movements on news days and non-news days. The two-sided Fischer test had the null hypothesis that the proportion of observations between two samples was equal, in this instance, the proportion of news days with statistically significant price movements was equal to the proportion of non-news days with statistically significant price movements.

721 The Fischer test produced a p-value of 0.001. Since this was less than 0.05, he concluded that the proportion of news days with statistically significant price movements was different to the

proportion of non-news days with statistically significant price movements, at the five per cent level of significance.

Summary

722 Based on the above analysis there is little doubt in my mind that it is a robust assumption to make, applying the *Cammer* factors, that the semi-strong version of the efficient capital market hypothesis applied to the trading in MYR ED securities at all relevant times.

(c) Conditions affecting reliability

723 The reliability of an event study in measuring the full effect of the disclosure of new information on the price of a security increases if two other conditions are satisfied.

724 First, the strength of any inference as to the likely cause of any price movement or abnormal return is affected by the extent to which the release of company specific information is a well-defined event. If the particular time at which company specific news is released to or absorbed by the market is not clear, it becomes more difficult to attribute a particular share price movement to the information of interest. For example, if information is released over a number of days, or is leaked prior to its official announcement or is otherwise anticipated by the market, this may pose problems for identifying the timeframe over which the price reaction should be measured.

725 As a practical matter, when the event study technique is applied to a well-followed security, it is usually straightforward to determine whether these indicators or criteria for a well-defined event are satisfied. This is because a history of news events about the company over the relevant time period is publicly available on electronic databases, including the precise time that the news was released to the market. But in circumstances where these criteria are not satisfied, additional information and steps may be needed to isolate the price reaction attributable to the event of interest.

726 Second, a prerequisite for drawing inferences as to the causal link between the release of information and any associated price reaction is the ability to isolate the effect of confounding news. In this context, confounding news amounts to any disclosure that may be relevant to the valuation of a company’s shares and became known around the same time as the disclosure of interest, but for which there is no question as to its timeliness or accuracy.

727 Where two or more items of information are released to the market on the same day, it may be difficult to separate their respective effects on a share price. In order to estimate the likely separate price effect of each item of news, other techniques must be employed. These might include estimating the value of particular information through discounted cash flow (DCF) analysis, a review of analyst commentary and so on.

728 To summarise, for the purpose of assessing the share price effect of news released to the market, the reliability of an event study is improved where:

(a) trading in the company's shares is efficient, at least to the semi-strong form of capital market efficiency;

(b) the event of interest is well-defined, in the sense that the time at which information became available to the market is known; and

(c) the effect of the relevant news is capable of being isolated from the effect of any simultaneously released and confounding news.

(d) Three steps of an event study

729 Although there are different ways of conducting an event study, in my view the approach that Mr Houston generally adopted in his report was suitable. It can be described by reference to three distinct steps.

730 Step 1 identifies days of interest and predicts company share price returns on those days.

731 Step 2 computes "abnormal returns", that is, the difference between the actual return and the predicted return, to remove the effect on the share price of general market and sector specific movements.

732 Step 3 determines whether the abnormal return on the days of interest is statistically significant.

733 It is appropriate to describe these three steps in more detail.

Step 1: Predict company share price returns

734 The first step in performing an event study is to predict the share price returns for the company of interest from one day to the next, with particular reference to the "event days" that are the focus of the analysis. The predicted share price return is the expected change in the share price in the absence of any company specific event.

735 Predicted share price returns are based on the historical correlation between a company's share price returns and the returns on a market and/or industry index, which serves to account for market movements that affect all companies listed on the stock exchange or all companies that operate within a particular sector. As for share prices, returns on a market index are defined as the percentage or log change in closing value from one day to the next. The predicted returns are calculated over an event "window". This is typically defined as the period from the close of trading the day before news of the relevant event enters the market, to the close of trading on the day that the share price is likely to have assimilated the news which might be several days after the release of information to the market.

736 There are a number of approaches to predicting the returns of a company's shares that have been accepted in the academic literature, but most event studies use what is called the "market model". The market model conforms to the following specification:

$$\text{Predicted company return} = \alpha + \beta_1(\text{market index return}) + \beta_2(\text{industry index return})$$

737 The market model predicts the company's daily share price returns as a constant α (alpha), plus the coefficients β (beta) times the daily return in a market or industry index. The inclusion of an industry index return is optional.

738 The coefficient beta conveys the nature of the relationship between the returns on a market or industry index and the returns on a company's share price. For example, if a company's share price has a beta equal to 0.5, this means that if the market index were to increase by ten per cent, it would be expected, everything else held constant, that the company's share price would increase by five per cent. This implies that the company's share price has relatively low sensitivity to changes in market-wide conditions. Alternatively, for a stock that is more sensitive to market movements, say with a beta equal to 1.5, it would be expected that for every ten per cent increase in the market index, everything else held constant, the company's share price should increase by fifteen per cent.

739 The coefficient alpha is an additional although usually very small factor in the predicted return of an individual stock. For a particular period of time over which beta and alpha are measured, alpha is the expected daily return on the individual stock when there is no change in the market index. In other words, on days when the index is not making any contribution to the movement in the share price, there is still an expected return in the amount of alpha.

740 Typically, the values of alpha and beta are estimated simultaneously using regression analysis on a sample of daily returns. Regression analysis is an empirical method that uses the observed correlation between two variables to estimate the effect of a change in one variable on the other. For the purpose of developing a market model in an event study, regression analysis is typically performed using a sample of a company's daily share price returns and daily returns on a market and/or industry index over the year preceding the relevant period or event under consideration (the control period). The market model thus estimates the expected share price return for any given day on the basis of historic returns over the preceding year.

Step 2: Compute abnormal share price returns

741 The second step in performing an event study is to calculate the "abnormal return" for each day of the event window. The abnormal return is equal to the actual return, i.e., the observed change in the company's share price, minus the predicted return, i.e., the change in the share price as predicted by the market model. In other words, it is the amount of the share price return that is not explained by broad market movements.

Step 3: Assess whether abnormal returns are statistically significant

742 As I have already said, share prices adjust continuously as information becomes available that affects a company's expected future cash flows. Such information may arise in relation to a multitude of influences, such as changes in the macroeconomic environment and random events that affect the supply and demand for a particular stock. The abnormal return observed on any given day is not therefore necessarily a response to the release of company specific news. In order to determine whether an observed share price change is likely to be due to the release of company specific news, it is necessary to make an assessment as to whether the abnormal return is statistically significant.

743 In the context of an event study, statistical significance is best regarded as a measure of the likelihood that an observed abnormal return may simply have been caused by background noise or random chance, in the absence of company specific news. In other words, it amounts to an evaluation of whether or not it is likely that a share price could have moved as far as it actually did had there been no company specific news.

744 If the abnormal return on the day of an announcement is not statistically significant, then it could easily have been caused by unexceptional, day-to-day fluctuations in share prices. However, if the abnormal return is statistically significant, this suggests that a price movement

of equal or greater magnitude was unlikely to have been observed in the absence of company specific news.

745 A widely accepted standard for evaluating whether the actual change in price deviates from the predicted change in price by a statistically significant amount is whether or not the abnormal return is significant at the five per cent level (0.05). In general, an abnormal return is statistically significant at the five per cent level if, based on the volatility in daily returns over the year on which the market model was estimated (the control period), abnormal returns greater than that level are expected less than five per cent of the time. In other words, the abnormal return on a particular day must be large enough for there to be a less than five per cent chance that it would be observed simply due to statistical "noise" or random fluctuation in price.

746 For example, suppose that an abnormal return of four per cent is observed on the day of an announcement made by a company to the ASX. Based on the up and down movements in the abnormal returns over the period of the market model, assume that a four per cent abnormal return is expected to occur only once every 50 days. This is less than five per cent of the time. In this example, one would conclude that the four per cent abnormal return was significant at the five per cent level.

747 There are several methods for calculating whether or not an observed abnormal return is statistically significant at a particular level, with the most commonly used being the t-test. The t-test involves the calculation of a "t-statistic".

748 Let me elaborate. Daily abnormal return t-statistics are equal to the daily abnormal return divided by the standard error of the regression. Cumulative abnormal return t-statistics are equal to the cumulative abnormal return divided by $[s \times \sqrt{N}]$, where "s" represents the standard error of the regression and "N" represents days cumulated.

749 If the t-statistic is greater (or less than) a specific positive (or negative) value, as calculated for each particular test, this indicates statistical significance. This method assumes that the distribution of daily abnormal returns for the stock in question forms a particular bell-shaped curve, known as a normal distribution. A normal distribution describes a distribution of random variables where the observed measurements tend to cluster symmetrically around a central value, which gives rise to a bell-shaped distribution curve. Such distributions can arise

in practice, e.g., the heights or weights of a group of people or the exam results of a class of students could be normally distributed.

750 Where the daily abnormal returns derived from the market model do not follow a normal distribution, other statistical methods that do not rely on any prior distributional assumptions can be used to determine statistical significance.

751 In some instances, it may take more than one trading day for a share price to reflect the full implications of new information. The number of days that it does take for a stock price to react to the news (the event window) can be determined by examining the statistical significance of the price reactions on each successive day. If the abnormal returns on consecutive, subsequent trading days are also individually and cumulatively statistically significant, the event window should generally be extended beyond the (trading) day of the disclosure, provided there is no intervening disclosure of separate news. If the event window is extended to include additional days, the price reaction is calculated as the cumulative abnormal return over the consecutive days. The cumulative abnormal return is simply the sum of the daily abnormal returns. Statistical significance of the cumulative abnormal return is defined similarly to the statistical significance of individual returns, i.e., the probability that the abnormal return would have occurred in the absence of news is less than five per cent.

(e) True value and share price inflation

752 By estimating the likely effect on a share price of information that a company has failed to disclose, it is possible to construct a time series of values that represent the likely share price effect of the disclosure on each day over a period of time (a daily inflation series).

753 Had the information that was not disclosed to the market been revealed in a timely manner, the share price would have changed at that time by the amount estimated by reference to the corrective disclosure. Assuming that the market for the relevant securities trades with semi-strong efficiency, they subsequently would have traded at their “true value”. The difference between the observed price, absent the timely and accurate disclosure of material information, and the price at which the shares would have traded following a timely disclosure (the true value) can be described as the extent of share price inflation.

(f) Share price effect of information that was not disclosed

754 The event study framework described above can be used to assess the effect on a share price of information disclosed by a company. However, it is often necessary to assess the effect on a company's share price of its failure to disclose information in an accurate or timely manner.

755 In many cases a company's failure to disclose material information is brought to the attention of investors in the form of a corrective disclosure, i.e., the release of accurate information that had either been misrepresented in an earlier disclosure or simply not been disclosed at all. Corrective disclosures may be made by the company in question or may come to the attention of investors by other means.

756 Regardless of the means by which information is disclosed, the change in a company's share price at the time of a corrective disclosure provides the basis for an assessment as to how its share price may have changed had the information been disclosed when it first became known. An event study amounts to a framework for making that assessment, the focus of which is the price movement on the day of, or during the period of days following, the corrective disclosure.

(g) Constant dollar and constant percentage approaches

757 There are two approaches commonly applied to determine the extent of inflation in a company's share price.

758 The first approach is the constant dollar approach. Under this approach, the effect on the share price of a hypothesised disclosure of information is estimated by reference to the observed effect on the share price, in dollar terms, of the actual disclosure of the same or similar information.

759 The second approach is the constant percentage approach. Under this approach, the effect on the share price of a hypothesised disclosure of information is estimated by reference to the observed effect on the share price, in percentage terms, of the actual disclosure of the same or similar information.

760 The question of whether to adopt the constant dollar approach or constant percentage approach to estimate share price inflation depends upon the nature of the announcement that is being assessed.

761 Finance theory establishes that on average the value of a firm is equal to the net present value of its expected future cash flows. It follows that a company may experience an increase or

decrease in its share price upon the release of new information that alters expectations as to the level of future cash flows or the risks associated with those cash flows.

762 Generally, the constant dollar method is applied in circumstances where the effect of a disclosure on earnings has a one-off effect on cash flows or reduces cash flows by a constant amount each year, and does not materially alter perceptions as to the risk associated with future cash flows.

763 Contrastingly, the constant percentage method is typically applied in circumstances where a disclosure affects the market's assessment of future earnings, either by altering its expectations as to the growth of future earnings and/or the level of risk associated with those earnings.

764 By way of an example as to the relevance of the constant percentage approach in these circumstances, suppose that a company was expected to earn $9 million per year in perpetuity and the market had ascribed a discount rate of five per cent to the company's future cash flows. If the company had 100 million shares on issue, then the value of its shares would be $1.80 per share. If an announcement was then made that resulted in an increase in the market's discount rate to nine per cent, the company's share price would fall to $1.00 per share. This would be a decline of $0.80 in absolute terms and 44.4 per cent in relative terms.

765 Now suppose that at an earlier point in time prior to the announcement, the company was expected to earn $10 million per year in perpetuity. At this point in time the market would have valued the company more highly at $2 per share. If the same announcement that caused an increase in the market's discount rate was made at this point in time, the company's share price would fall to $1.11 per share. This would be a decline of $0.89 in absolute terms and the same 44.4 per cent in relative terms.

766 This example illustrates that an announcement that changes the market's assessment of the growth or risk of a company's ongoing earnings will cause the same percentage change in the share price regardless of the level of the initial share price. The change in the company's share price in the above illustrative example was 44.4 per cent, regardless of whether the initial share price was $1.80 or $2.00.

767 When the periodic payments are expected to increase at a given rate each period, its present value is calculated by dividing the payment in the first period by the discount rate, less growth rate. Taking the previous example, suppose that a company was expected to earn $9 million in period one, the market had ascribed a discount rate of five per cent to the company's future

cash flows, and the company had 100 million shares on issue. If the company's future cash flows are expected to grow at a rate of one per cent each year, then the value of its shares would be $2.25 per share. If an announcement was made that resulted in the market reducing its expectations of the company's growth rate to 0.5 per cent, then that value of its shares would fall to $2.00 per share.

768 In contrasting these approaches, I should address a misconception relating to the application of the constant percentage approach to assessing share price inflation, as distinct from its consideration in US cases in the context of assessing damages under US requirements.

769 Some US cases have been incorrectly cited in support of a proposition that the constant percentage approach has been discredited. But these cases generally relate to the estimation of damages in line with the decision in *Dura Pharmaceuticals, Inc. v Broudo* 544 US 336 (2005). But these cases relate to the assessment of damages under particular US legal requirements, as distinct from the determination of the appropriate estimate of inflation in the price of a security.

770 In the US, an assessment of the effect of a corrective disclosure typically involves three steps (Tabak D, "Implications for Market Efficiency and Damages Analyses of Plaintiff Interpretations of *Halliburton II's* Statement that 'market efficiency is a matter of degree'" (2015) 46(3) Loy U Chi LJ 467-484, 480-481). These steps involve:

(a) calculating the price reaction associated with the corrective disclosure, i.e., the abnormal return that has been adjusted to remove any effects of confounding news;

(b) translating the price reaction associated with the corrective disclosure at the end of the class period into a measure of inflation at earlier points in time, in this context where two of the most common approaches are the constant percentage approach and the constant dollar approach; and

(c) finally, turning the inflation into damages; in this regard any legal requirements such as limitations from the *Private Securities Litigation Reform Act 1995* or any requirements that are generally interpreted to flow from *Dura* are implemented, i.e., inflation estimates may need to be adjusted to comply with the loss causation requirements of the securities laws.

771 *Dura* endorsed an interpretation of loss causation that requires that an adjustment be made to the constant percentage method in the process of going from an estimate of share inflation to

an estimate of the damages suffered by a particular party (Tabak D, "Inflation and damages in a post-*Dura* world" (NERA Economic Consulting, 25 September 2007) p 1).

772 Prior to *Dura*, loss causation was generally viewed as either the amount that an investor overpaid at the time of the purchase or as the decline in the value due to the disclosure. However, in *Dura* it was ruled that an inflated purchase price is not by itself sufficient to establish loss causation. Now the findings in *Dura* relate to a specific interpretation of loss causation and so have affected the calculation of damages in the US.

773 But even under *Dura*, the inflation in the stock price should be estimated using the method that is appropriate given the economic and financial allegations in the case. For example, Dr David Tabak states that (Tabak (2007) p 10):

> [t]his part of the approach recognizes that while courts, even the Supreme Court, may issue rules affecting what types of losses are legally recoverable, the analysis of the effects of misrepresentations on a stock price is ultimately an economic or financial issue independent of how that analysis fits into the prevailing legal framework.

774 In summary, the findings of *Dura* that have on occasion been incorrectly cited as discrediting the constant percentage approach concern a different, subsequent step in the applicable process in that jurisdiction, specifically, that for assessing damages due in circumstances where a trader has bought and sold shares during the period when a share price was inflated.

APPLICATION OF EVENT STUDY FRAMEWORK

775 Mr Houston applied an event study to disclosures made by Myer in order to determine the extent to which the announcement made by Myer on 19 March 2015 could be said to have caused a movement in the price of Myer shares, and if so the amount of the share price movement that can be said to have been caused by the announcement of the relevant information, i.e., the matters the subject of Myer's ASX announcement on 19 March 2015, in respect of Myer's outlook for FY15.

776 As part of that event study, he estimated a market model to explain movements in Myer's share price by reference to both Standard and Poor's (S&P) ASX All Ordinaries index and the S&P/ASX 200 Consumer Discretionary index. He estimated his model by reference to a control period of 12 months, ending immediately prior to Myer's 19 March 2015 disclosure, i.e., 19 March 2014 to 18 March 2015 inclusive.

777 Dr Prowse also performed an event study with the same objective. He estimated a market model that sought to explain changes in Myer's share price by reference to the same market-

wide index adopted by Mr Houston (the ASX All Ordinaries index), but in combination with a bespoke index of six comparator companies selected by him. Dr Prowse's bespoke index replaced the industry index (i.e., the S&P/ASX 200 Consumer Discretionary Index) that had been adopted by Mr Houston. Dr Prowse constructed this index himself. He weighted each of its constituent companies equally by reference to their daily returns over the relevant period.

778 Dr Prowse also estimated his market model over a one year control period, but in contrast with Mr Houston he took this to be the six months either side of Myer's 19 March 2015 disclosure, i.e., from 19 September 2014 to 18 September 2015.

779 So, there are two principal distinctions between the market model adopted by Dr Prowse and that adopted by Mr Houston, being:

(a) the different industry variables used in their respective market models; and

(b) the different control periods over which their respective market models were estimated.

780 In presenting his event study analysis, Mr Houston reported results using different market indices, being the S&P/ASX 100 and the S&P/ASX 200 in addition to the one he ultimately used, the All Ordinaries Index, and mentioned that a shorter control period was also tested. The model Mr Houston selected had according to Mr Houston a higher proportion of the daily variation in Myer's share price explained by the variations in the benchmark index and best explained movements in Myer's share price relative to the versions of the market model that Mr Houston tested with other market indices.

781 But according to Dr Prowse, the industry index that Mr Houston used was conceptually flawed. In addition, according to Dr Prowse, Mr Houston did not choose the appropriate control period to use according to his own criteria. Dr Prowse purported to correct for these two issues, and constructed a market model that explained movements in Myer's share price that he considered to be much better than Mr Houston's market model.

(a) Details of the model-control period and indices

782 Mr Houston developed a market model to estimate the relationship between daily movements in the price of Myer's shares, and market-wide and industry influences. As I have indicated, in developing any market model, two principal judgments must be made:

(a) the sample period over which the relationship between the individual stock price and market movement has to be estimated; and

(b) one must also determine the appropriate grouping of securities, usually in the form of a benchmark index, that best explains market-wide influences on the stock price of interest.

783 The sample or control period of the model needs to extend over a sufficient number of trading days to allow the relationship, expressed as the beta coefficient, between the company's share price and the benchmark index to be estimated with reasonable precision. However, on the other hand, a longer sample period may also cover a period in which the nature of the relationship changes, which may cause the true value of the beta to shift. In practice, market models are most commonly estimated over a year, or approximately 252 trading days.

784 In the present case, Mr Houston estimated the market model for Myer share prices over the 12 month period immediately prior to Myer's 19 March 2015 disclosure, i.e., 19 March 2014 to 18 March 2015 inclusive. This period contains 253 trading days. He selected this control period for two main reasons.

785 The first reason is that it is the closest period that precedes 19 March 2015. Using a control period close to Myer's 19 March 2015 announcement ensures that the relationship between Myer's stock and index changes is as similar as possible to the period for which he estimates abnormal returns.

786 The second reason is that it has higher explanatory power than an alternative, shorter period. Mr Houston tested market models that were estimated using an alternative, six-month sample, however, the proportion of the daily variation in Myer's share price explained by the variations in the benchmark index is higher under the market model that was estimated using a 12 month control period.

787 Using this control period, Mr Houston estimated a number of potential market models, each utilising different market indices and an industry index (the S&P/ASX 200 Consumer Discretionary Index). His purpose in estimating several models, each using different market indices, was to establish the best estimate of the relationship between the price of Myer shares and market and industry-wide events as represented by the beta coefficient. The different market indices that he used in estimating potential market models were:

(a) the S&P/ASX 100 Index;

(b) the S&P/ASX 200 Index; and

(c) the All Ordinaries Index.

788 According to Mr Houston, these indices are all commonly used measures of the performance of a diversified portfolio of shares in companies listed on the ASX, with their constituent securities differing by market capitalisation. For example, the S&P/ASX All Ordinaries Index comprises the largest 500 domestically listed companies by market capitalisation, whilst the S&P/ASX100 comprises 100 ASX listed companies selected for market capitalisation and liquidity.

789 Mr Houston estimated market models for each of these potential indices using Myer's daily share price returns, the relevant market index returns and the industry returns. He calculated the price returns using daily closing share price data and index value data from Bloomberg LP, with Myer's share price adjusted by Bloomberg for dividends, share splits and acquisitions. His market models involved separately regressing the daily returns in the price of Myer shares against the daily returns in each of these market indices and the industry returns over the control period. Mr Houston also included two dummy variables to control for the effects of the release of the half year results for FY14 on 20 March 2014 and the release of the full year results for FY14 on 11 September 2014. Mr Houston set out the results and principal descriptive statistics for the three models as set out in the Table below.

Market models estimated using market indices and an industry index

	Market index S&P/ASX 100	S&P/ASX 200	All ordinaries
α (standard error)	-0.002 (0.001)	-0.002 (0.001)	-0.002 (0.001)
$\beta_{1,}$ market index (standard error)	0.591** (0.285)	0.641** (0.288)	0.734** (0.300)
$\beta_{2,}$ industry index (i.e., S&P/ASX 200 Consumer Discretionary) (standard error)	0.539** (0.251)	0.498* (0.255)	0.445* (0.258)
Adjusted R-Squared	0.275	0.277	0.280
Standard error of the regression	0.020 (df = 248)	0.020 (df = 248)	0.019 (df = 248)
Note: *p<0.1; **p<0.05			

Notes: (1) All market models are estimated using data from the 12 month control period described above. (2) Adjusted R-squared is a measure of the proportion of variation in the dependent variable (i.e., Myer's price returns) that is explained by the variation in the independent variables (i.e., index *returns), adjusted for the number of independent variables. (3) The standard error of the regression is a measure of the typical variability in Myer's abnormal returns.*

790 Mr Houston selected the market model estimated using the All Ordinaries Index and the S&P/ASX 200 Consumer Discretionary Index for use in his analysis, because this model explained the highest proportion of Myer's security price movements during the control period.

791 The t-statistics are test values for the hypothesis that the true relationship between index return and share price return is zero, that is the null hypothesis. The t-test has an associated significance level, which represents the probability of erroneously rejecting the null hypothesis. The critical value associated with the t-distribution is 1.97 for a 0.05 (5 per cent) level of significance, and 1.65 for a 0.10 (10 per cent) level of significance with a sample size of 253 and four independent variables. The t-statistic for β_1 is 2.45, which is well above this level. The t-statistic for β_2 is 1.73. In this regression, the coefficient of the All Ordinaries Index is significant at the five per cent level, and the coefficient on the S&P/ASX 200 Consumer Discretionary Index is not significant at the five per cent level, although it is significant at the ten per cent level, with a p-value of 0.0853. Although this is relatively low, the addition of this variable improves the overall model fit, as indicated by the increase in adjusted R-squared. The adjusted R-squared of the univariate regression (i.e., without the S&P/ASX 200 Consumer Discretionary Index) is 0.274 and the adjusted R-squared of the multivariate regression (i.e., with the S&P/ASX 200 Consumer Discretionary Index) is 0.280.

792 In other words, of the models that Mr Houston tested, the model that utilised the All Ordinaries Index and the S&P/ASX 200 Consumer Discretionary Index best explained, according to Mr Houston, movements in Myer's share price during the period 19 March 2014 to 18 March 2015.

793 Mr Houston's preferred market model has an α of -0.002, a β_1 of 0.73, and a β_2 of 0.44. The β_1 estimate of 0.73 indicates that, all else being equal, if the All Ordinaries Index rises (or falls) by one per cent, the value of a Myer share can be expected to rise (or fall) by an average of 0.73 per cent. The β_2 estimate of 0.44 indicates that, all else being equal, if the S&P/ASX 200 Consumer Discretionary Index rises (or falls) by one per cent, the value of Myer shares can be expected to rise (or fall) by an average of 0.44 per cent.

794 Now there was debate between the experts concerning the control period. It is appropriate to elaborate on some aspects of the debate.

Control Period

795 Mr Houston stated that his justification for choosing his model's control period was that it was the closest period preceding the event date, 19 March 2015, and it produced a model with higher explanatory power than a model with a shorter period. But according to Dr Prowse, he was able to improve the explanatory power of the model by adjusting the control period to be even closer to the event date than the model chosen by Mr Houston. Dr Prowse used a control period that surrounded the event date. This period surrounded the event date by six months in each direction, rather than extending twelve months before the event date. The market model used a control period of 19 September 2014 through 18 September 2015 and included dummy variables for half-year and full-year earnings announcements on 19 March 2015 and 3 September 2015. For a model run over this period but using the same industry index as Mr Houston, the adjusted R-squared was 0.43. Using this control period and Dr Prowse's industry index increased the explanatory power of the model even further to 0.47. The following Table reports on the results.

Improvements Upon Mr Houston's Market Model

	Mr. Houston's Model	Model with Custom Industry Index instead of Mr. Houston's Industry Index	FTI Model with control period (19/9/14 – 18/9/15) and Custom Industry Index
α	-0.002	-0.002	-0.002
(standard error)	(0.001)	(0.001)	(0.001)
B_1, market index	0.734**	0.571**	0.200
(standard error)	(0.300)	(0.223)	(0.221)
B_2, industry index	0.445*	0.703**	1.008**
(standard error)	(0.258)	(0.170)	(0.185)
Adjusted R-Squared	0.28	0.32	0.47
Standard error of the regression	0.01948	0.01896	0.02139
	(df = 248)	(df = 248)	(df = 247)

Note: ** indicates statistical significance at the 10% level; * indicates statistical significance at the 5% level.

796 I will refer to this improved model, shown in the shaded column in the above Table, as the FTI market model.

797 Next, Dr Prowse performed an event study for Myer stock in the same manner as Mr Houston, but with the FTI market model. Applying the improved market model to the event study on Myer's 19 March 2015 announcement yielded an abnormal price decline of $0.144 or 9.46%, which was statistically significant at the 5% level. On each of the following three trading days, the abnormal return was not statistically significant at the 5% level, and on the fourth day it was positive and statistically significant at the 5% level. I will refer to this model as the FTI event study. The following Table reports on the results.

FTI Event Study

Date	Myer Closing Price	Myer Log Return	Predicted Log Return	Abnormal Log Return	Abnormal Log Return t-stat	Daily Abnormal $ Return	Daily Abnormal % Return
18/3/15	$1.53						
19/3/15	$1.38	-0.11	-0.01	-0.10	-4.65	-$0.145	-9.46%
20/3/15	$1.35	-0.02	0.00	-0.02	-1.02	-$0.030	-2.14%
23/3/15	$1.35	0.00	0.02	-0.01	-0.56	-$0.016	-1.17%
24/3/15	$1.36	0.00	0.01	0.00	-0.14	-$0.004	-0.28%
25/3/15	$1.42	0.04	0.00	0.05	2.20	$0.065	4.85%

798 Dr Prowse concluded that the market model used in Mr Houston's event study was not the most appropriate market model to use by Mr Houston's own criteria, and resulted in an artificially inflated estimate of the abnormal price decline on 19 March 2015 in Myer's stock. Using an improved market model in an event study resulted in a conclusion that the abnormal price decline on 19 March 2015 was approximately 18% smaller than as calculated by Mr Houston (calculated as (11.5% - 9.46%) / 11.5% = 17.77%).

799 Making this one correction to Mr Houston's analysis, but holding all else constant, resulted in estimated share price inflation amounts that were approximately 21% lower than reported by Mr Houston under his upper bound counterfactual.

800 Dr Prowse contended that Mr Houston did not choose the appropriate control period according to Mr Houston's own criteria, which he interpreted as preferring and comprising:

(a) the closest period preceding the event date, 19 March 2015; and

(b) the model with the highest explanatory power when compared to a model with a shorter period.

801 Now as I have said, Dr Prowse stated that he was able to able to improve the explanatory power of Mr Houston's model by adjusting the control period to be even closer to the event date than the model chosen by Mr Houston.

802 Dr Prowse selected a control period that encompassed the event date by six months either side of it, i.e., the period spanning 19 September 2014 through 18 September 2015. Now Dr Prowse cited Tabak and Dunbar by way of support for his choice of control period, since they acknowledged three potential choices for the control period including surrounding the event window. But Dr Prowse overlooked two contrary observations made by Tabak and Dunbar, which state that (Tabak D and Dunbar F, "Materiality and magnitude: Event studies in the courtroom" in Weil R, Wagner M and Frank P (eds), *Litigation services handbook: The role of the financial expert* (3rd ed, Wiley, 2001) p 19.5):

(a) "[t]he most common choice places the estimation window before the event", i.e., the option that Mr Houston selected for his control period; and

(b) a control surrounding the event is used in place of a control period preceding the event in situations where there is a lack of relevant prior trading history, such as because the event window comes shortly after an initial public offer or change in regulatory environment.

803 Although Dr Prowse concluded that the market model used in Mr Houston's event study was not the most appropriate market model to use by Mr Houston's own criteria, he appeared to overlook Mr Houston's criterion that the control period be the closest period preceding the event date of 19 March 2015. As Dr Prowse's control period surrounded the event date, as opposed to preceding it, his preferred approach in my view did not meet the criteria Mr Houston had applied and therefore Dr Prowse's control period was inferior.

804 It is trite to observe that the purpose of using the preceding period is to avoid the possibility that the event day disclosure for the stock of interest may have itself affected the relationship that is to be estimated by the market model. It would not be uncommon for the underlying relationship between, in this instance, Myer's share price and the market and industry indices to have changed in light of the information released on 19 March 2015, and subsequent uncertainty arising in relation to Myer's ability to fulfil its continuous disclosure obligations.

It is conventional practice to avoid the risk that the relationship being estimated in an event study may have been contaminated by the event itself or later effects of the event. Any such contamination would thereby give rise to unreliable estimates of the abnormal return that, as a matter of confident inference, can be attributed to the relevant disclosure or other event.

805 Mr Houston's estimation window is placed immediately prior to the event window, consistently with the literature. In a later version of their 1999 NERA paper (Tabak D and Dunbar F, "Materiality and Magnitude: Event Studies in the Courtroom" (NERA Economic Consulting Working Paper No 34, 1999)), Tabak and Dunbar state at 19.5 that "[t]he most common choice places the estimation window before the event" (Tabak and Dunbar (2001)). At footnote 23, Tabak and Dunbar (2001) explain that the "concern about a 'clean' period actually relates to the possibility that the estimation of the relation between the stock and the index is contaminated by the effects of the event being studied. That is, one does not want any overlap between the estimation window and the event window". Mr Houston's estimation window does not overlap with the event window, and according to Tabak and Dunbar there is no theoretical concern which arises on the basis of the estimation window including a period of alleged inflation.

806 The academic literature concurs with the view of Tabak and Dunbar (2001) that the common placement of the estimation window is before the event. Professor MacKinlay states that "[t]he most common choice, when feasible, is using the period prior to the event window for the estimation window" (MacKinlay AC, "Event Studies in Economics and Finance" (1997) 35(1) JEL 13-39 at 15). Professors Bhagat and Romano state that "[r]esearchers usually estimate these statistical models by using between 100 and 200 daily returns in the period preceding the announcement period" (Bhagat S and Romano R, "Event Studies and the Law: Part I: Technique and Corporate Litigation" (2002) 4(1) Am L & Econ Rev 141-167 at 146).

807 Dr Prowse's estimation window surrounds the event window (i.e., it is on either side of 19 March 2015). The applicant raises no concern in respect of the period prior to 19 March 2015, however, the inclusion of the period after 19 March 2015 is contrary to usual practice.

808 Dr Prowse relies upon his application of a Chow test to determine that there was no "structural break" between the two periods.

809 When a Chow test is performed "the null hypothesis allows for no differences at all between the groups" (Wooldridge JM, *Introductory Econometrics: A Modern Approach* (5th ed, South-

Western Cengage Learning, 2013), 247). Assuming that the test performed is as to whether the null hypothesis should be rejected, and in circumstances in which no detail of the test performed by Dr Prowse has been disclosed in Dr Prowse's report, the only conclusion which the Court may draw from this is that the null hypothesis should not be rejected, not that the null hypothesis is corrected. This is consistent with Dr Prowse's evidence that the Chow test "indicated no evidence" that there was a structural change, which the applicant submits should be inferred to mean that the null hypothesis was not rejected. Assuming that is the case, Dr Prowse's opinion that "while that might be a theoretical concern, it's not the case in this matter" should not be understood as excluding the possibility of the relationship being affected by either the corrective disclosure on 19 March 2015 in conjunction with the 2 March 2015 advice that Myer assessed its disclosure obligations by reference to the Bloomberg consensus.

810 Mr McClintock's evidence in relation to the 2 March 2015 analyst call is that:

> MR O'BRYAN: …Do you agree with the proposition that what you said to the … analysts on 2 March 2015 was the first time Myer, speaking through its chairman – you – said to the analysts, "You should understand that the Bloomberg consensus is the best proxy for Myer's own view of its likely financial forecast"?--- Yes. I agree with that.

811 The advice given to analysts on that day did not cause (unsurprisingly) any material change in analysts' forecasts for FY15 earnings, although there was a A$0.20 or approximately 11% decline in Myer's share price on the day. This seems to gainsay the proposition put by counsel for Myer that "[s]o what these events, effectively, tell you is that in order for consensus to move down – and on your analysis, for there to be a corresponding decline in the share price – you need an announcement of NPAT of less than consensus". It is important to note that Mr Houston agreed with the proposition as "[g]enerally speaking" being correct. However, it is important to note that Mr Houston uses change in consensus only as a proxy for assessing the market's understanding of earnings, and does not suggest that it is a causative relationship. That does not mean that there is no disconnect between the analysts' consensus view and the value attributed to Myer by other market participants. Where Myer has acted to confirm the analysts' views, as it did on 2 March 2015, the effect may nonetheless be to give new and important information to the market as a whole.

812 Nonetheless, 17 days later on 19 March 2015, Myer surprised the market by announcing an expectation of materially lower earnings than either FY14 or the then Bloomberg consensus figure for FY15.

813 Given Dr Prowse's evidence that this event "may have reduced confidence of some of the analysts" and the manner in which the Chow test operates, in conjunction with Mr Houston's evidence that when "my objection to taking the period after – when you cannot see a – you cannot see a structural break either before or after - is that the economic principle is that that announcement could have and, on evidence of what analysts were saying, did change the way the analysts were thinking about the Myer stock", there should be a clear preference for an estimation window prior to the event window.

814 In my view and for the foregoing reasons, Mr Houston's control period is to be preferred.

815 Let me turn to another debate between the experts concerning the indices.

Industry Index

816 Mr Houston's model included as an industry index the S&P /ASX 200 Consumer Discretionary Index. But although Mr Houston compared results from the use of three different market indices, he only presented results using a single industry index. But according to Dr Prowse, the industry index used was conceptually not the best suited industry index to use to explain movements in Myer's stock price. Dr Prowse pointed out that in addition to retail companies such as Harvey Norman Holdings Ltd and JB Hi-Fi Ltd, this index also contained:

(a) entertainment companies; for example, the index contained as of year-end 2014 Ardent Leisure Group, which was a trust holding a portfolio of theme parks, bowling centres, and health clubs as well as a portfolio of family entertainment assets in the United States, and Crown Resorts Ltd., which operated and managed gaming and entertainment facilities, bars, restaurants, nightclubs, cinemas, and retail outlets;

(b) gaming technology companies; for example, the index contained as of year-end 2014 Ainsworth Game Technology Ltd., which developed and manufactured gaming machines and games combination software and other related equipment for the gaming industry in Australia, and Aristocrat Leisure Ltd., which manufactured and sold gaming machines in Australia and internationally;

(c) educational service companies; for example, the index contained as of year-end 2014 G8 Education Ltd., which provided community-focused child care, and Navitas Ltd., which offered educational services;

(d) media companies; for example, the index contained as of year-end 2014 Fairfax Media Ltd., which published and printed newspapers, magazines and entertainment publications, and HT&E Ltd, which operated as a media and entertainment company and owned and managed radio, outdoor, and digital assets; and

(e) restaurants; for example, the index contained as of year-end 2014 Domino's Pizza Enterprises Ltd, which was a franchise license owner of the Domino's Pizza.

817 In fact, of the 38 companies included in the index as of year-end 2014, seven companies were classified as "Casinos & Gaming" companies, another seven companies were classified as "Publishing & Broadcasting" companies, and only six, including Myer, were classified as any type of "store" or "retailer".

818 According to Dr Prowse, including these types of companies in an industry index meant to explain movements in a retail company's stock price was problematic because many of the companies in Mr Houston's industry index were not comparable to Myer. As stated by Ferrell and Saha (2007) in their discussion of how to construct an appropriate market model and the choice of an industry index: "[i]n selecting an appropriate industry index, it is important to pay particular attention to which firms are truly 'comparable' in terms of their line of business and hence should be included in the industry index"; see Ferrell A and Saha A, "The Loss Causation Requirement for Rule 10b-5 Causes-of-Action: The Implication of *Dura Pharmaceuticals v. Broudo*" (2007) 63 The Business Lawyer 163-186, p 167. The authors go on to state that the selection of particular comparable companies can come from the firm's own financial filings, equity analyst reports, or from companies in the same broad industry index.

819 Further, according to Dr Prowse, another conceptual problem with Mr Houston's industry index (the S&P/ASX 200 Consumer Discretionary Index) was that it included Myer itself in the index. But using an index containing Myer to explain changes in Myer's stock price is conceptually incorrect in constructing a market model. But it must be said that to the extent that movements in Myer's stock price have a small influence on movements in the S&P/ASX 200 Consumer Discretionary Index, the practical effect of this conceptual error may not have been significant.

820 To address these conceptual problems and to better proxy the retail industry in which Myer competed, Dr Prowse constructed a custom industry index made up of the equally-weighted

returns of six retail companies that Myer itself identified as competitors in its own internal analyses. The six companies were Premier Investments Ltd., JB Hi-Fi Ltd., Wesfarmers Ltd., Super Retail Group Ltd., Harvey Norman Holdings Ltd., and Woolworths Ltd. This list of companies was obtained from a Myer Investor Relations Report dated 18 March 2015. Using Dr Prowse's customised industry index instead of Mr Houston's industry index, and holding all else constant, increased the explanatory power of the market model from an adjusted R-squared of 0.28 to 0.32.

821 There are further aspects of the evidence of Dr Prowse that explain why, in his opinion, the companies he has selected in his custom index are conceptually appropriate, and more conceptually appropriate than Mr Houston's use of the S&P/ASX 200 Consumer Discretionary Index, and selected consistently with the criteria identified in relevant literature.

822 First, Mr Houston's industry index included a lot of companies that have little conceptual basis in explaining a retailing company's movements in its stock price. This includes, for example, entertainment companies, gaming technology companies, educational service companies, media companies and restaurants. There is, therefore, a significant question as to the conceptual underpinning of Mr Houston's industry index as a whole.

823 Second, as Dr Prowse noted, "from a conceptual or theoretical basis, a variety of different indices you could use, both from market index or the industry index". The important point then is to identify possible indices with some relevant conceptual underpinning, and to then test them from an empirical standpoint to see which has the greatest explanatory power.

824 Third, Dr Prowse considered not only conceptual issues, but then sought to test all aspects of potential models empirically. In contrast, it was evident that Mr Houston did not seek to test empirically all relevant possible industry indices. So, for example, when Mr Houston was asked whether he could have selected just a set of retail companies from the S&P/ASX Consumer Discretionary Index, Mr Houston conceded that "I could have done that", but then made it clear that he had not done so:

> HIS HONOUR: Your industry index selection, though, includes non-retailing companies. Is that right?
>
> MR HOUSTON: Yes. But the – the composite – the purpose – it does. It includes a wide range of things.
>
> HIS HONOUR: Yes. So I thought one of the questions that Dr Prowse might have had is that you could have selected just a set that had retail companies or a lot more than just a sample selection.

> MR HOUSTON: No, I could have done that, but you still – I could have done that, but I don't accept the proposition that just because a company is a retailer that it necessarily is going to be a good – from an a priori point of view is going to be a good predictor of the stock of a – a consumer discretionary retailer, to put it – put it – and to my mind there's no reason to expect while someone that is retailer of food would be – behave and have – in the same way as a retailer of clothing and more discretionary items or – you could take a retailer of cars or a retailer of any other thing that – so the retailing label, in my view, is a – a little bit of a red herring as to the economic properties of the stock that you are trying to explain.
>
> And so for that reason I wouldn't – if I had gone to choose a bespoke index I would not have even gone down the retailing route. I would have taken a much – perhaps a more refined view of consumer discretionary which is clearly the investor class that Myer places itself. But if you're going to contemplate that process, why wouldn't you stick with the, you know, standard recognised investor focus consumer discretionary benchmark index that is out there.

825 That is, Mr Houston worked only on a theoretical basis and did not undertake the same empirical testing as Dr Prowse did.

826 Dr Prowse considered whether there was a conceptual basis for including Woolworths and Wesfarmers (and the other selected companies) in his custom index. Well-known literature in this area identifies that "the selection of firms to be used as industry comparables can include the firm's own financial filings (10-K, 10-Q); equity analysts' reports, and the constituents of widely-used industry indexes such as the Dow Jones Internet Index or the S&P Telecom Index" (Ferrell and Saha (2007) p 6). Similarly, Tabak and Dunbar F (1999) at p 5 refer to a good index as being "a standard index (say one developed by Standard & Poor's), one that was constructed based on comparable companies listed in analyst reports or public filings, or one based on selecting all companies that meet certain objective criteria (e.g., market capitalization within 10% of the pre-event market capitalization of the company being studied)". They further note that "an index is suspect when the choice of companies in the index is made by the expert without recourse to objective criteria".

827 Consistently with this literature, Dr Prowse sought to identify companies identified by Myer in its own materials as "industry comparables". This review identified that Myer, in its internal documents, identified both Woolworths and Wesfarmers as comparables (or peers) to which Myer had regard. In addition to the references included by Dr Prowse in his report, it can be noted that other Myer documents (both internal and external) referred to Woolworths and Wesfarmers (and the other companies included in Dr Prowse's custom index) as peers or comparables to Myer. For example, in its FY13 Annual Report, Myer included both Woolworths and Wesfarmers as part of its "peer group", and explained that in selecting that peer group:

> the Board sought independent advice. The composition of the group reflects measures of relative sales and market capitalisation as well as industry type that is complementary in nature to the Company's business. It includes companies that are consumer facing, have a service orientation and/or are retail in nature with either product or services provided as part of their core offer.

828 Further, there were analyst reports that included Woolworths and Wesfarmers as "peers" to Myer. CLSA included a similar "peer/customer matrix" in various other reports in evidence. The analyst reports in evidence demonstrate that a number of other analysts also identified or grouped Wesfarmers and Woolworths (and the other companies in Dr Prowse's custom index) together with Myer in their reports. For example:

(a) Morgan Stanley's reports identified "Australian Consumer" as an industry that it covered, and the companies that it listed as part of this group included Myer, Wesfarmers and Woolworths (as well as JB Hi Fi, Premier Investments, Super Retail Group and Harvey Norman, being the other four companies in Dr Prowse's custom index).

(b) Bank of America Merrill Lynch listed in its reports what it referred to as "Australia – Consumer Coverage Cluster". This list consisted of 14 companies, which included Myer, Wesfarmers and Woolworths (as well as JB Hi Fi, Premier Investments, Super Retail Group and Harvey Norman).

(c) CIMB, in analysing Bloomberg consensus earnings forecasts for the retail sector compared to its revised FY15 NPAT forecast, included an analysis of six companies, which included Myer, Woolworths, Wesfarmers, Harvey Norman and JB Hi-Fi.

(d) Citi, in a report of 5 January 2015, dealing with Australian retail spending during Christmas, addressed 11 companies, which included Myer, Woolworths, Wesfarmers (as well as Super Retail, JB Hi-Fi, Harvey Norman and Premier Investments).

(e) JP Morgan prepared a report on the "retail sector" in which it grouped together and dealt with eight companies, which included Myer, Woolworths, Wesfarmers, Super Retail, JB Hi-Fi and Harvey Norman.

(f) Credit Suisse in reports on "Australian retail" and the "Australian retail sector" grouped together and dealt with companies, which included Myer, Woolworths, Wesfarmers, Super Retail, JB Hi-Fi and Harvey Norman.

829 Finally, as a check to the conceptual underpinnings of his approach, Dr Prowse had regard to the fact that the applicant's own expert witness, Mr Molony, identified both Woolworths and Wesfarmers as relevant comparator retail business to Myer. Mr Molony noted that they were comparator companies "[f]rom an equity market perspective"; that is, from the perspective of investors in the companies. Mr Houston's evidence was that what is important was to select companies that are similar from an investor perspective. Mr Molony's evidence confirms that in fact this includes the companies selected by Dr Prowse.

830 When cross-examined about the inclusion of Woolworths in his custom index, Dr Prowse disagreed with the proposition that it was inappropriate to include Woolworths in a custom index, stating:

> DR PROWSE: No. I would disagree with that for the reason that, I mean, there are elements of Woolworths that are not retail, like Myer, but Myer itself considered Woolworths as a peer in its analysis. It looked at its operations and considered it comparable or at least parts of it comparable to Myer. And so I think there's a theoretical or conceptual basis for considering including Woolworths in an industry index and then the question is does adding Woolworths to your industry index or to my industry index improve the explanatory power of the overall regression and it does.

831 And, as is evident from an examination of the share price graphs showing the performance of both Myer and Woolworths (to which Dr Prowse was taken during cross-examination), of the various companies that Myer considered to be its "peers", it was perhaps Woolworths with which its share price movements had the closest correlation (especially in the six months prior to March 2015).

832 As to Wesfarmers, Dr Prowse gave similar evidence:

> MR O'BRYAN: …And would you agree that if you've got a company, only 11 per cent of which is – or the EBIT contribution to which – is in directly comparable activity to Myer, that the company as a whole is not a particularly good fit in a market industry – sorry, in an industry model?
>
> DR PROWSE: I would not say it that way, no. I would say there is a reason to consider including Wesfarmers in an industry index because it has divisions that directly compete with Myer, and also Myer considered Wesfarmers – these pieces Wesfarmers – to be comparable to Myer. And so the – so there's a theoretical basis for considering them, a conceptual basis. And then the issue is does adding Wesfarmers to a industry index improve the performance of the overall market model versus not having Wesfarmers in there and including Wesfarmers does improve the overall performance of the index?

833 Importantly, Dr Prowse then confirmed that he had tested a custom index both with and without Woolworths and Wesfarmers:

> MR O'BRYAN: … Did you test the R-squared if you removed Woolworths and/or

> Wesfarmers from your industry index?
>
> DR PROWSE: I have done that analysis to see what happens if you take those two out, and if you take those two out the explanatory power of my market model declines. In other words, if you put them in the explanatory power of my market model increases.

834 What this evidence demonstrates is that Dr Prowse carefully considered conceptual or theoretical bases for including companies in his index, and then undertook the important step of empirically testing whether including them in the index increased its explanatory power.

835 No "problem" with the inclusion of Woolworths or Wesfarmers was identified.

836 But Dr Prowse's bespoke industry index is not comparable.

837 Dr Prowse created an equally weighted index of six companies. Dr Prowse's stated justification for the creation of that index is:

> To address these conceptual problems and to better proxy the retail industry in which Myer competes, I have constructed a custom industry index made up of the equally-weighted returns of six retail companies that Myer itself identified as competitors in its own internal analyses. The six companies are Premier Investments Ltd., JB Hi-Fi Ltd., Wesfarmers Ltd., Super Retail Group Ltd., Harvey Norman Holdings Ltd., and Woolworths Ltd. Using my customized industry index instead of Mr. Houston's industry index, holding all else constant, increases the explanatory power of the market model from an adjusted R-squared of 0.28 to 0.32.

838 Dr Prowse's industry index cannot be characterised as an appropriate index for the following reasons:

(a) the competitors were not identified on any objective grounds. Drawn from a Myer internal report (not an external filing), Dr Prowse's industry index took only a subset of Myer's identified "peers". No justification for selecting that subset has been given;

(b) Myer only regarded Woolworths and Wesfarmers (two of the six competitors included in the constructed index) as competitors in respect of particular, relatively small, parts of their respective businesses (part of Big W in the case of Woolworths; parts of Target and Kmart in the case of Wesfarmers). The reliance on the Myer internal report is therefore apt to mislead;

(c) on the basis of analysis of EBIT contribution, through the inclusion of Woolworths and Wesfarmers in the constructed index close to 30% of the movement in the constructed index would be explained by those two companies' conduct of businesses which were affected by different economic

> factors to Myer. Given that Ferrell and Saha (2007) focus upon comparability in terms of lines of business and Tabak and Dunbar (1999) prefer the inclusion of comparable companies, the inclusion of both Woolworths and Wesfarmers as whole entities are unlikely inclusions in a properly constructed index.

839 The applicant submits that Dr Prowse's constructed index should be treated as a "suspect" index in that it has not been constructed on objective grounds and it does not include companies with comparable businesses affected by similar economic factors.

840 Let me elaborate.

841 The six companies selected by Dr Prowse were obtained from a Myer Investor Relations Report dated 18 March 2015.

842 The Investor Relations report shows a "Share price graph vs. peers" which shows the share price performance of Myer, Premier Investments, JB Hi-Fi, Wesfarmers, Super Retail, Harvey Norman, and Woolworths and the performance of the ASX 200 index.

843 Elsewhere in the Investor Relations report other listed companies (Pacific Brands, Billabong, and Kathmandu) were said to be Myer's peers.

844 Dr Prowse did not seek to explain his rationale for not including those other companies which Myer regarded as its peers in his constructed index.

845 Further, Mr Brookes' evidence addressed the extent to which Wesfarmers and Woolworths might be regarded as Myer's competitors.

846 Mr Brookes' evidence was to the effect that Wesfarmers was treated as a competitor, but that Myer only competed with Wesfarmers in respect of particular merchandise lines, e.g., entry price point fashion. So, Myer considered that "in the true sense, [Wesfarmers is] not a competitor, but the answer is "yes". K-mart – about 20 per cent of our range in fashion and homewares would directly compete with K-mart" and "nearly as much as that again would be competing with Target". Myer only considered that it competed in respect of particular categories of general merchandise, not with Kmart and Target as a whole.

847 Mr Brookes' evidence in respect of Big W and Woolworths was to similar effect:

> MR O'BRYAN: Sure. And the final one is Big W, down that page. Again, you regarded Big W within the Woolworths group as your direct competitor. You did not regard, for example, the ordinary Woolworths supermarkets business as your direct

> competitor?---We did look at – at that stage, I can't recall whether Dick Smith was still part of the Big W business – sorry, part of the Woolworths business, but we competed as a major competitor against them in electronics prior to them getting into financial trouble. Similarly, we would have in things like copy paper and basic price points, we would be looking at Big W, and the supermarkets carry about – all the supermarkets have about six to eight per cent of their turnover in general merchandise, so we would keep an eye on entry price point tops, jeans, etcetera, but they weren't major competitors, but they were the – the supermarket certainly was another competitor set that we had to take notice of.

848 Let me say something about the contribution of consumer discretionary businesses to Woolworths and Wesfarmers' earnings.

849 After being taken to analysis published by the Reserve Bank of Australia which discloses a significantly different relationship between the consumer sentiment indices and consumer discretionary expenditure when compared to non-discretionary expenditure, Dr Prowse was taken to Woolworths' 2014 Annual Report which disclosed:

(a) General Merchandise EBIT of $152.9m;

(b) Hotels EBIT of $275.4m; and

(c) Total Group EBIT of $3,775.2m.

850 Dr Prowse agreed that Big W (being the General Merchandise component of Woolworth's business) was "more comparable to Myer than other elements of Woolworths' business" and that the hotels business was likely to be a largely consumer discretionary category of business. The consumer discretionary component of Woolworths, analysed by EBIT contribution, was therefore approximately 11% at the relevant time.

851 After being taken to a similar analysis of Wesfarmers' business at the relevant time by reference to its 2014 Annual Report, Dr Prowse gave the following evidence:

> MR O'BRYAN: …Well, let's come back to our case and the equally-weighted index that you've developed, Dr Prowse, because I want to put a couple of propositions to you. You've equally-weighted Woolworths and Wesfarmers, which are very large companies, far larger than any of the other four in your industry index. You're aware of that, aren't you?
>
> DR PROWSE: Yes.
>
> MR O'BRYAN: And both of [Woolworths and Wesfarmers] … if we include all of the consumer discretionary part of their businesses which are in a similar field of commerce to Myer, they total 11 per cent of their EBIT contributions, and therefore would you agree that 89 per cent, at least at the EBIT level, of the performance of those business is likely to be attributable to factors which are not in the consumer discretionary category? Do you agree with that?
>
> DR PROWSE: That's likely, yes.

> MR O'BRYAN: And that would suggest, would it not, if you apply that ratio, nearly 90 percent of each of those two companies being in dissimilar fields of activity to Myer, that … nearly 15 per cent of the 16.66 per cent recurring that your index attributes to them in terms of weight … is actually non-comparable with Myer. Do you agree?
>
> DR PROWSE: The numbers may be correct as the way you've stated them, but they're not – what's relevant is, is including Wesfarmers and Woolworths in my industry index, does that add explanatory power to the industry index and to the market model, and it does.
>
> MR O'BRYAN: Measured by R-squared.
>
> DR PROWSE: Measured by R-squared and measured by the statistical significance of the industry index.

852 The applicant does not criticise the equal weighting of the constructed index, as the market capitalisation of Woolworths and Wesfarmers (each non-comparable to Myer) were far greater than the other four included companies.

853 However, the non-comparability of Woolworths and Wesfarmers and their outsized market capitalisation suggests that Dr Prowse took an unusual step in equally-weighting his index to avoid criticism of an otherwise suspect index.

854 Dr Prowse could cite only two papers in which equally-weighted indices had been employed. Neither paper analysed the desirability of employing an equally-weighted index or recommended the use of an equally-weighted index.

855 Using the Tabak and Dunbar (1999) examples of a "good index", it may be inferred that the standard index to be used would necessarily be value-weighted and it may be assumed that a constructed index of comparable companies would also be equally weighted. Common sense suggests that only an index of peers constructed on an objective basis of market capitalisations within 10% of the subject company's may not need to be value-weighted. Indeed, this may be why the Eckel, Eckel and Singal study concerning the airline industry was sensibly conducted on an equal-weighted basis (Eckel C, Eckel D and Singal V, "Privatization and efficiency: Industry effects of the sales of British Airways" (1997) 43(2) J Financ Econ 275-298).

856 Finally, let me say something about Mr Houston's application of the Consumer Discretionary Index.

857 The economic evidence published by the Reserve Bank of Australia, and Dr Prowse's own recognition of the relationship between the consumer sentiment indices and discretionary

consumption, supports the proposition that Myer could be expected to be affected by the same economic factors as other companies in the S&P/ASX 200 Consumer Discretionary Index.

858 The S&P/ASX 200 Consumer Discretionary Index is, by definition, a "good index" to be used as the industry index on the bases stated by Tabak and Dunbar (1999). It is a standard index.

859 Whilst the use of the standard index means that the market index plays a significantly greater role in Mr Houston's regression than it does in Dr Prowse's, Mr Houston's analysis should be preferred as being properly constructed.

860 Further, Dr Prowse contended that the industry index included in Mr Houston's market model, the S&P/ASX 200 Consumer Discretionary Index, was not the best suited industry index to use to explain movements in Myer's stock price because it included companies that were not in the retailing industry and so were not comparable to Myer. Dr Prowse referred to Ferrell and Saha (2007) at p 167 who stated:

> [i]n selecting an appropriate industry index, it is important to pay particular attention to which firms are truly "comparable" in terms of their line of business and hence should be included in the industry index.

861 But I note that Ferrell and Saha (2007) went on to say that:

> [t]he information source for the selection of firms to be used as industry comparables can include the firm's own financial filings (10-K, 10-Q); equity analysts' reports, and the constituents of widely-used industry indexes, such as the Dow Jones Internet Index or the S&P Telecom Index.

862 The S&P/ASX 200 Consumer Discretionary Index is one of a set of S&P/ASX Australian indices that are closely aligned with S&P Dow Jones Indices global suite of indices, and are recognised internationally as Australia's principal investable equity indices. As a widely used industry index, the S&P/ASX 200 Consumer Discretionary Index would seem to meet the criteria described by Ferrell and Saha.

863 Further, although the S&P/ASX 200 Consumer Discretionary Index included companies that were not retailers, the unifying principle for companies that were included in the S&P/ASX 200 Consumer Discretionary Index was their classification as members of the global industry classification standard (GICS) consumer discretionary sector and sub-industries. These companies were in industries that tended to be the most sensitive to economic cycles.

864 Mr Houston's choice of indices reflected the desirable property that a market model account for the likely effect on stock prices of both economy-wide information through a market-wide

index, and industry-wide information through an industry index. The inclusion of an industry index in a market model accounts for changes that affect a particular type of industry but are not necessarily felt across all of the entities of different industries listed on the stock exchange.

865 The S&P/ASX 200 Consumer Discretionary Index is made up of listed companies in industries that are more sensitive to changes in economic conditions than the S&P/ASX 200. Further, it is of lesser relevance that other companies in the index provide the same products as Myer. It is more relevant that they respond in a similar way to changes in external factors. This is consistent with the principles cited in relation to the selection of indices for a market model in Crew NI, Goshtigian PG, Moore MA and Sarin A, "Securities Act violations: Estimation of damages", in Weil R, Wagner M and Frank P (eds), *Litigation services handbook: The role of the financial expert* (3rd ed, Wiley, 2001) p 17.11, which refer to:

> …the effects of industry-wide information, such as technological innovations, changes in the demand, the level of competition within in the industry, and regulatory announcements…

866 According to Mr Houston the S&P/ASX 200 Consumer Discretionary Index is the most suitable independent variable for the purpose of explaining industry-wide price effects on Myer's stock.

867 And contrastingly, Dr Prowse's bespoke industry index included Woolworths and Wesfarmers, whose main business division was food retailing. Accordingly, these two firms were part of the GICS sector "Consumer Staples", which was obviously *less* sensitive to economic cycles than "Consumer Discretionary".

868 Dr Prowse cited another conceptual problem with Mr Houston's choice of the S&P/ASX 200 Consumer Discretionary Index as being that the index included Myer itself. In his view, using an index containing Myer to explain changes in Myer's stock price is conceptually incorrect in constructing a market model.

869 But Dr Prowse did acknowledge that:

> However, to the extent that movements in Myer's stock price have a small influence on movements in the S&P/ASX 200 Consumer Discretionary Index, the practical effect of this conceptual error may not be significant.

870 Now in contrast to the bespoke index developed by Dr Prowse, the S&P/ASX 200 Consumer Discretionary Index is a capitalisation index, where the index weight assigned to each company is proportional to that company's capitalisation, with larger companies being assigned a greater

weighting and therefore having a greater impact on index values. Price movements in companies with relatively low capitalisation when compared with others that make up the index therefore had only a negligible effect on the index value.

871 Since day-by-day index weights were not readily available to him, Mr Houston estimated the weighting of Myer in the S&P/ASX 200 Consumer Discretionary Index at the beginning and end of the control period over which he estimated his market model, i.e., 19 March 2014 and 18 March 2015. He formed his estimate by taking the list of index constituents at a given point in time and the market capitalisation of each company drawn from Bloomberg L.P. He estimated the weighting of Myer by dividing its market capitalisation by the sum of market capitalisation of all index members. This gave rise to an estimated weighting of 0.9 per cent at 19 March 2014, and a weighting of 1.0 per cent at 18 March 2015.

872 These estimated weights confirm that the daily returns on Myer's stock represented a small fraction of the returns of the S&P/ASX 200 Consumer Discretionary Index. Accordingly, Dr Prowse's concern has no practical relevance for the choice of industry index in seeking to explain changes in the price of Myer's stock.

873 But there were problems with Dr Prowse's industry index. Dr Prowse developed his own industry index from a set of six companies, comprising the equally weighted daily returns of Premier Investments Ltd, JB Hi-Fi Ltd, Wesfarmers Ltd, Super Retail Group Ltd, Harvey Norman Holdings Ltd, and Woolworths Ltd. Dr Prowse stated that he obtained this list of companies from those that Myer itself identified as competitors.

874 Dr Prowse constructed his index so that the daily returns of his six preferred companies were weighted equally, rather than according to their size. Dr Prowse did not explain why he chose to weight his six preferred companies equally.

875 Mr Houston was not aware of any relevant literature or principle in relation to the performing of an event study that would suggest it was appropriate to construct an index of industry returns that accorded each of its constituent companies equal weight, regardless of their size. In seeking to explain price movements in Myer by reference to those of comparable companies, according to Mr Houston it did not make sense to apply the same weight to each observed price movement, irrespective of the commercial significance of that company within the comparator set.

876 By way of illustration, Dr Prowse's bespoke index gave equal weight to the daily returns of specialty retailer Super Retail Group as it did to the conglomerate Wesfarmers. In the financial year ended 30 June 2015, which covered the majority of Dr Prowse's control period, Wesfarmers reported NPAT 23 times higher than Super Retail Group, whilst its market capitalisation was also 24 times greater than Super Retail Group. The reported NPAT for FY15, reported as "Net Income, Adj+" on Bloomberg for Wesfarmers was $2.426 billion and for Super Retail Group was $105.46 million. Further, even if the composition of Dr Prowse's bespoke index had merit, there was no economic or financial principle that justified the equal weighting of entities of such diverse scale.

877 In contrast, all of S&P's ASX indices, including the ASX100 and ASX All Ordinaries, were prepared on a capitalisation weighted basis, i.e., the constituent companies were each weighted according to their relative financial size as measured by their market capitalisation.

878 Now Dr Prowse dealt with the criticism to some extent as follows:

> DR PROWSE: …Mr Houston's criticism is that I'm using an equally weighted index and I should have used a market cap weighted index. Mr Houston says in his responsive report that he's not aware of any literature or any principle that would suggest using an equally weighted index. In fact, there are – there's a vast body of academic and practitioner literature which uses equally weighted indexes in event studies.
>
> HIS HONOUR: What's the basis for doing that? I mean, intuitively it doesn't seem that attractive.
>
> DR PROWSE: The basis for doing it is actually explained in one of the papers, and that – that is in the – in the book that has been given, is that based on empirical analysis, it has been found that the equally weighted index is more likely and more precisely to identify abnormal returns. Again, this is an empirical matter. There's no – I don't believe there's any golden rule that you have to use a market cap index, you have to use a weighted index or an equally weighted index. The issue is – they both have some justification – what is – which index explains better movements in the company's stock price and more precisely estimates abnormal returns. And the general finding in the – in the economic and academic literature is that equally weighted indexes do a better job of detecting abnormal security returns.
>
> HIS HONOUR: Is that a function of the choice – I mean, if you've just got six firms and you've got one with two orders of magnitude higher market capitalisation than one of the others as compared with a situation where you've got 100 companies that's an equally weighted index but they're roughly the top 100 firms, does that make any difference in the choice of whether you should do a weighted average or just an equally weighted?
>
> DR PROWSE: Well, again, I think the issue comes down to what explains better Myer's stock price movements. And Mr Houston says it's computationally difficult to compute market cap industry indexes. It's actually not that hard. I've done it. I've compared my industry index market cap weighted to my industry index equally weighted, and the equally weighted index explains Myer's stock price better than the

> market cap weighted index does. And so I think even in this particular case, there's – there's much more reason to use my index in equally weighted form than it is in market cap form. So I believe those were the – and so I – and so my question on the equally weighted issue would be is Mr Houston aware of the vast amount of academic and practitioner literature out there that use equally weighted indexes in event studies.
>
> HIS HONOUR: Well - - -
>
> DR PROWSE: And there's – there's a number of those papers in the book that has been handed to you. There's a paper by Brown and Warner, there's a paper by Peterson, there's a paper by Eckel that all use and talk about using equally weighted indexes in – in event study analyses.

879 Dr Prowse's evidence was that for his custom industry index, he tested both an equally-weighted index and a market capitalisation weighted index, and the equally-weighted index explained Myer's stock price better than the market capitalisation weighted index.

880 Further, according to Dr Prowse, there were some academic articles which used an equally-weighted index, and therefore suggested that it was appropriate to do so.

881 The first article was an event study article by Brown and Warner (Brown S and Warner J, "Using Daily Stock Returns: The Case of Event Studies" (1985) 14(1) J Financ Econ 3-31). In this paper Brown and Warner examined properties of daily stock price returns and how the particular characteristics of these data affected event study methodologies. The index they used in conducting their analysis was the Centre for Research on Securities Price (CRSP) equally-weighted index, which was an equally-weighted index constructed at the University of Chicago for the purposes of stock price research. It can be noted that this paper by Brown and Warner is referred to in other articles which were tendered by the applicant. For example, the article by Professor MacKinlay (MacKinlay (1997)) referred to the Brown and Warner paper as part of the discussion key papers in the event studies literature, and on four other occasions in his article. The article by Sanjai Bhagat and Roberta Romano also referred to the Brown and Warner article in footnote 1 as part of the general discussion of event studies, as well as on three other occasions (Bhagat and Romano (2002) at 146, 147 and 148).

882 The second paper referred to was by Eckel, Eckel and Singal, and which provided another example where an equally-weighted index was used in an event study (Eckel, Eckel and Singal (1997)).

883 The third paper was by Peterson. In a survey of the "present state of knowledge and practice with respect to event study methodology", Petersen noted that (at 50): "As described by Brown and Warner, asset pricing suggests the use of a value-weighted index as a market index. The

equally-weighted index, however, is more likely to detect abnormal security returns" (Peterson P, "Event Studies: A review of Issues and Methodology" (1989) 28(3) Q J Bus ECON 36-66).

884 Further, Dr Prowse gave evidence that the use of an equally-weighted index served to reduce any risks that the index would be "skewed" or "highly weighted" by including two very large companies (Woolworths and Wesfarmers). So, the following exchange occurred:

> MR O'BRYAN: …And as you're probably aware, or you may be aware, Wesfarmers and Woolworths were then two of the biggest companies listed on the Australian Stock Exchange. They're in the top 20. And would you agree that your index is very highly weighted to these very large enterprises and there is a risk that your index will not eliminate stock-specific factors with such weightings in it?
>
> DR PROWSE: Well, no. There – my index is equally weighted. So it doesn't give any more weight to Woolworths or Wesfarmers because they have higher market cap. My index is equally weighted.

885 But having said all of this, I am not convinced that Mr Houston does not have a point.

886 Finally, once Dr Prowse's bespoke industry index was introduced into his estimated model, the market index variable in his model was not statistically significant. In Dr Prowse's preferred "FTI Model with control period (19/9/14 – 18/9/15) and Custom Industry Index", the custom industry index was significant at the one per cent level, whilst the market index was not statistically significant. Mr Houston noted that Dr Prowse reported the statistical significance of his industry index as meeting the 10 per cent level. But Mr Houston's replication of his model suggested that it was statistically significant at the one per cent level.

887 The consequence of these statistical properties was that Dr Prowse's model derived most of its explanatory power from his custom index. But this was a variable that, as Mr Houston explained, could not be relied upon as being free from bias. In contrast, both indices in Mr Houston's own model were statistically significant, with the market index being significant at the five per cent level, and the industry index being significant at the lower, 10 per cent level.

888 In Mr Houston's model:

(a) his market index was statistically significant at the 5 per cent level (i.e. $p<0.05$);

(b) his industry index was statistically significant at the 10 per cent level (i.e. $p<0.1$).

889 The result of this is that it would appear that in Mr Houston's model the market index is doing the bulk of the work in explaining the movements in Myer stock.

890 In Dr Prowse's model:

(a) his market index was not statistically significant at the 10 per cent level;

(b) his industry index was statistically significant at the 1 per cent level (i.e. $p<0.01$).

891 In Dr Prowse's report it was incorrectly stated that his industry index was only statistically significant at the 10 per cent level. However, Dr Prowse's clarified in his oral evidence that it was statistically significant at the 1 per cent level. Mr Houston also confirmed that in fact Dr Prowse's industry index was statistically significant at the 1 per cent level.

892 It can be noted from Mr Houston's evidence that for the three combinations of market and industry indices that Mr Houston tested, the adjusted R-squared for each of them was different to only a very small degree:

(a) the S&P/ASX 100 combined with the S&P/ASX 200 Consumer Discretionary Index had an adjusted R-squared of 0.275;

(b) the S&P/ASX 200 combined with the S&P/ASX 200 Consumer Discretionary Index had an adjusted R-squared of 0.277;

(c) the All Ordinaries combined with the S&P/ASX 200 Consumer Discretionary Index had an adjusted R-squared of 0.280.

893 Mr Houston selected the All Ordinaries index in combination with the S&P/ASX 200 Consumer Discretionary Index because it had the highest explanatory power as measured by its adjusted R-squared. It can be noted from Mr Houston's report, that when the S&P/ASX 100 was combined with the S&P/ASX 200 Consumer Discretionary Index each index was statistically significant at the 5 per cent level. In contrast, when the All Ordinaries was combined with the S&P/ASX 200 Consumer Discretionary Index, the S&P/ASX 200 Consumer Discretionary Index was only statistically significant at the 10 per cent level. Mr Houston did not seek to suggest, despite the small difference between the adjusted R-squared, that the higher statistical significance of the S&P/ASX Consumer Discretionary Index when combined with the S&P/ASX 100 market index was a relevant consideration in determining which index to use; he relied only on the adjusted R-squared.

894 Dr Prowse sought to explain why this issue of statistical significance was irrelevant:

> DR PROWSE: First of all, Mr Houston raised the issue that it so happens that in my model the market index is not statistically significant at the 10 per cent level, and that's

> because my industry index is doing such a good job of explaining movements in Myer's stock price that the market index doesn't have much to add on top of it. It has something to add, but not to make it statistically significant. But that is not a reason to reject the industry index if the overall market model I'm using has better explanatory power in terms of the adjusted R squared than another one which allows the market index to be statistically significant and – but doesn't have the – at a – at the aggregate level doesn't have as good a performance in explaining Myer's stock price movements as one where the industry index is just doing such a good job because these companies are very comparable and they're explaining a lot of Myer's stock price movements.
>
> HIS HONOUR: I've seen the linear regression equations where if you've got two or more explanatory variables and they're actually interacting with each other, you have a sort of what I will describe as a compounding factor in your equation. Is that something done in this area? I don't think it's something that you've done here, is it?
>
> DR PROWSE: Well, there's certainly – there is certainly likely to be some co-movement between the market index and the industry index.
>
> HIS HONOUR: Yes.
>
> DR PROWSE: That's if the market goes up one day. In my industry index retail companies' prices may likely go up the same day and vice versa and the same with Mr Houston's model. So there are certainly – they certainly will – will very often move together, but they're different enough that the industry index captures a different piece of explaining Myer stock price movement than the market index does. And in my model the industry index is so well – explains Myer stock price so well that it doesn't leave a whole lot for the market industry index.
>
> But that's not a criterion that's used to choose between market models whether all the variables are statistically significant; that's just not used. I disagree with Mr Houston on that point. Like I said, the – if you believe you have a properly specified regression model, what you should be – and the variables in there are variables that have a conceptual basis for being in there, then you go to how well does this model perform and explain stock price movements.
>
> HIS HONOUR: What's your P-value for the industry index? It's certainly less than .05; is it even better than that? I'm just trying to - - -
>
> DR PROWSE: Yes. I think it's .01.
>
> HIS HONOUR: .01. Yes. Okay.
>
> DR PROWSE: Yes, statistically significant at the one per cent level.

895 Moreover, it was said that no literature or principle that would require both indices used to be statistically significant was identified.

896 In summary, I accept that Dr Prowse has advanced some support for his model. But on the whole, I am not satisfied that Dr Prowse's model should be the preferred model. In substance I have accepted Mr Houston's preferred model, at least as to its elements that I have discussed above concerning the control period and indices, notwithstanding the otherwise discrepancies in explanatory power.

(b) The measurement of abnormal returns

897 Mr Houston used the alpha and beta estimates from his preferred market model (All Ordinaries Index and S&P/ASX 200 Consumer Discretionary Index) to estimate the movement in the price of Myer shares that would have been expected on 19 March 2015 and four subsequent days (event window), absent the release of any company-specific news.

898 He also calculated the abnormal return set out in the Table below using a number of the other market models, each of which was estimated over different control periods and/or with different market indices as the independent variable. The abnormal return did not change significantly with these variations, and was $0.18 when rounded to the nearest cent in each model.

899 He then calculated the abnormal return on each day of the event window by subtracting the expected or "predicted" price return from Myer's actual price return.

900 Mr Houston presented his estimates of the predicted and abnormal returns for Myer shares, along with the actual returns, for each day in the event window as shown in the Table below.

Estimated abnormal returns following Myer's 19 March 2015 announcement

Date	Myer closing price	Predicted log return	Abnormal log return	Cumulative abnormal log return	Abnormal log return t-stat	Cumulative abnormal log return t-stat	Cumulative abnormal price reaction
18/03/2015	1.53						
19/03/2015	1.38	1.61	-12.29	-12.29	-6.31	-6.31	-0.18
20/03/2015	1.35	0.46	-2.66	-14.95	-1.37	-5.43	-0.21
23/03/2015	1.35	-0.35	0.72	-14.23	0.37	-4.22	-0.20
24/03/2015	1.36	0.12	0.25	-13.98	0.13	-3.59	-0.20
25/03/2015	1.42	0.08	4.25	-9.73	2.18	-2.23	-0.14

901 The abnormal movement in the price of Myer shares on 19 March 2015 is statistically significant at the five per cent level.

902 On each of the following trading days, between 20 and 25 March 2015, the abnormal return on Myer shares is not statistically significant at the five per cent level on a daily basis.

903 The statistical significance of the Myer share price movement on 19 March 2015 at the five per cent level shows that the abnormal return estimated for that day is very unlikely to have been due to random chance.

904 Mr Houston estimated the abnormal price movement following the 19 March 2015 announcement to be approximately 11.5 per cent, or $0.18.

(c) The cause of abnormal return on Myer shares

905 Mr Houston's analysis suggested to him that the drop in the price of Myer's shares on 19 March 2015 could be attributed to information contained in its announcement to the ASX released that day. However, in order to draw conclusions in relation to the particular elements of Myer's ASX announcement that caused the fall in Myer's share price, it was necessary to establish the extent to which some or all of the information disclosed was already known by market participants. To the extent that part of the information disclosed was already known, it could not be said to be a cause of the abnormal return estimated for 19 March 2015.

906 Mr Houston was provided with 33 reports issued by 12 equity analysts that followed Myer over the period 11 September 2014 to 19 March 2015. He sourced an additional nine reports by the same group of analysts. Equity analysts' reports provide an important service to the market, since they are one means by which new information in relation to a company can be disseminated to and interpreted by potential buyers and sellers of shares.

907 Analyst reports contain the opinions of professional and knowledgeable third parties, drawn from publicly available information and proprietary research. In Mr Houston's opinion, in analysing the share price consequences of a particular event such as a company announcement, it is instructive to examine the commentary and valuations produced by analysts around the time of that event. Analyst reports reflect the information that was available at the time, and provide an objective measure of the contemporaneous beliefs and expectations of sophisticated participants in the market.

908 Analysts typically discuss the announcement of new, material information about a company's future prospects and, where applicable, revise their earnings and/or valuation estimates. According to Mr Houston it follows that the particular information that was perceived at the time as having a significant impact on analysts' valuations represents an objective basis for determining those components of an announcement that were considered to be "new".

909 Mr Houston's review of analyst reports suggests that prior to Myer's 19 March 2015 announcement, market participants were not aware that:

(a) Myer's forecast NPAT for FY15 was in the range of $75 million to $80 million, which was below its previous guidance of anticipated profit growth from the previous year's $98.5 million; and

(b) Myer expected to incur a one-off cost in the order of $7 million relating to its strategic review in the second half of FY15.

910 Now Myer had been undertaking a strategic review for some time, which continued under the leadership of its new CEO, Mr Umbers. Mr Houston assumed therefore that market participants may already have had knowledge of this expenditure at least to some extent prior to 19 March 2015.

911 Mr Houston reviewed reports issued by nine analysts in relation to Myer between 19 and 20 March 2015. Of these, seven analysts noted that FY15 guidance was "below expectations" or "a shock". In particular:

(a) the Commonwealth Bank stated that Myer's earnings guidance for FY15 was well below expectations;

(b) Credit Suisse explained that the result was well below expectations;

(c) Deutsche Bank noted that guidance was well below expectations and was a disappointment, i.e., it stated that:

> The NPAT guidance is at odds with commentary from outgoing CEO Bernie Brooks [sic] given at the FY14 result, that FY15 NPAT is expected to be higher than FY14. This is a key disappointment as the mid-point of normalised NPAT guidance ($77.5m) is some 20% lower than FY14. It is also contrary to the very recent update from the Chairman who suggested he was comfortable with Bloomberg consensus expectations earlier this month;

(d) JP Morgan stated that Myer's earnings guidance for FY15 was weaker than expectations and consensus;

(e) Macquarie described FY15 NPAT guidance as below consensus and expectations;

(f) Morgan Stanley stated that, given the reaffirmation of the consensus NPAT estimate by Myer's Chairman, the release was a shock; and

(g) UBS noted that Myer's earnings guidance for FY15 was well below expectations.

912 All nine analysts substantially reduced their FY15 NPAT forecasts and price targets for Myer following the announcement, as shown in the Tables below.

Revisions to analysts' NPAT forecasts for Myer, March 2015

Date	Analyst	Previous FY15 NPAT ($ millions)	Updated FY15 NPAT ($ millions)	Percentage change
19 March 2015	Citi	85	72	-15.29%
19 March 2015	CLSA	88	76	-13.64%
19 March 2015	Commonwealth Bank	86	71	-16.61%
19 March 2015	Credit Suisse	88	79	-10.58%
19 March 2015	Deutsche Bank	87	72	-17.24%
20 March 2015	J.P. Morgan	84	71	-15.81%
19 March 2015	Macquarie	90	67	-25.14%
19 March 2015	Morgan Stanley	91	75	-17.58%
19 March 2015	UBS	91	81	-10.99%

Revisions to analysts' 12 month price targets for Myer, March 2015

Date	Analyst	Previous 12 month price guidance	Updated 12 month price guidance	Percentage change
19 March 2015	Citi	1.60	1.25	-21.88%
19 March 2015	CLSA	1.30	0.99	-23.85%
19 March 2015	Commonwealth Bank	1.90	1.33	-30.00%
19 March 2015	Credit Suisse	1.70	1.40	-17.65%
19 March 2015	Deutsche Bank	1.60	1.10	-31.25%
20 March 2015	J.P. Morgan	1.66	1.23	-25.90%
19 March 2015	Macquarie	1.65	1.40	-15.15%
19 March 2015	Morgan Stanley	2.50	1.80	-28.00%
19 March 2015	UBS	1.50	1.33	-11.33%

913 In Mr Houston's opinion, the comments by analysts that I have referred to above and the changes in their valuation of Myer as at 19 March 2015 or shortly thereafter suggested that market participants were unaware that Myer was expecting FY15 NPAT in the order of $75 million to $80 million.

914 Now this may be so at that point. A matter to which I will need to return later is of course the relevance of market consensus as to NPAT from time to time and how that was factored into the market price.

(d) The value of confounding news

915 The $75 million to $80 million range of forecast NPAT outcomes presented in the 19 March 2015 corrective disclosure excluded one-off costs, but also identified that Myer expected to incur one-off costs of $7 million relating to the strategic review.

916 On the analyst call on 18 March 2015, Myer CEO, Mr Umbers, explained that:

> During the half we decided to accelerate a strategic review process that had been underway for some time. The aim of this review was to reveal the formula to make Myer more relevant to its customers, more engaging in its execution and more able to adapt and capitalise on the forces of change.

917 Mr Houston pointed out that the one-off cost of $7 million had not previously been disclosed to the market and so it was necessary to take account of the likely effect of this information on Myer's share price in Mr Houston's estimate of the abnormal return on 19 March 2015. To distinguish its effect from that of the revised FY15 NPAT forecast of $75 million to $80 million (excluding one-off costs), Mr Houston estimated that the $7 million cost would have a one-off effect on FY15 NPAT equal to $4.9 million, calculated as $7 million multiplied by 0.7, being 1 minus the corporate tax rate of 30 per cent. And he estimated that the disclosure of this information could be expected to reduce Myer's share price by an amount equal to $4.9 million divided by the number of shares on issue on 19 March 2015.

918 On this basis, Mr Houston estimated that the disclosure of the one-off strategic review cost of $7 million on 19 March 2015 resulted in a reduction in the Myer share price on that day equal to $0.008, calculated as $4.90 million divided by 585.69 million, being the number of Myer shares on issue on 19 March 2015.

919 I will not need to discuss that adjustment further or its quantification in the light of my views on other matters.

(e) Interim summary

920 In Mr Houston's opinion, the forecast range of NPAT in FY15 of $75 million to $80 million, excluding one-off costs, was neither known nor expected by the market prior to 19 March 2015. Mr Houston drew this conclusion because each of the nine equity analysts' reports published on 19 and 20 March 2015 included revised profitability expectations for FY15, and many of them noted that Myer's revised guidance was "well below expectations".

921 Using the market model that Mr Houston developed that I have described above, he found that the abnormal return attributable to Myer's disclosures on 19 March 2015 was $0.177. Of this abnormal return, he estimated that:

(a) $0.168 was attributable to news of Myer's revised profitability range of $75 million to $80 million for FY15, excluding one-off costs; and

(b) $0.008 was attributable to news of the forecast one-off cost of $7 million relating to a strategic review.

922 I note that $0.168 and $0.008 do not sum to $0.177 but this is due to the effect of rounding.

923 For the remainder of this discussion the abnormal return as calculated by Mr Houston is to be taken as that resulting only from the 19 March 2015 corrective disclosure of Myer's revised profitability guidance of FY15 NPAT in the range of $75 million to $80 million, excluding one-off costs, i.e., an abnormal return of $0.168 in dollar terms or 11.0 per cent in relative terms.

SHARE PRICE INFLATION

924 In estimating the extent of inflation in the Myer share price over the period from 11 September 2014 to 18 March 2015 (the relevant period), Mr Houston's approach was founded on the principles of financial economics referred to above as applied to the information available to him and assumptions he was asked to make. At this point let me focus on one assumption that he was asked to make concerning the alternative disclosure that would have been made to the market on 11 September 2014.

925 I should say now that I do not accept Mr Houston's assumption as to the counterfactual disclosure and will later address what I consider to be the correct counterfactual disclosure. As I have said elsewhere, the appropriate counterfactual disclosure should have been the following.

926 In the context of and given the fact that the 11 September 2014 representation had been made, Myer should have disclosed to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 was not likely to be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

927 Now in a sense these are cascading possibilities because making any one disclosure *may* have removed the need for any later disclosure in the sequence that I have just outlined.

928 But in case I am wrong, it is appropriate for the moment to set out the evidence based upon the assumption that Mr Houston in fact used.

(a) The counterfactual disclosure assumed by Mr Houston

929 The counterfactual disclosure that he was asked to make was to the effect that Myer was obliged to clarify the meaning of Myer's CEO's advice on 11 September 2014 by immediately disclosing to the market that:

(a) achieving sales in the order of $3,310 million to $3,330 million, Myer expected to achieve NPAT of approximately $77 million in FY15;

(b) on the same assumed sales volume, Myer hoped to achieve NPAT in the order of $107 million in FY15 by achieving certain cost savings and miscellaneous additional revenue including in the following categories:

(i) fast track initiatives;

(ii) foreign exchange gains;

(iii) markdowns;

(iv) store wages;

(v) store operating expenditure (including occupancy);

(vi) CEO / management;

(vii) information technology;

(viii) omni-channel / marketing;

(ix) Sass & Bide;

(x) buying and supply chain;

(xi) finance;

(xii) NSO;

(xiii) board;

(xiv) depreciation; and

(xv) Myer annual incentive plan;

(c) Myer recognised that each 1% positive or negative change in its sales for the year from budget would have a $6 million "NPAT Impact"; and

(d) cumulative sales for the year-to-date as of 11 September 2014 were $284.4 million and approximately 5% below budgeted sales of $298.2 million.

930 First, Mr Houston estimated likely market expectations as to FY15 NPAT and ongoing earnings over the relevant period had the information contained in the counterfactual disclosure been made available to the market on 11 September 2014. He then compared these likely market expectations as to FY15 NPAT and ongoing earnings over the relevant period with the higher earnings expectations that actually prevailed, and which underpinned the Myer share price, over the same relevant period.

931 Second, he considered the extent to which the Myer share price would have been lower over the relevant period if the relatively lower market expectations as to FY15 NPAT and ongoing earnings arising from the counterfactual disclosure had been known to the market from 11 September 2014. He drew on the observed relationship between the change in market expectations and the estimated abnormal return on 19 March 2015 to estimate the change in the Myer share price on each day given the hypothesised change in market expectations following the counterfactual disclosure. The relevance of this comparative analysis drew from the very similar nature of the information presented in the counterfactual and corrective disclosures.

932 Since both disclosures affected the market's expectations as to Myer's future earnings and the level of risk associated with those earnings, Mr Houston concluded that the observed relationship between the relative change in NPAT expectations and the abnormal return on 19

March 2015 was the appropriate basis on which to estimate the extent of inflation in the Myer share price over the relevant period.

933 As I have already explained, the estimation of share price inflation by reference to the observed abnormal return measured in proportionate terms is known as the constant percentage approach. Mr Houston applied that approach by calculating the proportionate change in the Myer share price resulting from a one per cent reduction in market expectations as to FY15 NPAT and multiplying this ratio by the relative reduction in market expectations under the counterfactual disclosure to estimate the relative change in the share price. Finally, having applied the constant percentage approach to account for the estimated change in market expectations as to Myer's ongoing earnings under the counterfactual disclosure, Mr Houston made a further adjustment to account for the effect on Myer's share price of the counterfactual disclosure of one-off effects on earnings in FY15.

934 Before proceeding further, let me elaborate on other aspects of Mr Houston's evidence relevant to his counterfactual.

935 Mr Houston was provided with only limited information on the prospective cost savings and miscellaneous revenue items identified in Myer's internal documents and in the counterfactual disclosure as having the potential to increase its FY15 NPAT from $77 million to $107 million. He therefore established his upper bound expectation of Myer's ongoing earnings by deducting from the top end of the FY15 NPAT range identified in the counterfactual disclosure only those items for which there was a sufficient basis to draw conclusions as to their one-off nature or other likely effect on future earnings.

936 It followed that in undertaking its assessment of ongoing earnings the market may well have excluded additional cost and revenue items listed in the counterfactual disclosure from its assessment of Myer's ongoing earnings, whereas the inclusion of those items in Mr Houston's analysis reflected the absence of sufficient information to draw a more reliable conclusion. He therefore considered that his upper bound estimate was reasonable (i.e., conservatively high).

937 Mr Houston noted that in the event that the counterfactual disclosure had been made, it was likely that analysts would have sought clarifying details on the nature of some of the items, say in a call with analysts, and their likelihood. Such a process may well have given rise to a clearer picture as to the implications for ongoing earnings than was available to him, including after

taking into account that his understanding of the nature of the items was informed by documents not disclosed to the market.

938 Mr Houston set out his analysis of the market's likely reaction to the cost savings and profit improving measures that were identified in the counterfactual disclosure.

939 One complexity in this process was that the counterfactual disclosure did not ascribe individual values to the cost savings and miscellaneous additional revenue items it identified, even though it was clear that Myer considered their combined achievement would result in a $30 million (equal to $107 million minus $77 million) increase in forecast NPAT in FY15. Mr Houston explained his approach to ascribing an individual effect on NPAT to each of these items in the following terms. But given that he has used the wrong counterfactual it is not necessary to rule on each of these estimates. Having said that, if the correctness of his counterfactual is assumed for the sake of argument, then what he estimated had some merit.

Effect on NPAT of achieving each individual cost and miscellaneous revenue item

940 According to Mr Houston, the NPAT forecast in the budget for FY15 approved by the board in July 2014 was the same as that resulting from the achievement of the cost items in the counterfactual disclosure, i.e., $107 million. Further, with one exception (being MAIP costs), the cost and revenue items listed in the counterfactual disclosure were the same as those underpinning the FY15 budget approved by the board, which contributed to an increase in forecast NPAT for FY15 from $77 million to $107 million.

941 In light of these similarities, Mr Houston assumed that the value of each cost and revenue item listed in the counterfactual disclosure was equal to the value of the corresponding item underpinning the FY15 budget approved by the board in July 2014. One consequence of this assumption was that he ascribed no value to the removal of MAIP costs listed in the counterfactual disclosure, because it appeared no such benefit underpinned the FY15 budget approved by the board.

942 This approach implied that the attainment of all the cost and revenue items listed in the counterfactual disclosure would have a net effect on NPAT equal to $32 million. However, the counterfactual disclosure indicated a combined effect on NPAT of $30 million (equal to $107 million minus $77 million). Mr Houston assumed that this discrepancy arose from the rounding of the values presented in the source document listing each of these items. For

example, he calculated that the items in the source document sum to $111 million, whereas the source document indicates a sum of $110 million.

943 Mr Houston adjusted for this difference in rounding by scaling down the value of each cost and miscellaneous revenue item in equal proportion, so that their combined attainment would increase NPAT by $30 million, consistent with the counterfactual disclosure.

944 Mr Houston achieved this by multiplying the value of each item by an amount equal to 0.94 (equal to 30 million divided by 32 million).

A reduction in store wages – $11.25 million cost reduction with $8.44 million NPAT impact

945 Mr Houston said that the most substantial of the prospective items identified as underpinning forecast NPAT of $107 million in FY15 was a $11.25 million cost saving relating to store wages.

946 He noted that the potential to achieve a cost saving of this nature was identified in the June 2014 "budget update" for FY15 discussed between Mr Brookes and Mr Ashby, where it was noted that a cost saving of $12 million in relation to "store wages":

> [e]quates to 400,000 hours; or 16 hours per day, per store

947 This statement implied that the contemplated cost saving was expected to arise from a reduction in staff hours, rather than from a reduction in the rate of pay for floor staff.

948 Mr Houston said that the analyst commentary to which he referred suggested that it is probable the market would have expected any potential reduction in the staffing of Myer's stores to have an adverse effect on its sales. However, the potential additions to Myer's baseline FY15 NPAT within which these prospective cost savings fall does not provide for any corresponding adjustment for the adverse effect on forecast sales. To Mr Houston, that seemed unrealistic and so he assumed that the market would have disregarded such an action as being likely to increase Myer's FY15 NPAT or ongoing earnings.

949 Drawing on the figures discussed between Mr Brookes and Mr Ashby, Mr Houston assumed that an $11.25 million cost saving for "store wages" would necessitate a reduction in floor staff hours of 15 hours per day per store, or 375,000 hours in total, calculated as $11.25 million divided by $12 million, and applied to the 400,000 hours estimate identified at Myer. Further, the FY15 budget presented to the board noted, in relation to store costs:

> Sales per labour hour FY15 $208 vs FY14 $206

950 Mr Houston said that the reporting of this metric in the FY15 budget presented to the board was consistent with the proposition that the level of floor staff was important to sales. Adopting the more conservative FY14 metric of $206 sales per labour hour, a 375,000 hour reduction in floor staff time corresponds to a $77.25 million reduction in sales (calculated as 375,000 multiplied by $206).

951 Mr Houston, adopting the assumption that there is a causal relationship between staff hours and sales, and where each labour hour gives rise to $206 of sales, said that the information provided to him suggested that a $77.25 million decline in sales arising from this cost saving would reduce Myer's FY15 NPAT by $14.0 million. This is calculated as $77.25 million divided by $33 million multiplied by $6 million. He noted that the FY15 budget presented to the board stated that a $33 million reduction in sales in FY15 would result in a $6 million reduction in NPAT.

952 Mr Houston said that this analysis suggests that the $8.44 million potential increase in forecast NPAT assumed by Myer to arise from a reduction in store wages may well have been more than offset by a larger reduction in NPAT, driven by its potential adverse effect on sales.

953 He said that the potential for any reduction in floor staff to have an adverse effect on Myer's sales and earnings is reinforced by the views of equity analysts. Several analyst reports identify the detrimental effect on Myer's business of past reductions in store hours and, notably, the need for increases in floor staff. Although these analysts' opinions were expressed in response to Myer's 19 March 2015 disclosure, in Mr Houston's opinion it is likely that analysts would have expressed the same opinions on 11 September 2014.

954 In Mr Houston's opinion, the market is likely to have interpreted the prospect of a reduction in Myer floor staff as likely to cause an adverse effect on sales, with the potential to cause a disproportionately greater adverse effect on Myer's earnings. However, although the upper end of the FY15 NPAT range of $107 million detailed in the counterfactual disclosure depended in part on such a cost saving, Myer made no corresponding adjustment for the likely negative effect on forecast sales (and so NPAT) in FY15.

955 Mr Houston therefore concluded that the market would have ascribed no positive value to this potential cost saving, either in forming its expectations as to Myer's FY15 NPAT or its ongoing earnings. Indeed, the market may well have considered this cost saving to have a net-negative effect on Myer's earnings in FY15 and future years. On this reasoning, Mr Houston omitted

this $11.25 million cost saving from his estimate of the upper bound of the expectations that would likely have been formed as to Myer's ongoing future earnings, as at 11 September 2014.

A reduction in omni-channel/marketing expenses – $1.88 million cost reductions with $1.88 million improvement in NPAT

956 Mr Houston noted that Myer's internal documents indicate that "omni-channel" expenses relate to marketing expenses across a broad range of categories, including cross-company advertising, visual merchandising, events, Myer.com and digital services. He said that the June 2014 budget update for FY15 noted that this potential saving was "across all areas".

957 He said that an omni-channel approach to sales was a key element of Myer's strategy. For example, in its annual report for FY14, Myer identified its omni-channel marketing as one of five key elements to its business strategy. In the "Chairman and CEO report" in Myer's annual report for FY14, Mr Brookes and Mr McClintock highlighted that:

> We invested significantly in improving our omni-channel capability to provide customers with more choice in when, where, and how they shop with us. This investment delivered positive results, with online sales growth of more than 100 percent during the year, supported by improved fulfilment with the opening of our dedicated online distribution centre in Melbourne (Victoria).
>
> …
>
> As we move into FY2015 we expect to begin realising the benefits of recent investments and a number of strategic initiatives. We see this as a time of opportunity and will continue to invest in the important areas of *omni-channel*, our people, Myer Exclusive Brands, customer service innovation, and refreshing the Myer brand, to position Myer at the forefront of a rapidly changing and competitive retail environment.
>
> (Emphasis added.)

958 Myer stated elsewhere in its FY14 Annual report that:

> Our online business represents an important growth platform, as customers increasingly choose to research and purchase products via our website. We are pleased with the continued acceleration in all key customer metrics including sales, average monthly visits, basket size, and online order value.
>
> …
>
> The strength of Myer's brand represents a significant competitive advantage in omni-channel, and our social media presence on Facebook, Twitter, Instagram, YouTube, and Pinterest supports our strategy of inspiring more customers every day.

959 Mr Houston said that given the limited detail in relation to these contemplated cost savings, there is the potential for the marketing initiatives to which they relate to have little or no effect on sales. However, Myer's June 2014 budget identifies such cost cuts as being:

> [a] [r]isk to growth in sales, myer one [sic] & events.

960 Consistent with this sentiment, Mr Houston then noted that a number of analyst reports emphasise the importance of marketing expenditure to the performance of Myer's business. For example, CLSA noted that reducing advertising spend was one of the cost cuts, along with staff reductions, that:

> …has killed the customer experience and EBIT margins.

961 Similarly, Citi highlighted in March 2015 that:

> …marketing costs need to rise by $5-10 million to boost customer traffic in its stores.
>
> The challenge is the service and marketing investment may not have an immediate impact on sales, but the investment is necessary to restore sales over time.

962 Citi also highlighted both the importance of marketing to boost customer traffic into stores and the need for more sales staff to improve the conversion of customer traffic into sales. However, so Mr Houston said, Myer identified that it needed to reduce both marketing expenditure and sales staff to improve NPAT beyond $77 million in FY15, and implicitly assumed there would be no corresponding adverse effect on sales.

963 Nevertheless, on 12 November 2014 Deutsche Bank noted a previous statement made by Myer's management:

> Management noted that given the launch of its new brand positioning ("find wonderful") and Myer Christmas Giftorium, it did not have to over rely on advertising and markdowns throughout the period.

964 On balance, in Mr Houston's opinion the market would not have been likely to interpret a reduction in omni-channel/marketing expenditure as a form of sustainable cost saving, because of:

(a) the strategic importance of Myer's omni channel offer;

(b) equity analysts' views as to the adverse effect of previous reductions in marketing expenditure on customer experience and EBIT margins, and the need for increased expenditure; and

(c) the relevance of marketing investment to restore sales over time, as noted by Citi.

965 Mr Houston therefore concluded that the market would likely have disregarded the potential for any valuation benefit arising from this $1.88 million cost saving in forming its view of Myer's expected ongoing future earnings. However, he made an adjustment to his estimated

lower bound for share price inflation to account for the one-off effect of this potential cost saving in FY15.

A reduction in IT expenses – $1.88 million cost reductions with $0.94 million improvement in NPAT

966 Mr Houston noted that there was only limited information as to the particular nature of the $1.88 million information technology (IT) cost saving identified as having the potential to increase NPAT by $0.94 million. However, Mr Houston said that Myer's budget identified the opportunity to realise a $1.5 million cost saving for IT that indicated it related to the postponement of IT roles otherwise planned to be filled in FY15. A note attached to the IT cost saving in the budget stated:

> Note $3m for 35 vacant roles Do we slow down the increase in the IT structure - stagger increase in resources over next 2 years?

967 If this category of "cost saving" references the postponement until FY16 of $1.88 million of costs otherwise planned to be incurred in FY15, the resulting benefit to Myer would not be equal to $1.88 million, so Mr Houston said. Rather, assuming there were no negative effects of such a deferral, the benefit to Myer would be equal to the time value of delaying this expenditure. In the context of the market valuation of Myer equal to approximately $1,295 million (calculated equal to the Myer share price of $2.15 on 11 September 2014 multiplied by the 585.685 million shares on issue on that day) on 11 September 2014, any such "cost saving" would have an immaterial effect on the share price. Mr Houston said that the effect on the share price would be equal to $1.88 million multiplied by Myer's cost of capital, divided by the number of shares on issue. For example, if a $1 million cost must be incurred by a company with weighted average cost of capital (WACC) of 10 per cent, the cost of incurring such expenditure immediately would be $1 million. If the incurring of the cost was delayed by one year, the present-day value of the cost would be $1 million divided by (1 plus WACC), or $1 million divided by 1.10, and so $0.91 million. The saving to the company of the delay would then be $1 million minus $0.91 million, or $0.09 million.

968 On the other hand, Mr Houston said that if such a cost saving was sustainable indefinitely, its valuation effect would be assessed by reference to a change in ongoing earnings, as compared with the cost of any detrimental effects on the business.

969 Myer stated elsewhere that its strategic focus on omni-channel sales and its corresponding reliance on technology was said to necessitate continued improvements in its IT systems. For example, Myer highlighted in its 2014 Annual Report that:

> With Myer's increasing reliance on technology in a rapidly changing technological environment, outages, online disruptions and a failure to upgrade and improve our IT systems, could have a detrimental effect on our sales, business efficiencies, and brand reputation.

970 Similarly, Citi on 16 March 2015 also emphasised the importance of investing in IT, i.e., noting that:

> Major offshore department stores spend a significant proportion of their capex on IT. The reality is that the evolution of digital retail means a frequent upgrade in IT is required. The growth in mCommerce is a good example of the need to continue investing in IT.

971 Citi also highlighted that Myer invested materially less in IT systems, as compared with its international comparators. In particular, Citi highlighted that Myer would need to increase its investment in IT to $30 to $50 million per annum, from $25 to 30 million per annum, to meet the comparable level of investment by Nordstrom and Debenhams.

972 Mr Houston said that in Myer's FY15 budget presented to its board on 14 May 2014, it highlighted rapid growth in online sales as part of its:

> Strategies / Actions to address Analyst concerns
>
> …
>
> Fast Track initiatives to drive rapid growth in online sales supported by improved distribution, click and collect rollout

973 In light of this material, Mr Houston concluded that the market would have been unlikely to have viewed favourably a $1.88 million reduction in Myer's IT expenditure in FY15, principally because of the corresponding potential to inhibit one of its key strategies in FY15, i.e., omni-channel sales.

974 Mr Houston therefore disregarded any potential valuation benefit arising from a potential $1.88 million cost saving for IT in forming a market expectation of Myer's ongoing future earnings. However, he made an adjustment to his estimated lower bound for share price inflation to account for the one-off effect of this potential cost saving in FY15.

A reduction in markdowns – $5.63 million cost reductions with $3.75 million NPAT improvement

975 Mr Houston said that the counterfactual disclosure identified the potential for reduced markdowns in FY15 to increase baseline NPAT by an amount equal to $3.75 million. He said that Myer's internal documents indicated that this $3.75 million benefit to NPAT was underpinned by no corresponding adverse effect on sales.

976 Mr Houston said that it is well accepted in economics that for goods such as those sold by Myer the quantity demanded by customers will increase as prices reduce. In economic terms, the benefit to Myer of selling goods at reduced prices arises from the prospect that the reduction in its per unit profit margin is more than offset by the increase in sales elicited by those lower prices.

977 Although Myer was best placed to evaluate the prospect for this trade-off to have a favourable effect on its profitability, according to Mr Houston it seems unrealistic to assume that a reduction in the level of markdowns would not give rise to a lower level of sales than would otherwise be the case. Indeed, Myer's FY15 budget update on 5 June 2014 noted that such a measure:

> Could be a risk to MEB sales growth

978 Further, in the analyst presentation for FY14, Myer noted that its margin enhancing activities in FY14 were offset by:

> Increased markdowns in a competitive market

979 On the subject of markdowns, Mr Brookes noted in the analyst call on 11 September 2014 that:

> From a markdown point of view, we always start the year saying we're going to spend less on markdowns, but it really depends. The unknown factor is two things, and that's what happens from a micro and macroeconomic environment, and the second is what happens with our own ability to pick the right stock. So if those two work in our favour then we'll probably spend less in markdowns than last year.

980 In Mr Houston's opinion, Mr Brookes' comment suggests that Myer determined its spend on markdowns on a year-by-year basis and, as such, any cost reduction from reduced markdowns would be assessed by the market as a one-off cost saving. This interpretation is consistent with an observation by Merrill Lynch who stated, as part of its FY15 forecasts, that:

> …the gains from markdown reductions and reduced shrinkage appear to have been largely exhausted.

981 Mr Houston therefore concluded that the market would likely have disregarded the potential for any valuation benefit to arise from this $5.63 million cost saving in forming its view of Myer's expected ongoing future earnings. However, Mr Houston made an adjustment to his estimated lower bound for share price inflation to account for the one-off effect of this potential cost saving in FY15.

A Foreign Exchange gain – $2.81 million gain with $1.88 million NPAT impact

982 Mr Houston noted that the counterfactual disclosure identified the potential for Myer to derive a $2.81 million foreign exchange gain that would increase its baseline FY15 NPAT by $1.88 million in FY15, i.e., in its 5 June 2014 budget update Myer identifies a potential:

> Forex gain of $3m (in 1st half), based on current hedging levels

983 Myer explained in its 2014 annual report that:

> To minimise the effects of a volatile and unpredictable exchange rate, Group policy is to enter into forward exchange contracts in relation to the Group's overseas purchases for any 12 month period. The actual level of cover taken fluctuates depending on the period until settlement of the foreign currency transaction, within the Board approved hedging policy. This policy allows cover to be taken on a sliding scale between 25 – 100% depending on the period to maturity (up to 12 months).

984 Mr Houston understood that this gain was expected to arise because Myer expected a more favourable exchange rate in the first half of FY15. However, he said that future exchange rates were determined by a range of macroeconomic factors beyond Myer's control and were notoriously difficult to predict. Even if Myer had perfect foresight in the first half of FY15 and expected to realise this gain over that period, it is unlikely that the market would have expected that Myer could derive sustained foreign exchange gains into the future, so Mr Houston said.

985 Mr Houston therefore concluded that the market would likely have disregarded the potential for any valuation benefit arising from this $2.81 million revenue gain in forming its view of Myer's expected ongoing future earnings. However, Mr Houston made an adjustment to his estimated lower bound for share price inflation to account for the one-off effect of this potential revenue gain in FY15.

Summary

986 In Mr Houston's opinion, the market would have formed its view on the level of Myer's ongoing future earnings and the associated risk of those earnings by reference to a maximum level of expected ongoing NPAT in FY15 equal to $107 million, less the NPAT impact of the cost savings and the miscellaneous revenue items just discussed, namely:

(a) $8.44 million (store wage cost savings);

(b) $1.88 million (savings from reduced omni/marketing);

(c) $0.94 million (IT cost savings);

(d) $3.75 million (savings from reduced markdowns); and

(e) $1.88 million (revenue from foreign exchange gain).

987 In other words, if the counterfactual disclosure had been made, in Mr Houston's opinion the market would have formed its view on expected ongoing future earnings as at 11 September 2014 by reference to an upper bound for forecast ongoing FY15 NPAT of $90.13 million.

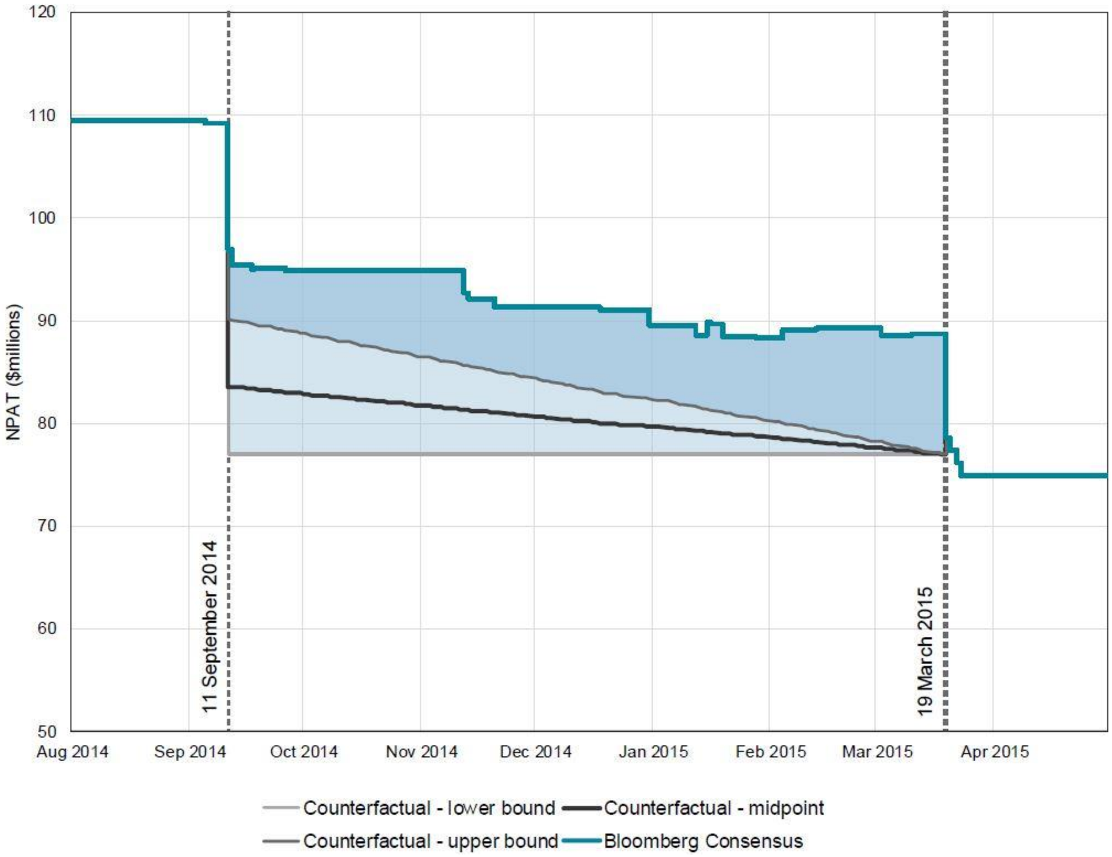
988 Mr Houston assumed that over the period 11 September 2014 to 18 March 2015 the performance of Myer's business was generally deteriorating relative to its expectations at the outset, whilst analyst expectations of FY15 NPAT were also declining. In such circumstances, Mr Houston assumed that the market would have expected Myer to adjust its business strategy to account for the changing market conditions and would have reassessed the ability of Myer to achieve the additional cost savings and miscellaneous revenue items had the counterfactual disclosure been made.

989 It follows, so Mr Houston said, that in the environment of declining business performance and falling market expectations, the market would likely have revised down its expectations as to Myer's ability to achieve not only its baseline FY15 NPAT expectation but also the additional cost savings and miscellaneous revenue items it had identified. In Mr Houston's opinion, the upper bound of the market's assessment of Myer's ongoing earnings as at 11 September 2014 ($90.13 million) would have been revised steadily downwards through the relevant period to reach the lower bound of the market's assessment of Myer's earnings ($77 million) that ultimately prevailed by 19 March 2015.

990 According to Mr Houston, the rate of decline in market expectations and the date at which the market would have placed no value on the combined effect of baseline FY15 NPAT and the additional cost savings or miscellaneous revenue items it hoped to achieve is inherently uncertain. In the absence of any detail as to precisely what Myer would have disclosed to the market following 11 September 2014, Mr Houston adopted the assumption that the time path of adjusted market expectations would have been linear, i.e., declining from $90.13 million as at 11 September 2014 to $77 million as at 18 March 2015. The effect of this assumption is

illustrated in the following graph. Of course this is all based upon Mr Houston's counterfactual disclosure which I do not accept.

Actual and counterfactual market expectations as to ongoing earnings



Market expectations of one-off effects on earnings in FY15

991 Mr Houston identified that a number of the cost savings or miscellaneous revenue items that Myer hoped to achieve would likely have been assessed by the market as either one-off items or have been disregarded as unlikely to have the potential to improve its ongoing earnings in FY15. These items were potential cost saving from a reduction in store wages, savings from reduced omni/marketing, IT cost savings, savings from reduced markdowns, and revenue from a foreign exchange gain.

992 In his opinion, the market would have either disregarded or valued negatively the potential cost saving from a reduction in store wages, either in forming its expectations as to ongoing earnings or earnings in FY15. It follows that the one-off impact on FY15 NPAT of this cost saving was at most zero.

993 As to the other potential reductions in costs or increases in revenue that he identified as likely to be one-off, the limited information available made it difficult to estimate whether the market would have incorporated any of these cost and revenue items, albeit one-off in nature, into its expectations of FY15 NPAT. Adopting a conservative approach, he therefore assumed that the market would have formed the view that Myer would have been able to achieve all of these reductions in costs or increases in revenue, thereby giving rise to a one-off FY15 NPAT effect of $8.44 million, being $1.88 million (savings from reduced omni/marketing) + $0.94 million (IT cost savings) + $3.75 million (savings from reduced markdowns) + $1.88 million (revenue from foreign exchange gain).

(b) Upper and lower bounds based upon Mr Houston's counterfactual

994 Now as I have said, Mr Houston assumed that to achieve compliance with its continuous disclosure obligations, Myer was obliged to clarify its CEO's advice to the market on 11 September 2014 by immediately disclosing that:

(a) it expected sales in FY15 to be in the order of $3,310 million to $3,330 million and, on that basis, it expected to achieve NPAT of approximately $77 million ("baseline FY15 NPAT"); and

(b) on the same sales volume, Myer hoped to achieve NPAT in the order of $107 million in FY15 by achieving certain cost savings and miscellaneous additional revenue.

995 Mr Houston saw that his task was to estimate how the market would have valued Myer's shares over the relevant period had the counterfactual disclosure been made on 11 September 2014. So, to estimate the effect that the counterfactual disclosure would have had on Myer's share price, it is necessary to assess the extent to which the market's expectations of Myer's future earnings and the associated risk of those earnings would have changed in light of that counterfactual disclosure. Since the assumed counterfactual disclosure involved a range of NPAT outcomes for FY15, Mr Houston approached his task by estimating a likely upper and lower bound for the market's expectations of Myer's future earnings following the counterfactual disclosure.

Lower bound for market's assessment of Myer's future earnings

996 Under the counterfactual disclosure, Myer would have indicated that it expected to achieve NPAT of approximately $77 million in FY15 and that, on the same sales volume, it hoped to

achieve NPAT in the order of $107 million by achieving certain cost savings and miscellaneous additional revenue.

997 Although Myer did not disclose any revisions to its forecast NPAT until 19 March 2015, the market was nevertheless revising downward its expectations of FY15 NPAT over the relevant period. For example, in response to Myer's first quarter sales update released on 12 November 2014, the market reduced its expectations of FY15 NPAT from $94.89 million to $92.72 million, a decline of $2.17 million or 2.3 per cent. Further, it was likely that other external information of relevance to the prospects for Myer's financial performance, such as economy-wide indicators of consumer spending, may also have contributed to declining analyst expectations over this period.

998 Although the factors underpinning the market's expectation as to Myer's FY15 NPAT were likely to have changed over the relevant period, in Mr Houston's opinion a reasonable lower bound as to market expectations of Myer's FY15 NPAT and ongoing earnings in light of the hypothetical, counterfactual disclosure was $77 million. This figure represented the lower end of the FY15 NPAT range indicated by the counterfactual disclosure, but was not less than the bottom of the range set out in that hypothetical disclosure. Taking into account that the market had otherwise adopted an average FY15 NPAT expectation of $96.85 million on 11 September 2014 in light of Myer's guidance of "anticipated profit growth" from the previous year's NPAT of $98.5 million, Mr Houston considered that this was a reasonable (i.e., conservative) lower bound estimate.

999 Mr Houston therefore adopted an FY15 NPAT of $77 million as a lower bound estimate of the market's expectations of ongoing earnings in light of the counterfactual disclosure. This lower bound estimate did not include any additional one-off items affecting earnings in FY15. This contrasted with Myer's 19 March 2015 announcement that provided FY15 NPAT guidance of $75 million to $80 million, but before accounting for an expected one-off cost of $7 million.

Upper bound for the market's assessment of Myer's future earnings

1000 The counterfactual disclosure that Mr Houston was asked to assume would have been made by Myer details various potential cost savings and miscellaneous revenue items that, if realised, had the potential to increase Myer's FY15 NPAT to $107 million, an increase from baseline FY15 NPAT of $77 million in the order of $30 million, or 39 per cent.

1001 If Myer had made a disclosure that included the potential to increase FY15 NPAT from its baseline figure, the market would have undertaken an assessment of both the nature of those potential cost savings and miscellaneous revenue items, and the likelihood that they could have been achieved. In other words, the market would have derived its expectations of Myer's ongoing earnings by excluding any cost savings or miscellaneous revenue items that were either:

(a) one-off in nature, and so would not contribute to Myer's ongoing expected future earnings; or

(b) were unlikely to be realised in FY15 or beyond.

1002 Mr Houston estimated the level of FY15 NPAT that would likely have informed the market's upper bound expectations of Myer's ongoing earnings, in light of the counterfactual disclosure. He approached this by deriving an estimate of:

(a) the market's upper bound expectations of FY15 NPAT that would likely have informed Myer's ongoing earnings immediately following the counterfactual disclosure on 11 September 2014; and

(b) the path by which the market's initial expectations formed at 11 September 2014 would have changed over the period to 18 March 2015.

1003 Mr Houston also estimated the contribution to FY15 NPAT from the cost savings and miscellaneous revenue items that the market would have considered as one-off effects, which he used to estimate the effect on Myer's share price of the disclosure of those elements of the counterfactual disclosure.

1004 The counterfactual disclosure presented a range of forecast FY15 NPAT outcomes, where a level of earnings above the bottom end of that range depended on the achievement of particular cost and miscellaneous revenue items in that year. In the event the counterfactual disclosure had been made, market participants' precise expectations as to Myer's NPAT in FY15 would have been informed by their assessment of:

(a) the likelihood of Myer achieving those cost and revenue items; and

(b) the implications of each of those items for Myer's future earnings (and so its cash flows).

1005 Since the counterfactual disclosure presented a range of potential NPAT outcomes and Mr Houston had only limited information on the factors underpinning that range, he estimated an upper and lower bound of likely market expectations as to Myer's future earnings following the counterfactual disclosure. As I have said, he had taken a relatively conservative approach to estimating both these bounds, by:

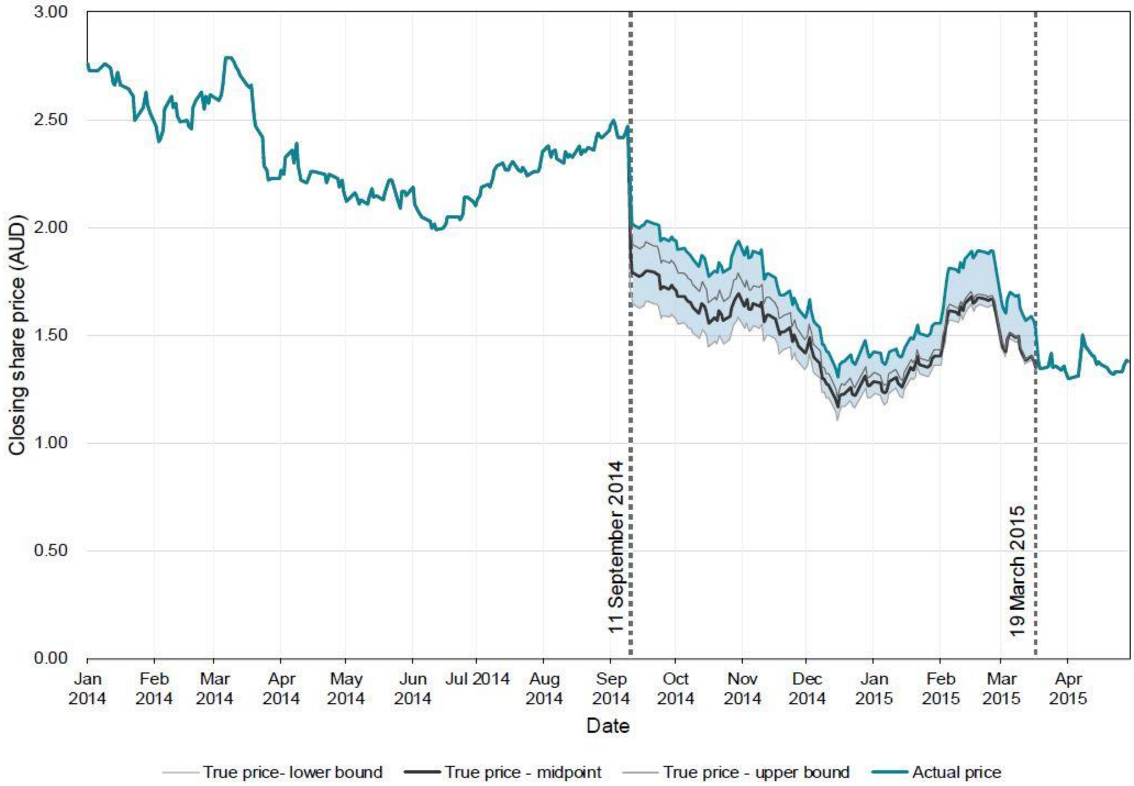
(a) adopting a lower bound that was equal to the bottom of the disclosed range, even though analysts had otherwise adopted FY15 NPAT expectations that were less than those otherwise disclosed by Myer; and

(b) adopting an upper bound that deducted only those items for which there was a sufficient basis to draw conclusions as to their one-off nature or other likely effect on value.

1006 Given the achievement or otherwise of the identified cost and miscellaneous revenue items had the potential to increase FY15 NPAT by up to 39 per cent, market participants and analysts would likely have sought clarifying details on the nature and expected effects of those items. This process may well have resulted in the emergence of a clearer picture in relation to Myer's future earnings, as compared with that on which Mr Houston's analysis was based.

1007 In the absence of further information that would permit the estimation of a more precise range or point estimate of market expectations as to Myer's future earnings following the counterfactual disclosure, in the graph below he presented his estimate of the extent of inflation in Myer's share price over the relevant period by taking the midpoint of that range on each day, along with the upper and lower bounds described above. Adopting this mid-point, he set out tabulated estimates of share price inflation on each day of the relevant period. For completeness, he also presented estimates of Myer's share price inflation derived using the upper and lower bounds. I have set this out as an annexure to my reasons.

Estimated share price inflation 11 September 2014 to 18 March 2015



Criticisms of Mr Houston's assumptions regarding the counterfactual bounds

1008 Mr Houston relied on three counterfactual bounds that were meant to represent the estimates that the market would have made for FY15 NPAT under the counterfactual disclosure assumed by Mr Houston.

1009 Dr Prowse has criticised Mr Houston's counterfactual bounds which it is appropriate to elaborate on at this point.

1010 The counterfactual lower bound used by Mr Houston was a constant value of $77 million. This value resulted directly from the assumption that Mr Houston relied upon to the following effect:

> Portfolio Law has asked me to assume that, to achieve compliance with its continuous disclosure obligations, Myer was obliged to clarify its CEO's advice to the market on 11 September 2014 by immediately disclosing that:
>
> - it expected sales in FY15 to be in the order of $3,310 million to $3,330 million and, on that basis, it expected to achieve NPAT of approximately $77 million ('baseline FY15 NPAT'); and
> - on the same sales volume, Myer hoped NPAT in the order of $107 million in FY15 by achieving certain cost savings and miscellaneous additional revenue.

1011 Dr Prowse was asked to perform his analysis under the assumption that I found that Mr Houston's assumption regarding expected NPAT of $77 million was not reasonable. Dr Prowse found that the assumption he had been asked to make to be reasonable. He said that the $77 million figure included in the counterfactual disclosure given to Mr Houston appeared to be related to an early version of Myer's internal budget calculations. The $77 million NPAT forecast in the source document was an early projection that did not consider the strategic initiatives that Myer was planning to undertake in FY15. Mr Brookes described the $77 million NPAT as from a "first cut of the budget [that] would ordinarily start with a 'do nothing' or 'take no actions' base figure without allowing for the impact of any initiatives to be implemented in the coming year". Mr Brookes stated that the next stage of the budgeting process would be to adjust this base figure "by reflecting the anticipated impact of the strategic initiatives and investments planned for the business, as well as possible actions that might be taken in relation to costs". Similarly, Mr Ashby referred to the $77 million figure as "simply a step in the process of developing the budget".

1012 Based on this assumption, Dr Prowse did not include the lower bound counterfactual NPAT used by Mr Houston in his analysis.

1013 Further, the midpoint counterfactual bound used by Mr Houston was simply the average of the upper and lower bounds. For the same reasons that Dr Prowse did not use the lower bound, he also did not use the midpoint in his analysis.

1014 Let me now say something about the upper bound.

1015 To reach his starting (11 September 2014) upper bound counterfactual, Mr Houston began with the $107 million value stated in his assumed counterfactual disclosure and made five adjustments. These adjustments were related to: (a) store wage cost savings; (b) savings from reduced omni-channel / marketing; (c) IT cost savings; (d) savings from reduced markdowns; and (e) revenue from foreign exchange gain. Mr Houston asserted that the market would have ascribed no positive value or disregarded the potential for any value arising from these items in forming its view of Myer's expected ongoing future earnings.

1016 Now as an economist who was not privy to the internal budgeting process at Myer and who was not a market analyst of Myer at the time, Dr Prowse did not have an independent opinion as to how market analysts would have reacted to Mr Houston's assumed counterfactual disclosure. But he asserted that Mr Houston's assertions regarding how the market would have viewed and reacted to these elements of the internal Myer budget were inconsistent with both the testimony of Mr Ashby and the expert opinion of Mr Molony.

1017 In particular, Dr Prowse noted that Mr Ashby disagreed with the analysis and assumptions made by Mr Houston to conclude that the market would disregard the potential for any value arising from these items.

1018 In addition, he noted that Mr Molony was of the opinion that Myer's budgets were "prepared by experienced retailers with a detailed knowledge of the Australian retail market and the Myer business" and that "Myer undertook a comprehensive budgeting process for FY15" which "included seeking feedback from all Myer merchandise groups and subsequent directions from the CFO (and endorsement by the CEO)".

1019 Dr Prowse concluded that Mr Houston's assertions regarding how he believed analysts would have reacted to the counterfactual upper bound disclosure were problematic. And if any or all of Mr Houston's adjustments were not reasonable, Mr Houston's estimates of inflation in Myer's stock price would be correspondingly reduced. In particular, if all of Mr Houston's five adjustments were unreasonable, then Mr Houston's inflation estimates using his upper bound counterfactual would be reduced to zero. This would be established using the correction to Mr Houston's methodology with regard to the appropriate way to model market expectations of upper bound NPAT from 11 September 2014 to 18 March 2015 by basing it on how actual market expectations changed.

1020 Further, Mr Houston made two assumptions regarding how market expectations of his upper bound earnings scenario would develop after 11 September 2014 being that:

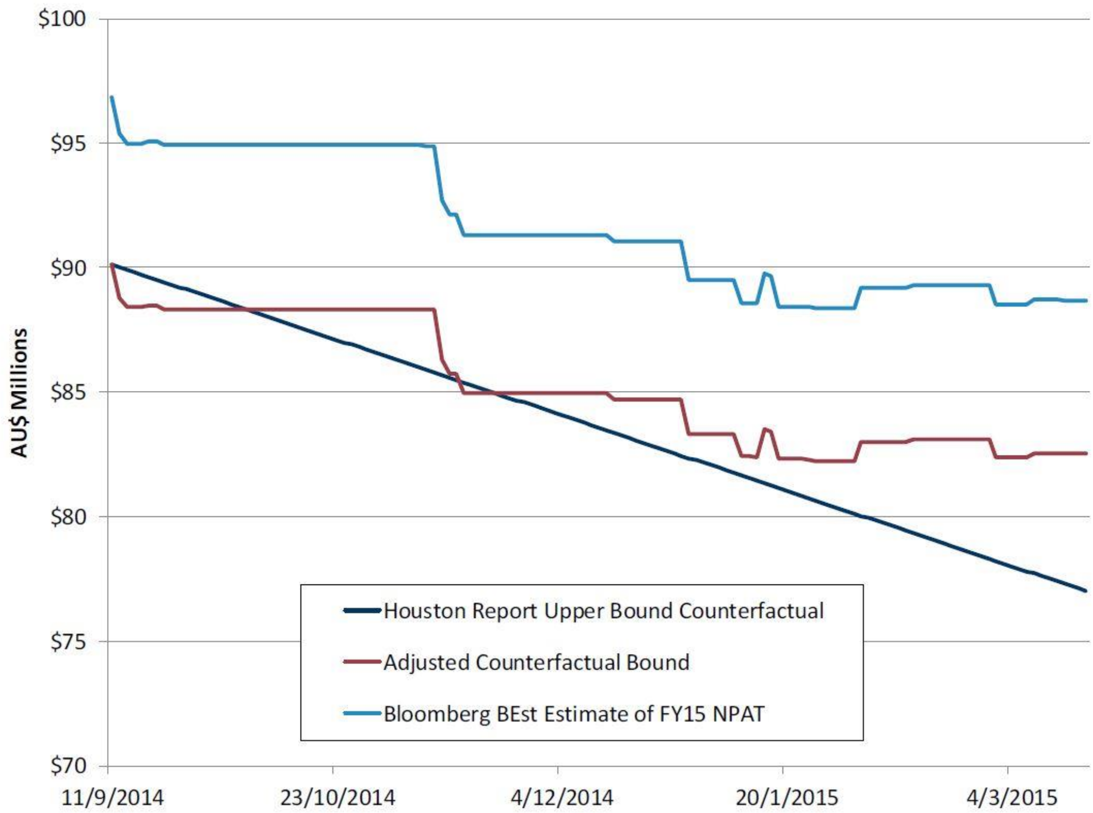
(a) by 18 March 2015 the market expectation of earnings would be approximately $77 million; and

(b) the market expectations of earnings would decline linearly between 11 September 2014 and 18 March 2015.

1021 But according to Dr Prowse, neither assumption made by Mr Houston has any basis. Mr Houston claimed that "the market would be likely to have revised down its expectations as to Myer's ability to achieve … the additional cost savings and miscellaneous revenue items it had identified". But according to Dr Prowse, unlike Mr Houston's evaluation of Myer's internal analysis as of 11 September 2014, he did no analysis of any of these other items, either individually or collectively, as a basis for his assumption that the market would have entirely discounted them and ignored them in assessing Myer's likely FY2015 NPAT level by 18 March 2015, and that they would have done so in a strictly linear manner.

1022 Dr Prowse found the assumptions by Mr Houston not to be reasonable and to have no basis in economics or fact. He believed a more reasonable assumption to use was one that used information about how the market actually adjusted its FY15 NPAT expectations over the relevant period. He believed it was reasonable to use this information as a guide as to how the market would have adjusted its expectations of FY15 NPAT over time in Mr Houston's upper bound counterfactual scenario. Accordingly, he adjusted the value of the market expectations of FY15 NPAT in the counterfactual world each day by the rate at which it actually changed in the relevant period. The graph below shows the actual Bloomberg BEst consensus estimate of earnings, his estimate of the adjusted counterfactual bound, assuming that all five of Mr Houston's adjustments to consensus FY15 NPAT after the counterfactual disclosure were reasonable, and Mr Houston's estimate of the counterfactual bound.

Mr Houston's "Upper Bound" Counterfactual and Adjusted Counterfactual Bound



1023 Making just this one correction to Mr Houston's analysis, but holding all else constant, resulted in estimated upper bound share price inflation amounts that were approximately 19% lower than estimated by Mr Houston.

1024 Now as I have said, Mr Houston estimated the lower and upper bounds for the likely earnings expectations that would have been formed by the market in light of his assumed counterfactual disclosure. Under that counterfactual disclosure, Myer would have indicated that it expected to achieve NPAT of approximately $77 million in FY15, and that on the same sales volume it hoped to achieve NPAT in the order of $107 million by achieving certain cost savings and miscellaneous additional revenue. He formed his upper and lower bounds for market expectations as to NPAT by reference to alternative assumptions as to how the market would have viewed the indicated cost savings and miscellaneous additional revenue aspirations. He estimated that the market would have arrived at a lower bound expected NPAT of $77 million for FY15 if the market did not assign any value to the cost savings and miscellaneous additional revenue in the counterfactual disclosure, and continued to maintain this expectation up to 19 March 2015. He estimated that the market would have arrived at an upper bound expected NPAT of $90.13 million on 11 September 2014, falling linearly to $77 million on 18 March 2015, if the market had assigned a positive NPAT impact to cost savings and miscellaneous additional revenue items as he had described.

1025 And as I have indicated, Dr Prowse was asked by Myer to assume that Mr Houston's assumption that Myer was obliged to disclose to the market that it expected to achieve NPAT of approximately $77 million in FY15 was not reasonable. So, as a consequence of his instruction that the assumption given to Mr Houston was not reasonable, Dr Prowse did not include either Mr Houston's lower bound or midpoint counterfactual NPAT in his analysis.

1026 In discussing Mr Houston's upper bound estimate of the market's expectations, Dr Prowse referred to the evidence of Mr Ashby and the expert opinion of Mr Molony. Specifically, Dr Prowse recited that:

(a) "…Mr. Ashby disagrees with the analysis and assumptions made by Mr. Houston to conclude that the market would disregard the potential for any value arising from these items"; and

(b) "…Mr. Molony is of the opinion that, based on the information he has reviewed, Myer's budgets were "prepared by experienced retailers with a detailed knowledge of the Australian retail market and the Myer business" and that

> "Myer undertook a comprehensive budgeting process for FY15" which "included seeking feedback from all Myer merchandise groups and subsequent directions from the CFO (and endorsement by the CEO)"".

1027 But none of the observations of Mr Ashby or Mr Molony caused Mr Houston to alter his earlier upper bound estimate as to market expectations of Myer's FY15 NPAT given the counterfactual disclosure assumption provided to him.

1028 In his opinion most of Mr Ashby's observations concerned the strength of the counterfactual disclosure assumption Mr Houston was asked to make, and so had limited relevance for his assessment of market expectations in light of that disclosure.

1029 Further, in his opinion it was incorrect to suggest that equity analysts would not review all aspects of a disclosure that contained information relevant to a company's earnings. By way of example in contradiction to that suggestion, a few days prior to Myer's 19 March 2015 disclosure, Citibank wrote "Our calculation for staffing investment equates to $20 million, which is equivalent to six-full time equivalent staff per store. This would lift the service levels of [sic] 4% and close to the level achieved in 2010".

1030 Further, in his opinion Mr Molony's observations related to the quality of Myer's budgeting process and so had limited relevance for Mr Houston's assessment of market expectations.

1031 Further, Mr Houston noted that Dr Prowse neither developed an alternative counterfactual disclosure nor provided any alternative analysis of how the market may have assessed the earnings effects of various potential cost savings and miscellaneous additional revenue items. Indeed, despite the listing of numerous analyst reports in an appendix to his report, Dr Prowse's report did not make reference to any analyst reports in his assessment. His analysis of Mr Houston's upper bound estimate of the market's likely earnings expectations was limited to inferences drawn from the statements of Mr Ashby or Mr Molony, and was deficient to that extent.

1032 Further, Dr Prowse contended that Mr Houston's approach to reducing Mr Houston's upper bound estimate of earnings expectations to the level that was ultimately disclosed by Myer was not reasonable. In his opinion, the changes in the upper bound estimate for market earnings expectations should have been based on how the market actually adjusted its FY15 NPAT expectations over the relevant period. On this basis, Dr Prowse adjusted Mr Houston's upper bound value of market expectations of FY15 NPAT each day by the rate at which the actual

Bloomberg BEst consensus changed in the relevant period. But according to Mr Houston, the difficulty with Dr Prowse's approach is that the profile of the Bloomberg BEst consensus could not be expected to provide a reasonable approximation of market expectations over time under the counterfactual disclosure. Under the counterfactual disclosure, analysts were given different and more detailed guidance, which would have allowed them to make their own assessment of the likelihood of achieving each of the various cost savings and miscellaneous additional revenue items. Such considerations could not be reflected in the Bloomberg BEst consensus. Mr Houston's upper bound was equivalent to assuming that analysts would have revised the probability, which they placed on the cost savings and miscellaneous additional revenue items being realised, in a linear fashion from 100 per cent on 11 September 2014 to zero per cent on 18 March 2015.

1033 In a sense most of this debate is academic as I have rejected Mr Houston's assumed counterfactual disclosure, the reasons for which I will explain in more detail later.

(c) Constant dollar and constant percentage approaches

1034 As I have said, there were two alternative approaches to using an observed effect on the share price at a particular date to estimate share price inflation at a different date, that is:

(a) the constant dollar approach, which involves application of an observed effect on the share price measured in absolute terms; or

(b) the constant percentage approach, which involves application of an observed effect on the share price measured in relative terms.

1035 Mr Houston explained that the decision as to which approach to apply depends upon the nature of the announcement that is being assessed. In this context, the information the subject of these proceedings concerns Myer's forecast profitability in FY15. This forecast is a reference point for the market's assessment of the level and associated risk of future earnings.

1036 By way of example, each of the equity analyst reports available to Mr Houston that were published on either 19 or 20 March 2015 following the corrective disclosure not only revised downwards their expectations as to Myer's FY15 NPAT but also their expectations as to Myer's NPAT in FY16 and FY17, as presented in the Table below.

Effect of the corrective disclosure on analyst expectations, March 2015

Analyst	FY15			FY16			FY17				
	Before ($m)	After ($m)	Change	Before ($m)	After ($m)	Change	Before ($m)	After ($m)	Change	CAGR before[1]	CAGR after[1]
Citi	85	72	-15.5%	91	74	-18.7%	94	74	-21.5%	5.16%	1.38%
CLSA	88	76	-13.6%	87	73	-16.1%	87	72	-17.2%	-0.57%	-2.67%
Commonwealth Bank	85	71	-16.1%	83	64	-23.0%	95	73	-23.4%	5.72%	1.05%
Credit Suisse	88	79	-10.6%	89	71	-19.8%	97	73	-25.3%	5.05%	-3.96%
Deutsche Bank	87	72	-17.2%	82	67	-18.3%	82	68	-17.1%	-2.92%	-2.82%
J.P. Morgan	84	71	-15.8%	87	62	-29.2%	96	63	-35.0%	7.06%	-5.89%
Macquarie	90	67	-25.1%	96	78	-19.0%	104	89	-14.5%	7.40%	14.80%
Morgan Stanley	91	75	-17.6%	94	75	-20.2%	99	67	-32.3%	4.30%	-5.48%
UBS	91	81	-11.0%	94	83	-11.7%	93	78	-16.1%	1.09%	-1.87%
Average			**-15.85%**			**-19.55%**			**-22.48%**		

Notes: (1) Constant annual growth rate (CAGR) calculated by (NPATFY17 divided by NPATFY15) to the power of (0.5 minus 1).

1037 Mr Houston’s analysis of the information presented in the above Table shows that the announcement of Myer’s revised profitability guidance in the corrective disclosure on 19 March 2015 resulted in the market revising its expectations as to the rate of growth of Myer’s future earnings. He therefore applied the constant percentage approach to estimate the extent of share price inflation arising from a change in market expectations as to ongoing earnings.

1038 He also noted that the relevant period corresponds to a timeframe over which the relevant market indices (the All Ordinaries Index and the S&P/ASX 200 Consumer Discretionary Index used in his market model) were relatively flat, but when Myer’s share price fell by approximately 29 per cent (calculated equal to the Myer share price on 11 September 2014 ($1.53) divided by the Myer share price on 18 March 2015 ($2.15) minus 1). Since market expectations as to Myer’s ongoing NPAT in FY15 reduced by only eight per cent over this period (Bloomberg Consensus NPAT fell from $96.9 million on 11 September 2014 to $88.7 million on 18 March 2015; he calculated the relative reduction equal to $88.7 million divided by $96.9 million and by then subtracting 1), this suggested to him that the relatively larger reduction in the share price may have been caused by the market revising its expectations as to both the rate of growth in future earnings and level of risk associated with those earnings.

1039 Finally, he made a subsequent adjustment to the share price to account for any difference between the market expectations as to one-off earnings in FY15 under the counterfactual disclosure, as compared with that under the corrective disclosure on 19 March 2015. Given the one-off nature of these effects, he made this adjustment using the constant dollar approach.

1040 Mr Houston’s analysis showed that on 19 March 2015 an 11.3 per cent reduction (calculated equal to $78.7 million divided by $88.7 million minus 1) in market expectations as to ongoing NPAT in FY15 resulted in an 11.0 per cent reduction in the share price.

1041 However, to the extent that Mr Houston’s assumed counterfactual disclosure would have resulted in a hypothesised reduction in market expectations as to ongoing NPAT in FY15 that was not equal to the 11.3 per cent reduction in expectations observed on 19 March 2015, a proportionate adjustment was needed to the 11.0 per cent estimated relative change in the Myer share price.

1042 Mr Houston therefore translated the observed relationship between the relative change in market expectations and the share price on 19 March 2015 into a standardised metric. He did this by calculating the percentage change in share price resulting from a one per cent change in market expectations as to NPAT, i.e.:

$$\frac{estimated\ abnormal\ return\ (per\ cent)}{change\ in\ market\ expectations\ (per\ cent)} = \frac{11.0\%}{11.3\%} = 0.97$$

1043 In other words, he estimated that a one per cent change in market expectations as to FY15 NPAT over the relevant period would have resulted in a 0.97 per cent change in the share price. He then estimated the reduction in the share price arising from lower expectations as to ongoing NPAT in FY15 on a particular day as being equal to the relative reduction in market expectations multiplied by 0.97.

1044 By way of example, if the actual market expectations as to ongoing NPAT in FY15 on a particular day was equal to $80 million, and following his assumed counterfactual disclosure market expectations would have been $70 million on that day, he estimated the relative change in the share price equal to:

$$\frac{(70\ million - 80\ million)}{80\ million} \times 0.97 = -12.14\%$$

1045 Mr Houston’s application of the constant percentage approach adjusted the Myer share price to account for differences in the market’s actual expectations as to ongoing earnings in FY15, as compared with that which would have arisen under his assumed counterfactual disclosure.

However, it was also necessary to adjust the share price to reflect any differences in the market's expectations as to one-off earnings in FY15.

1046 Mr Houston adopted the assumption that, although the following items would have been excluded from the market's assessment of the upper bound on ongoing earnings under his counterfactual disclosure assumption, they would have been realised in FY15, i.e.:

(a) savings from reduced omni/marketing;

(b) IT cost saving;

(c) savings from reduced markdowns; and

(d) revenue from foreign exchange gain.

1047 Together, these one-off items would have resulted in FY15 earnings being $8.44 million higher than the level of ongoing FY15 NPAT that informed the market's assessment of future earnings. To account for this one-off NPAT increase in FY15, Mr Houston adjusted upwards his estimate of the upper bound of the share price under his counterfactual assumption by an amount, in dollar terms, equal to $8.44 million divided by the number of shares on issue on each day of the relevant period. He noted that there was a change in the number of shares outstanding on 16 September 2014. The change in the number of shares outstanding was reflected in his calculation of the adjustment for one-off costs, as used in the calculation of the lower bound of inflation.

Criticisms

1048 Dr Prowse disagreed with Mr Houston's characterisation that there were only two common approaches to estimating inflation. According to Dr Prowse there were other approaches to estimate inflation, including those based on the earnings response coefficient approach extensively described in the academic and practitioner literature; see, for example, Bruegger E and Dunbar FC "Estimating Financial Fraud Damages with Response Coefficients" (2009) 35(1) J Corp L 11-69 and Ferrell and Saha (2007).

1049 Now Mr Houston discussed at length the appropriateness of the constant dollar or constant percentage approach in different circumstances. Based on his reasoning, he asserted that the constant percentage approach was appropriate to use in this matter, with some exceptions related to his adjustment of Myer's FY15 NPAT in his "Upper Bound" counterfactual where he asserted that the market would discount some NPAT adjustments made by Myer in its internal analysis.

1050 But according to Dr Prowse, Mr Houston's discussion was irrelevant because Mr Houston did not use the constant percentage approach as defined in the literature in determining the alleged inflation and incorrectly labelled his approach as the constant percentage approach.

1051 The constant percentage method presumes that the percent of the stock price that is accounted for by inflation does not vary over the relevant period; see Tabak (2007). In this matter, Mr Houston determined that the abnormal return associated with the alleged corrective disclosure was 11%. But under the constant percentage method, Mr Houston should simply have determined inflation at all times during the relevant period to be 11% of the daily stock price; see Tabak (2007), p. 2. But this is not what Mr Houston did. Instead, he determined the relationship between the percentage change in consensus earnings and the abnormal stock price reaction and used this relationship to analyse the impact of an asserted change in consensus earnings expectations as a result of the counterfactual earnings disclosure.

1052 In short, and contrary to Mr Houston's assertion, Dr Prowse said that the methodology he used was not the constant percentage methodology. Therefore, his discussion of it was irrelevant to the appropriateness of his actual methodology.

1053 Further, he said that Mr Houston's discussion of the appropriateness of the constant dollar versus constant percentage approach contained no citations to any practitioner literature on this topic.

1054 Mr Houston claimed that the constant dollar method was generally applied in circumstances where the effect of the disclosure on cash flows was a one-off effect or by a constant amount each year and did not materially affect the risk associated with those cash flows, whereas the constant percentage approach was typically applied where a disclosure affected the market's assessment of the growth of future cash flows and/or the level of risk associated with them. As the basis for these assertions he then gave an example that he claimed showed that a company's announcement resulting in an increased risk of cash flows would affect the company's stock price by a constant percentage amount regardless of the total value of the company (or the value of the company's shares).

1055 But according to Dr Prowse, Mr Houston's assertions and example were incomplete and misleading. In particular, they failed to note that his example only worked in a situation where the company had no debt on its balance sheet. If a company had debt on its balance sheet then Mr Houston's example broke down and did not provide support for his assertions with regards to the appropriateness of the constant percentage approach in certain situations. Dr Prowse explained this by reference to Mr Houston's example in the following terms.

1056 Mr Houston's example assumed that a company has expected future cash flows of $9 million per year and 100 million shares outstanding. With a discount rate of 5%, the company's share price is $1.80 (the share price is calculated as [the annual cash flow divided by the discount rate] divided by the number of shares outstanding, or [$9 million / 5%] / 100 million shares). He assumed that the company makes an announcement that increases its discount rate to 9%, and the share price drops accordingly to $1.00 per share, a 44.4% decline.

1057 At an earlier point in time, the company's expected future cash flows were $10 million per year. At a 5% discount rate, its shares are valued at $2.00. At this point, if the company makes an announcement increasing its discount rate to 9%, the share price will drop to $1.11, which is again a 44.4% decline.

1058 Now consider this same example if the company has $90 million in debt at both points in time. When the company is expecting $9 million per year in cash flows with a 5% discount rate, the enterprise value ("EV") of the company is still $180 million ($9 million / 5%), but since $90 million of that is debt, only $90 million is the value of equity, or $0.90 per share. When the discount rate increases to 9%, the EV drops to $100 million, leaving $10 million for equity or $0.10 per share. This is a drop of 88.9%.

1059 At the earlier point in time with expected cash flows of $10 million per year, the EV would have been $200 million under a 5% discount rate. With $90 million in debt, this leave $110 million for the equity, $1.10 per share. If the discount rate increases to 9%, the EV will decline to $111 million, valuing the equity at $21 million or $0.21 per share. This is an 80.8% decline in value.

1060 According to Dr Prowse, as this example makes clear, when a company has debt on its balance sheet, the same change in the perceived riskiness of its cash flows (discount rate) at different points in time when the company had different values does not cause the same percentage drop in share price.

1061 Dr Prowse noted that in this example, the dollar change in stock price is also not the same between the two points in time. He concluded that the choice of dollar versus percent methods of calculating inflation must be based on other considerations.

1062 Dr Prowse said that this issue had been recognised in the practitioner literature that specifically discussed different approaches to estimating share price inflation. For example, in a working paper by David Tabak and Chudozie Okongwu entitled "Inflation Methodologies in Securities Fraud Cases: Theory and Practice" (NERA Economic Consulting Working Paper, July 2002), the authors state (at p 20) that "the constant percentage inflation method is generally not appropriate for companies with positive amounts of debt".

1063 Further, Dr Prowse noted that 20% to 30% of Myer's capital is in the form of debt. Myer's debt-to-capital ratio ranged from 21% to 31% during the period from 26 July 2014 through 25 July 2015. Therefore, if one were to consider employing a constant percentage methodology to estimate alleged inflation in this matter one would need to take account of the fact that Myer was a leveraged company.

1064 Now as I have said, Mr Houston explained in his earlier report that the constant dollar method was generally applied in circumstances where the effect of the disclosure on cash flows was either one-off in nature or a constant amount each year, and did not materially affect the risk associated with those cash flows. In contrast, the constant percentage approach was typically applied where a disclosure affected the market's assessment of the prospects for growth of future cash flows and/or the level of risk associated with them. He provided an example demonstrating that an announcement that changed the market's assessment of the growth or risk of a company's ongoing earnings would cause the same percentage change in the share price regardless of the level of the initial share price.

1065 But as I have indicated, Dr Prowse contended that the example that Mr Houston had provided to illustrate the suitability of the constant percentage approach only applied in instances where companies had no debt. Dr Prowse observed that 20 to 30% of Myer's capital was in the form of debt and so he concluded that if one were to consider employing a constant percentage methodology to estimate alleged inflation in this matter, one would need to take account of the fact that Myer was a leveraged company. And Dr Prowse expanded on Mr Houston's example to include debt. He contended that his example illustrated that when a company had debt on its balance sheet, a change in the perceived riskiness of its cash flows through a changed discount rate for those cash flows at different points in time did not cause a percentage drop in share price of the same magnitude, regardless of other factors.

1066 But Dr Prowse's example was of little relevance for Mr Houston's analysis. It did not properly differentiate between cash flows before and after financing (debt) costs, and the critical requirement that any such analysis be aligned with the correct form of company earnings measure. In the example presented by Dr Prowse, the future earnings and therefore cash flows of the company were used to pay off debt, with the residual being distributed among shareholders. This use of cash flows is consistent with those underlying EBIT, which reports the earnings of a company after expenses, but before the satisfaction of its debt interest obligations and tax liabilities. But the accounting measure of earnings that was relevant to Mr Houston's analysis was NPAT, which represented the earnings of a company after expenses, debt interest and tax. Since NPAT was a measure of earnings after debt interest obligations had been met, NPAT was directly related to the company's earnings and cashflows available to pay dividends to preferred stock holders and common shareholders. Since Mr Houston's analysis and the emphasis in Myer's announcements drew from the implied cash flow consequences of changes in earnings expressed in terms of NPAT, the nature and extent of any debt obligations that would otherwise have complicated the relationship between earnings and cash flows in the example raised by Dr Prowse did not apply.

1067 In summary, for these and other reasons in my view the constant percentage approach provided the best means to estimate the effect of Myer's misrepresentation on its share price over the relevant period.

(d) Earnings response co-efficient method

1068 The relationship between a stock's abnormal return and earnings surprise is called the Earnings Response Coefficient ("ERC"). For example, if a stock has an ERC of 5, this implies that for every cent of an earnings surprise its stock price reacts by five cents; see Bruegger and Dunbar (2009) at p 28.

1069 Academics have studied methods to estimate ERCs for decades. Further, there is practitioner literature explaining how an ERC can be used in estimating a priori what would have been the effect of the truth on a company's stock price had it been told at the time it was covered up; see Bruegger and Dunbar (2009) and also Ferrell and Saha (2007).

1070 But according to Dr Prowse Mr Houston failed to use any generally accepted ERC-based methodology in determining inflation attributable to the counterfactual earnings disclosure that he analysed.

1071 Drawing from forty years of studies of the impact on stock prices of financial announcements published in the finance literature, Bruegger and Dunbar (2009) provide a methodology that uses ERC to assess the impact of a change in earnings on a company's stock price; see Bruegger and Dunbar (2009) at p 23. The literature is clear that the appropriate way to model such a relationship is between the dollar change in earnings and the dollar change in abnormal stock price return, and not as Mr Houston has modelled the relationship between the percent change in earnings and the percent change in abnormal return. For example, according to Bruegger and Dunbar (2009), the market-adjusted price reaction (i.e., abnormal return or "AR") due to earnings surprise can be determined as Bruegger and Dunbar (2009) at p 34):

> An earnings surprise is defined as $\hat{e}_t - E(e_t)$, where:
>
> $\hat{e}_t$ is the earnings per share announced on day t; and
>
> $E(e_t)$ is the market's expectations of earnings per share on day t (usually represented as consensus analysts' forecasts).
>
> The market-adjusted stock price return (excess return), AR_t, in response to this earnings news is assumed to be predicted by the following expression:
>
> $AR_t = a + b\{[\hat{e}_t - E(e_t)]/p_{t-1}\}$, where:
>
> p_{t-1} is the prior day's share price;
>
> b is the estimated earnings response coefficient; and
>
> a is an estimated constant.

1072 The above equations show that under the ERC approach, the appropriate way to model the relationship between an earnings change and the stock price abnormal return is between the dollar amount of the earnings change expressed as a proportion of the prior day's stock price, and the dollar amount of the abnormal stock price change expressed as a proportion of the prior day's stock price.

1073 Contrastingly, Mr Houston modelled the relationship between earnings change and stock price change as the percent change in the consensus earnings estimate in relation to the percent change in abnormal stock price. But Dr Prowse knew of no support for this approach in the academic or practitioner literature.

1074 But even assuming that one could use Mr Houston's purported constant percentage method, according to Dr Prowse his implementation was still incorrect because his estimate that a one per cent change in market expectations as to FY15 NPAT over the relevant period would have resulted in a 0.97 per cent change in the share price was based on one data point and therefore had no known error rate.

1075 Given the fact that Mr Houston did not cite any literature in support of his methodology for modelling earnings changes in relation to changes in stock prices and the fact that his method used an estimate without any error rate, Dr Prowse concluded his inflation estimate to be unreliable.

1076 Further, assuming that one could use one data point obtained from the alleged corrective disclosure date to estimate the impact of Myer's change in consensus earnings on its stock price, according to Dr Prowse one still needed to make at least one correction to Mr Houston's purported methodology to make it consistent with the ERC-based approach recommended in both academic and practitioner literature. This correction was to use the dollar amount of the change in the consensus estimate in estimating the impact of the consensus earnings change on the related abnormal dollar change in the stock price on the alleged corrective disclosure date. And making this one correction to Mr Houston's analysis but holding all else constant (including using Mr Houston's market model discussed earlier) resulted in estimated share price inflation amounts that were approximately 7% lower than estimated by Mr Houston using his "Upper Bound" counterfactual.

1077 Dr Prowse asserted that Mr Houston's approach was not the constant percentage methodology and so his discussion of it was irrelevant to the appropriateness of his methodology. Rather, Dr Prowse asserted that Mr Houston had attempted to use an ERC based methodology. But in so doing, he had failed to apply any generally accepted approach for using an ERC. Dr Prowse sought to draw comfort from a published article by Bruegger and Dunbar (2009) to support his criticisms.

1078 But Mr Houston pointed out that in the same article explaining the method for applying an ERC for the purpose of estimating the extent of share price inflation arising from a wrongful disclosure, Bruegger and Dunbar identified the circumstances in which an ERC could be appropriately implemented. But none of those circumstances applied here. Bruegger and Dunbar explained that an ERC could be used to parse price reactions in an otherwise unadjusted event study when:

(a) there was confounding news at the time of the corrective disclosure, and the event study did not itself allow one to adjust for that confounding news;

(b) the corrective disclosure set right several successive misstatements, and it was necessary to estimate the separate extent of price inflation for each misstatement; or

(c) there was more than one defendant to a wrongful disclosure proceeding, with each having contributed differently to the misstatement.

1079 Further, Bruegger and Dunbar make clear that whenever an ERC was estimated for a particular stock, some form of multiple regression analysis of the relationship between observed earnings disclosures and the associated price effects was necessary. I note that in the circumstances of Myer, estimation of an ERC would require examination of the history of responses of share price reactions to earnings surprises, and the making of assumptions about the stability of any such relationship over time. Bruegger and Dunbar also noted than an ERC estimate might be able to be drawn from academic research on price reactions to earnings announcements or the professional literature, but Mr Houston was not aware of any such research or literature that would shed light on the estimation of this variable for Myer, as may be applicable for the relevant period.

1080 But none of the circumstances identified by Bruegger and Dunbar as being appropriate for use of an ERC applied in relation to Myer. And even if they were to do so, the absence of any suitable basis for estimating an ERC made the application of the method impracticable.

(e) Forward-casting

1081 Let me say something about forward-casting.

1082 The parties accepted, and as Ferrell and Saha (2007) have explained, that in forward-casting one estimates the inflation in stock price associated with the misrepresentation announcement as opposed to inferring the extent of the inflation from the price decline associated with the curative disclosure. The application of the forward-casting approach is straightforward when the false information, which the market believes is true, was unanticipated by the market. In such an event, the stock price reaction (net of market, industry and other confounding effects) associated with the initial dissemination of the misrepresentation would represent the inflation in stock price which potentially harms shareholders by artificially inflating the purchase price.

1083 Now there is no difficulty with the application of forward-casting as described in respect of the announcement modelled by Mr Houston's lower-bound analysis.

1084 But this was contentious concerning the upper-bound analysis.

1085 Mr Houston criticised the forward-casting approach referred to by Dr Prowse. Mr Houston criticised that approach by asserting that it did not accord with the description of when forward-casting is appropriate by Ferrell and Saha. But according to Dr Prowse, Mr Houston cited selectively from Ferrell and Saha (2012) and claimed that Dr Prowse's estimation of the relationship between earnings response and stock price drop was incorrect because "Ferrell and Saha advocate that the estimation of this relationship be undertaken using 'a substantial number of earnings surprises'". But the criticism is suspect because the reason behind Ferrell and Saha's recommendation is that "the stock price reaction to any given earnings surprise might be affected by confounding information that is not controlled for in the event study or might simply be the product of random stock price fluctuations" (Ferrell and Saha (2012), p 379). However, Dr Prowse determined the relationship using the stock price response on 19 March 2015 after making the same adjustment for confounding information that Mr Houston did and his event study showed that the stock price response on 19 March 2015 could not be attributed to random fluctuations. Therefore, there is little to this criticism.

1086 Mr Houston also criticised the forward-casting approach because under the approach "actual daily returns and counterfactual daily returns are the same for all days following 11 September 2015 [sic; 2014], which does not allow prices to reflect an alternative profile for NPAT expectations". But according to Dr Prowse this is incorrect. As the Ferrell and Saha (2012) paper cited by Mr Houston explained at p 366:

> We argue that the forward-casting method is well-grounded in the academic literature and enjoys several important advantages relative to the constant-dollar back-casting and allocation methods. Most importantly, the forward-casting method incorporates market expectations in determining what the stock price would have been absent the alleged fraud; a central consideration that neither back-casting nor the allocation method adequately address.

1087 Explaining this through an example, Ferrell and Saha (2012) noted that a stock's daily return in a "but for" world is the sum of two parts:

(a) the return attributable to counterfactual disclosures, if any made on the day; and

(b) the return attributable to "market and industry movements as well as any market reaction to any other firm-specific information, besides the quarterly earnings report, that become available" and that "such factors cannot be attributed to the fraud but rather would have happened irrespective of the fraud" (at p 380).

1088 Since the counterfactual disclosure being considered by Dr Prowse and Mr Houston does not allege that Myer should have made any additional counterfactual disclosures on the days following 11 September 2014, it follows that on those days, the first part of the stock's return would be zero. So far as the second part is concerned, the return would equal the return observed in the actual world. Combined, it follows that, on the days following 11 September 2014, the return in the but for world should be the same as the return observed in the actual world and therefore according to Dr Prowse, Mr Houston's criticism does not have merit. Similarly, Myer says that the points raised in the applicant's closing submissions also ignore the fact that the counterfactual disclosure being considered does not incorporate any further counterfactual disclosures after 11 September 2014. Further, the applicant's closing submissions made assertions about other disclosures that (apparently) ought to have been made after 11 September 2014, none of which were addressed by Mr Houston and did not form part of the counterfactual disclosure on which the applicant's loss assessment was based.

1089 On forward-casting, the applicant submitted that the continuous disclosure requirement meant that without analysing those dates upon which it could be said that Myer developed new and critical knowledge as to its expectations for NPAT in FY15 the forward-casting approach was inadequate. However, the problem with this argument is that the counterfactual disclosure which forms the basis of the applicant's case does not identify or rely on additional information or knowledge being required to be disclosed to the market on dates after 11 September 2014.

1090 I do not need to take these debates concerning forward-casting further at this stage given that I have rejected Mr Houston's assumed counterfactual disclosure.

(f) Other criticisms of Mr Houston's methodology

1091 Dr Prowse disagreed with many aspects of Mr Houston's analysis, including his ultimate conclusions about the price sensitivity of "the relevant no reasonable basis information" and "the relevant contradictory information," his event study, and his methodology for calculating share price inflation.

1092 Mr Houston concluded that "the relevant no reasonable basis information" and "the relevant contradictory information" (as defined in [12] of the statement of claim and in Mr Houston's letter of instruction) was "price sensitive information for Myer". In addition, he concluded that the Myer share price was inflated over the 11 September 2014 to 19 March 2015 period as a result of the failure by Myer to disclose the relevant no reasonable basis information and/or the relevant contradictory information. Mr Houston's reasoning for such a conclusion was that:

(a) in finance theory, share prices adjust in response to changes in the market's expectations of cash flows and/or the associated risks of those cash flows; and

(b) his event study showed that the announcement on 19 March 2015 gave rise to a statistically significant abnormal return.

1093 But Dr Prowse considered Mr Houston's reasoning to be deficient for a number of reasons.

1094 First, in an efficient market, share prices should adjust in response to changes in the market's expectations of cash flows. But isolating the price response solely attributable to changes in the market's expectations of cash flows is not easy because there are many factors determining the ultimate price response. For example, the price response depends on the time period, the company, and many other market and industry factors as to whether there is a response in stock price to a change in the market's expectations of cash flows. Additionally, stock prices fluctuate randomly even in the absence of any value-relevant information. In short, according to Dr Prowse, assessing the value-relevance of any information requires a careful analysis of what was publicly known when and what other factors might have caused the stock price to move (or not move) on the dates being analysed. But Dr Prowse asserted that Mr Houston had not performed any proper analysis that would directly support his assertion that both "the relevant no reasonable basis information" and "the relevant contradictory information" were value-relevant.

1095 Now Mr Houston accepted that Dr Prowse was correct to observe that share prices should adjust in response to changes in the market's expectation of cash flows. But this fundamental tenet of finance theory applies regardless of the factors cited by Dr Prowse, i.e., time period, the company, or other market and industry factors. Further, in referring to "the time period", it was unclear whether Dr Prowse meant the time period over which changes in cash flows were expected to occur, or the time period over which the stock price was expected to adjust in response to changes in expected cash flows. The efficient market hypothesis holds that stock prices adjust quickly in response to new information, and to changes in future cash flows after discounting, irrespective of when they are expected to occur.

1096 Further, according to Mr Houston it would have been correct to state that the magnitude of the share price reaction to a change in expectations as to future cash flows may vary depending on factors such as the risk that the market ascribes to those earnings, their timing as near term cash flows are usually valued more highly than longer dated cash flows, and general market sentiment which affects risk perception generally.

1097 Mr Houston's analysis showed that the relevant "no reasonable basis" and "contradictory" information had important implications for the market's expectations as to Myer's future earnings and associated cash flows. And having established that implication, the question as to the price sensitivity of the information turned on the magnitude of the observed price reaction at the time the corrective disclosure as to its anticipated earnings was made by Myer on 19 March 2015.

1098 Second, Dr Prowse disagreed with Mr Houston's assertion that his conclusion was "reinforced" by his event study analysis. In his view Mr Houston's conclusion was disconnected from his event study analysis to such a degree that Dr Prowse believed it could not reinforce his conclusion. The reason according to Dr Prowse was that his event study analysis was not measuring the effect of "the no relevant basis information" or "the contradictory information" on Myer's stock price. Both of these pieces of information involved what Myer allegedly thought or anticipated regarding FY15 earnings on 11 September 2014 or by 12 November 2014. But this was not the information that was disclosed to the market on 19 March 2015, which was actual half year results and guidance for FY15 based on a forecast compiled after the Christmas and New Year shopping period. So, according to Dr Prowse, "the relevant no reasonable basis information" and "the relevant contradictory information" were distinctly different pieces of information from what was actually disclosed on 19 March 2015. Therefore the assumption made by Mr Houston that he could conclude that "the relevant no reasonable basis information" and/or "the relevant contradictory information" was price sensitive information for Myer and that he could measure the inflationary effect of this information by observing what happened to Myer's stock price when actual half year results and guidance for FY15 were announced was thus flawed.

1099 Dr Prowse cited as a deficiency in Mr Houston's reasoning that "stock prices fluctuate randomly even in the absence of any value-relevant information". But according to Mr Houston, although Dr Prowse's random fluctuation observation was correct as a matter of principle, he appeared to have overlooked the fact that Mr Houston's analysis of the market's response to Myer's 19 March 2015 anticipated earnings disclosure explicitly tested the probability that the observed change in Myer's stock price on that day was not just a random fluctuation. Accordingly, Mr Houston disagreed with Dr Prowse's criticism as to there being a deficiency in his reasoning.

1100 Dr Prowse contended for a further deficiency in Mr Houston's reasoning as being that he did not:

> …[assess] the value-relevance of any information [which] requires a careful analysis of what was publicly known when and what other factors might have caused the stock price to move (or not move) on the dates being analyzed.

1101 But in his evidence, Mr Houston analysed the extent to which the information that Myer disclosed in the 19 March 2015 announcement was already known by market participants, by means of a comprehensive review of equity analysts' reports over the period 11 September 2014 to 19 March 2015.

1102 His review showed that prior to Myer's 19 March 2015 announcement, market participants were not aware that its forecast NPAT for FY15 was in the range of $75 million to $80 million, and below its previous guidance of profit growth on its previous year's NPAT $98.5 million. Analysts who reflected on the fact that this information had not previously been disclosed, substantially reduced their FY15 NPAT forecasts and price targets for Myer following its 19 March 2015 announcement. Together, these changes strongly suggest that market participants were not aware that Myer was expecting its FY15 NPAT to be materially lower than that for the previous financial year.

1103 Mr Houston also undertook a similar assessment of the extent to which "other factors", which he referred to as confounding news, were present in Myer's 19 March 2015 disclosure. He found Myer's announcement that it would undertake a strategic review at a one-off cost of $7 million to be confounding news, and estimated that this confounding news would have resulted in a reduction in Myer's share price on that day of $0.008. Accordingly, Mr Houston adjusted his estimate of the value-relevance of Myer's 19 March 2015 disclosure by this amount.

1104 Dr Prowse contended that Mr Houston's event study did not measure the effect of "the relevant no reasonable basis information" or "the relevant contradictory information" on Myer's stock price, because such information was distinctly different from that disclosed by Myer on 19 March 2015. Dr Prowse stated that:

> ["the relevant no reasonable basis information" and "the relevant contradictory information"] involve what Myer allegedly thought or anticipated regarding FY15 earnings on 11 September 2014 or by 12 November 2014. But this was not the information that was disclosed to the market on 19 March 2015, which was actual half year results and guidance for FY15 based on a forecast compiled after the Christmas and New Year shopping period.

1105 Dr Prowse contended that because the two sets of information were distinctly different, Mr Houston's method of measuring the inflationary effect of the relevant "no reasonable basis" and "contradictory" information by reference to market response to the information disclosed on 19 March 2015 was conceptually flawed.

1106 But Mr Houston disagreed with Dr Prowse's contention that the relevant "no reasonable basis" and "contradictory" information were distinctly different from that contained in Myer's 19 March 2015 disclosure. Myer's announcement on 19 March 2015 contained explicit guidance as to its FY15 financial performance, i.e., NPAT was expected to be between $75 million and $80 million. Similarly, the relevant "no reasonable basis" and "contradictory" information also contained explicit earnings guidance, in that Myer "anticipated profit growth" for the FY15 year as compared with its FY14 NPAT of $98.5 million.

1107 Market participants use guidance as to firms' future profits to form expectations of future cash flows. The relevant "no reasonable basis" and "contradictory" information and also Myer's 19 March 2015 disclosure contained information in relation to its anticipated profit for the 2015 year. Both forms of guidance can be taken to have influenced market participants' expectations of future cash flows, irrespective of the date at which that guidance was given.

1108 Consistently with this, Mr Houston noted that analysts substantially reduced their FY15 NPAT forecasts and share price targets in response to the updated guidance. In Mr Houston's opinion, it followed that the market response to the information released on 19 March 2015 was a reasonable basis to measure the price-sensitivity of "the relevant no reasonable basis information" and "the relevant contradictory information".

(g) Dr Prowse's corrections

1109 Dr Prowse did not believe that Mr Houston's analysis established that the alleged failure of Myer to disclose "the relevant no reasonable basis information" and "the relevant contradictory information" caused inflation in Myer's stock price. He also did not believe that, if I determine that there was inflation in Myer's stock price over the relevant period, Mr Houston's analysis could be used to estimate reliably the amount of that inflation. Nevertheless he reported the results of making some corrections to Mr Houston's methodology detailed in his report to calculate upper bound share price inflation.

1110 Using the FTI event study and adopting Mr Houston's methodology to isolate the portion of the abnormal price decline due to Myer's announced one-off cost of $7 million, Dr Prowse estimated that, of the estimated abnormal price decline, according to the FTI event study of $0.144 or 9.46%:

(a) an abnormal price decline $0.136 or 8.91% was due to Myer's announcement of FY15 guidance to $75 million to $80 million (the "alleged corrective disclosure"); and

(b) an abnormal price decline of $0.008 or 0.55% was due to Myer's announced one-off cost of $7 million.

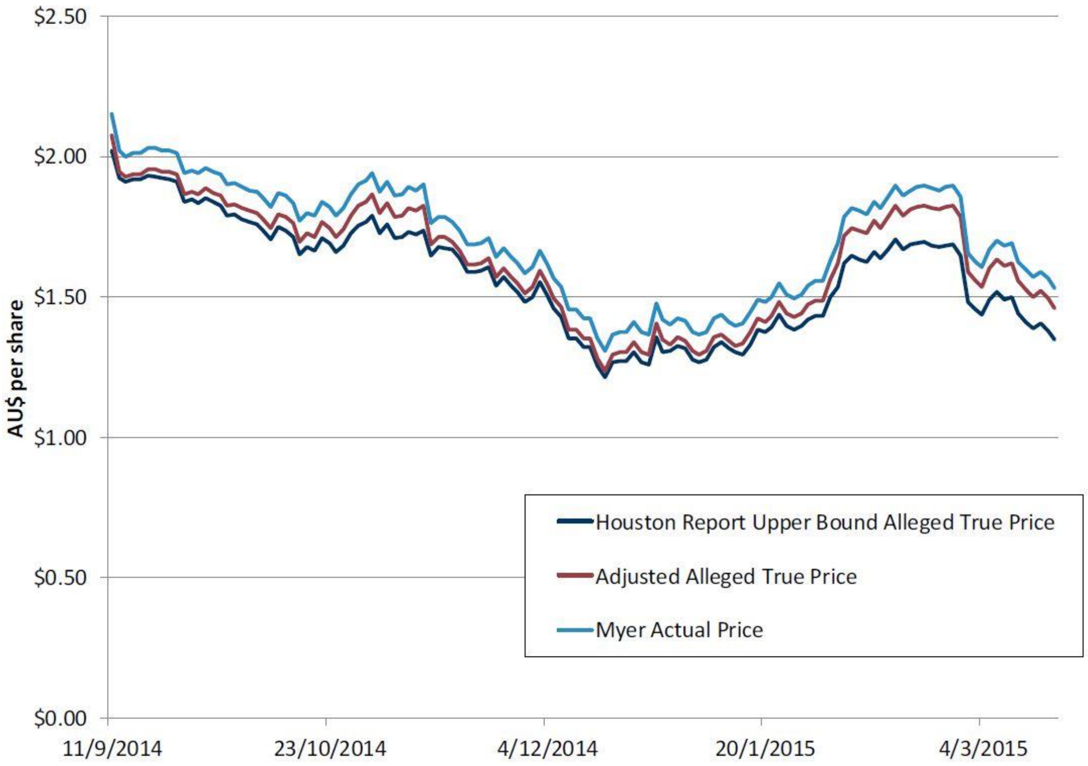
1111 Next, he made a correction to Mr Houston's modelling of the relationship to make it consistent with the academic and practitioner literature to estimate share price inflation. He calculated the ratio of the price drop related to the announcement of FY15 guidance calculated above ($0.136) to the drop in the consensus estimate following the alleged disclosure in millions ($10.05), calculated as $88.7 million less $78.65 million, where $88.7 million was the last consensus estimate before the 19 March 2015 announcement and $78.65 million was the consensus estimate as of 19 March 2015, using Bloomberg BEst as the consensus estimates. The relevant ratio is the abnormal price drop per $1 million drop in the consensus estimate and is assumed to remain constant over the relevant period.

1112 Each day, Dr Prowse calculated the difference between the consensus estimate and the adjusted counterfactual bound (in $millions) and multiplied by 0.0136. He made the same adjustment to this method as Mr Houston to account for the portion of certain cost-savings measures he deemed to have one-time effects. This adjustment removed an amount from the daily alleged inflation amount equal to $8.44 million divided by the number of Myer shares outstanding at the time, or approximately $0.01.

1113 The resulting figure is the amount of share price inflation on a given day. By subtracting this from the stock price, he was left with the alleged true price on that day. The following graph shows the actual share price, Mr Houston's upper bound alleged true price, and FTI's alleged true price.

1114 According to Dr Prowse, making these three corrections to Mr Houston's analysis resulted in upper bound levels of inflation that were approximately 41% less than those estimated by Mr Houston and that vary between $0.07 and $0.08.

Myer Share Price, Mr Houston's "Upper Bound" Alleged True Price, and Adjusted Alleged True Price

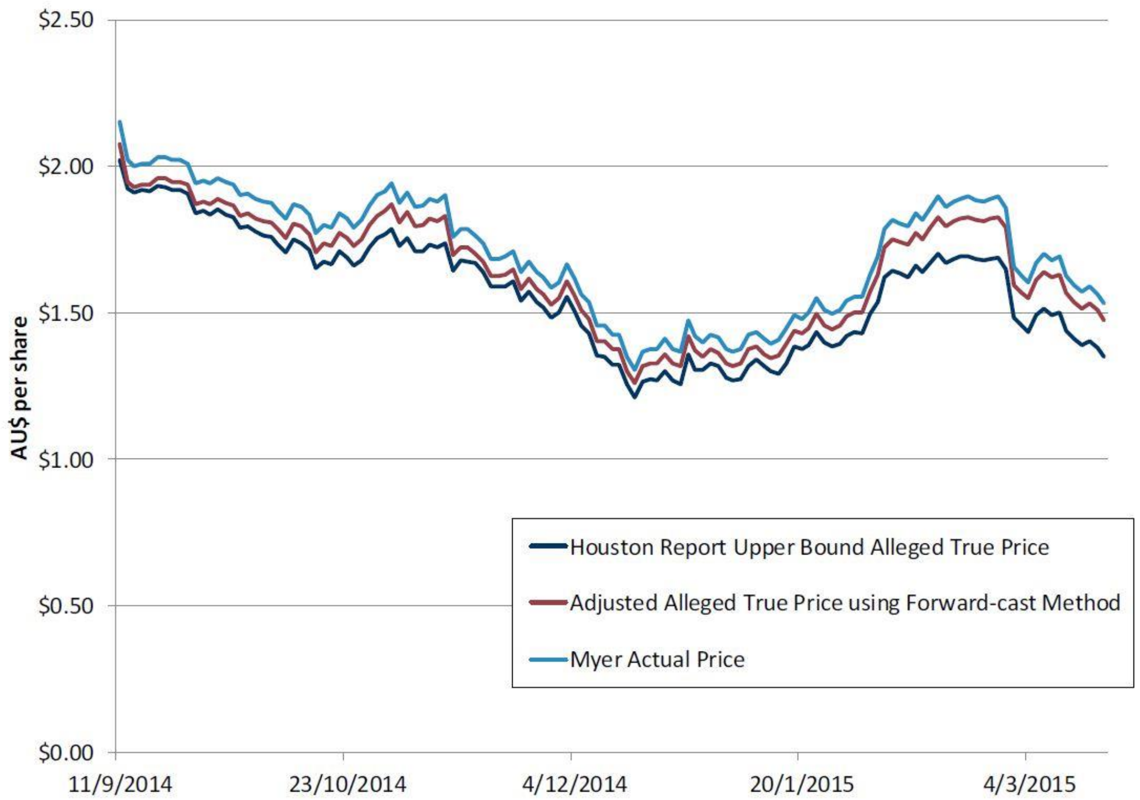


1115 In addition, he noted that there was another approach in the literature that did not require making any assumption about the evolution of counterfactual earnings bounds over the relevant period to estimate the inflation. Under this alternative approach, one would determine the true value of the stock price on the first day of the relevant period using the method he discusses. The time value of Myer's stock price from the next day onwards would evolve according to the returns actually observed for Myer's stock price; see Ferrell and Saha (2007) at p 186.

1116 For example, using Mr Houston's counterfactual upper bound for 11 September 2014, the FTI market model, and modelling the relationship between the change in earnings and the change in abnormal stock price in dollar terms, Dr Prowse determined the true value of Myer's stock price to be $2.07 on 11 September 2014. The next day, on 12 September 2014, Myer's stock price declined by 6.05%. Under the alternative approach, the true value would also decline by 6.05%, resulting in an alleged true value of $1.95 on 12 September 2014.

1117 The alleged inflation on 12 September 2014 would equal $0.07, the difference between the observed stock price of $2.02 and the alleged true value of $1.95. The following graph shows the actual share price, the Houston Report's "Upper Bound" alleged true price, and FTI's Alleged True Price under this alternative approach.

Myer Share Price, Mr Houston's "Upper Bound" Alleged True Price, and Adjusted Alleged True Price Using Forward-cast Method



1118 This approach was consistent with Mr Houston's assertion that the Myer stock traded in an efficient market. Under the efficient capital market hypothesis, and given Mr Houston's choice of a one-day event window, the impact of any counterfactual disclosure should have been fully reflected in Myer stock's price on 11 September 2014. Since there were no subsequent corrective disclosures during the relevant period, under the efficient market hypothesis, the stock return on any day during the relevant period under the counterfactual disclosure should be the same as the stock return actually observed on that day as assumed under the above alternative approach based on Ferrell and Saha (2007).

1119 Dr Prowse concluded that the alleged inflation levels in Myer's stock were no more than between $0.05 to $0.08 over the relevant period, and may be significantly lower depending on my determination with regard to which, if any, of the five adjustments made by Mr Houston were reasonable.

1120 I do not propose to linger further on this analysis given that in any event I have rejected the foundation for Mr Houston's analysis being his assumed counterfactual disclosure.

CONTINUOUS DISCLOSURE CLAIM

1121 It is necessary in a continuous disclosure claim under s 674 of the Act to identify with some precision the information which the applicant alleges Myer was aware of and should have disclosed. The central significance of the identified information arises from the fact that under the statutory regime:

(a) it must be shown that the company "has" that specific "information";

(b) the company through one or more of its officers must be "aware of" that specific "information";

(c) the identified "information" must not be "generally available";

(d) it must be shown that if the identified "information" were generally available, it would have a material effect on price; and

(e) it is "that information" which the company must disclose to the ASX.

1122 Section 674 provides:

> **674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules**
>
> *Obligation to disclose in accordance with listing rules*
>
> (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
>
> (2) If:
>
> (a) this subsection applies to a listed disclosing entity; and
>
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
>
> (c) that information:
>
> (i) is not generally available; and
>
> (ii) is information 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;
>
> the entity must notify the market operator of that information in accordance with those provisions.

(2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

(2B) A person does not contravene subsection (2A) if the person proves that they:

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

…

Obligation to make provisions of listing rules available

(5) If the listing rules of a listing market in relation to a listed disclosing entity contain provisions of a kind referred to in subsection (1), the market operator must ensure that those provisions are available, on reasonable terms, to:

(a) the entity; or

(b) if the entity is an undertaking to which interests in a registered scheme relate—the undertaking's responsible entity.

1123 In terms of s 674(2)(c)(ii), s 677 elaborates in the following terms:

677 Sections 674 and 675—material effect on price or value

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

1124 Listing rule 3.1 provides:

Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

1125 Listing rule 19.12 contains the following definitions of "information" and "aware":

aware: an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

…

information: for the purposes of Listing Rules 3.1 [and] 3.1B, information includes:

(a) matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market; and

(b) matters relating to the intentions, or likely intentions, of a person.

1126 Further, the defence that a company may raise under listing rule 3.1A relates to the specific identified "information".

1127 Listing rule 3.1A provides:

> 3.1A Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:
>
> 3.1A.1 One or more of the following 5 situations applies:
>
> - It would be a breach of a law to disclose the information;
> - The information concerns an incomplete proposal or negotiation;
> - The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
> - The information is generated for the internal management purposes of the entity; or
> - The information is a trade secret; and
>
> 3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
>
> 3.1A.3 A reasonable person would not expect the information to be disclosed.

1128 The applicant's continuous disclosure claim and the accompanying particulars of knowledge refer to two types of information that it is said ought to have been disclosed.

1129 First, there is "the earnings forecast matter", which is defined as the fact that Myer would not achieve NPAT in FY15 in excess of $98.5 million.

1130 Second, there is "the information about the earnings forecast matter", which is defined to mean the information that:

(a) Myer had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million;

(b) Myer's sales would not increase in FY15 as previously forecast;

(c) Myer's OGP margin would not improve in FY15 as previously forecast;

(d) Myer's CCODB in FY15 would increase more than previously forecast; and

(e) Myer's NPAT in FY15 would be materially lower than in FY14.

1131 Let me elaborate further on the information about the earnings forecast matter. Such information as defined has two discrete parts.

1132 The first part contained in (a) is the allegation that Myer had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million. This "information" can be referred to as the "no reasonable grounds information".

1133 The second part contained in (b) to (e) consists of a number of matters relating to Myer's financial performance, namely that:

(a) Myer's sales would not increase in FY15 (the sales information);

(b) Myer's OGP margin would not improve in FY15 (the OGP margin information);

(c) Myer's CCODB would increase more than previously forecast (the CCODB information); and

(d) Myer's NPAT in FY15 would be materially lower than in FY14 (the NPAT information).

1134 The applicant has referred to the sales information, OGP margin information, CCODB information and NPAT information as the trading forecast information and I am content to use that terminology.

1135 The applicant alleges that Myer was aware of the no reasonable grounds information. Specifically, it alleges that Myer was aware on 11 September 2014 that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million. The allegation made is one of awareness on 11 September 2014. There is also an allegation of an awareness being acquired after 11 September 2014. Further, the case advanced appears to be one of actual awareness and not of constructive awareness.

1136 Now I would note at this point that listing rule 3.1 does not operate to require officers to form opinions that they did not hold. And in my view the issue of "no reasonable grounds" is a matter of opinion.

1137 I agree with Myer that this part of the case requires the applicant to prove that Myer actually held the opinion as at 11 September 2014 or thereafter that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million.

1138 Now I do not consider that such an opinion needs to be held by a majority of Myer's board of directors. An opinion held by senior management who were officers, such as Mr Brookes or Mr Ashby, may be sufficient to constitute the opinion of Myer and hence awareness for the purposes of s 674. But there may be difficult cases. For example, if the CFO held the opinion that there were no reasonable grounds for the statements as to increased NPAT, but the CEO held the contrary opinion, then that may mean that that "information" was not information of which the company was "aware". However, according to Myer, these points of attribution are moot in this case. There is no evidence of either Mr Brookes or Mr Ashby or the board having formed the opinion alleged, a proposition with which I agree.

1139 Let me pass to another matter.

1140 The applicant alleges that Myer was aware of the trading forecast information by no later than 11 November 2014. The key allegation is that Myer, through its officers relevantly identified as Mr Brookes, Mr Ashby and the members of the board, knew that:

(a) Myer's FY15 budget was unrealistic and was unlikely to be achieved, or at least was in significant doubt;

(b) due to Myer's poor sales in the first six weeks of FY15, Myer could not reliably "anticipate delivering sales growth in FY2015", as was announced to the market by Mr Brookes on 11 September 2014;

(c) Myer was not achieving "modest growth in the operating gross profit margin driven by improved sourcing and the mix benefit from the growth in [MEBs]" and therefore had no reliable basis to anticipate this growth, as was announced to the market by Mr Brookes on 11 September 2014;

(d) Myer was achieving actual sales in FY15 which were below those achieved in FY14, and sales at this level were consistent with achieving an NPAT of only $73 million in FY15;

(e) Myer's forecast of 3% growth in CCODB in FY15 announced on 11 September 2014 was dependant on aggressive and unidentified savings; and

(f) Myer had determined internally that a realistic NPAT forecast for FY15 was $73 million.

1141 For convenience I will refer to (a) to (f) as the information underlying the trade forecast information.

1142 It is the alleged actual knowledge of the information underlying the trade forecast information which is said by the applicant to have given rise to the obligation to disclose the NPAT information and the other aspects of the trading forecast information. The way in which the applicant alleges that Myer was aware of the trading forecast information is to allege in the chapeau to the particulars of knowledge that Myer was aware of such information because it knew the matters listed in the particulars of knowledge including most relevantly the information underlying the trade forecast information.

1143 The applicant alleges that Myer had this knowledge and hence that it was aware of the trading forecast information on 11 September 2014 and then alternatively by at least various specified dates thereafter.

1144 The applicant's case proceeds by identifying a range of matters from which it says it can be inferred that Myer had the identified knowledge as at 11 September 2014. Further, for each of the additional dates referred to, the applicant identifies additional matters that it is alleged became known to Myer during that time period which it says lead to the inference that Myer had the identified knowledge by these later dates.

1145 As to the case as originally framed, the particulars of knowledge did not identify additional matters after 31 October 2014 that were said to give rise to knowledge of the information underlying the trade forecast information. The claim as originally pleaded was based on matters of which Myer was aware on or before 31 October 2014, with the date of the awareness being particularised as being 11 September 2014, or alternatively one of 15 September 2014, 25 September 2014, 2 October 2014, 8 October 2014, 15 October 2014, 26 October 2014 or 31 October 2014. The continuous disclosure claim, as originally pleaded and particularised, was not advanced on the basis of Myer becoming aware of information after 31 October 2014. And insofar as it was alleged that Myer failed to make the required disclosure between 1 November 2014 and 18 March 2015, such claim was only based on an alleged ongoing obligation to disclose the information that it was aware of on or before 31 October 2014, and was not based on Myer becoming aware of any additional information after this date.

1146 But I would note that the case as now framed and upon which the case was run is now broader and includes information that Myer became aware of after 31 October 2014 through and until 19 March 2015. And I am dealing with the case on that amended basis.

(a) The pleaded information

1147 Let me delve into the no reasonable grounds information aspect of the case in more detail.

1148 To succeed in its claim concerning the non-disclosure of no reasonable grounds information as at 11 September 2014, the applicant must establish that:

(a) Myer represented that it would achieve NPAT in FY15 in excess of $98.5 million;

(b) Myer had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million; and

(c) on 11 September 2014 Myer was aware that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million.

1149 But in my view the claim fails for a number of reasons.

1150 First, the statement on which the applicant relies, namely, the 11 September 2014 representation, did not convey that Myer *would* achieve NPAT in FY15 in excess of $98.5 million. The 11 September 2014 representation only conveyed the representation that Myer expected to achieve NPAT in FY15 in excess of $98.5 million. This representation was not promissory or an absolute representation as to what it would achieve. And it was subject to the inherent uncertainties attending forward-looking statements of the type made.

1151 The position is also to some extent fortified when regard is had to the disclaimers in contemporaneous documents that were part of the webcast when the 11 September 2014 representation was made. The presentation was given by way of a webcast during which Mr Brookes and Mr Ashby presented various slides. In particular, the slides which were displayed whilst Mr Brookes spoke contained a disclaimer which I have set out earlier. Further, to the extent that any person other than the analysts on the call was able to access the transcript of the analysts call, that transcript also contained the following disclaimer:

> In the conference calls upon which Event Transcripts are based, companies may make projections or other forward-looking statements regarding a variety of items. Such forward-looking statements are based upon current expectations and involve risks and uncertainties. Actual results may differ materially from those stated in any forward-looking statement based on a number of important factors and risks, which are more specifically identified in the companies' most recent SEC filings. Although the companies may indicate and believe that the assumptions underlying the forward-looking statements are reasonable, any of the assumptions could prove inaccurate or incorrect and, therefore, there can be no assurance that the results contemplated in the forward-looking statements will be realized.

1152 Further, it is significant to have regard to the nature of the audience to whom the comments were directed. That audience consisted of the 12 sell-side analysts from investment banks who followed Myer. Those analysts were sophisticated members of the business and commercial community and would have understood the qualifications attending such a statement. Further, even if the intended audience was some wider section of the commercial or business community, that audience would usually also understand the qualifications attending such a statement and in particular the inherent uncertainties attending forward-looking statements of the type made.

1153 But I do accept that Mr Brookes' statements made on behalf of Myer were not accompanied by any qualification other than printed disclaimers. Moreover, a reasonable person would not regard a standard form disclaimer as gutting the opinion or forecast of meaningful content. And in the present case, the prospect that the printed disclaimers could effectively negate the representations or relieve Myer from its obligation to have reasonable grounds is problematic to say the least.

1154 Second, in any event, the applicant has not established that Myer did not have reasonable grounds for making such a representation at the time it was made.

1155 Third, the applicant has not established that Myer was aware of any absence of reasonable grounds.

1156 I agree with Myer that the alleged information that Myer had no reasonable grounds for representing that it would achieve NPAT in excess of $98.5 million is necessarily an opinion. Moreover, as Myer points out, it is unclear precisely who the applicant says came into possession of this information by forming the opinion that Myer did not have reasonable grounds for the 11 September 2014 representation.

1157 The evidence of each of Myer's officers was to the effect that they considered the FY15 budget to be reasonable, realistic or achievable and did not change that view by the time of the 11 September 2014 representation, and that they expected NPAT in FY15 to increase on FY14. Further, for those witnesses who were asked what they would have done if they had been required to make some form of additional statement after Mr Brookes made his statement on 11 September 2014, they said that they would have confirmed his statement that Myer expected NPAT to increase in FY15. Further, I agree with Myer that the applicant's submission that particular emails sent on 15 September 2014 and 25 September 2014 might be treated as information of which Myer was aware or that emails sent to Mr Ashby might be treated as information known to Myer, does not advance the applicant's case in relation to the no reasonable grounds information, which involves the need to establish that Myer or a relevant officer such as the CEO or CFO held such an opinion. As I say, such an opinion was not held at the relevant time.

1158 Let me now discuss the elements of the trading forecast information.

The sales information

1159 Now the alleged sales information is that Myer's sales would not increase in FY15 as previously forecast. But Myer was not so aware of such sales information at any relevant time. This was not established on the evidence in terms of the times pleaded by the applicant.

The CCODB information

1160 The CCODB information is that Myer's CCODB would increase *more* than forecast. Now the forecast CCODB increase was an increase to the CCODB in FY15 of between $65 million and $80 million (in public statements) and an increase of $74 million (in the budget). But Myer was not aware of information in the form of any further increase in relation to its CCODB at the times pleaded by the applicant. This has also not been made out on the evidence.

The OGP margin information

1161 The OGP margin information is that Myer's OGP margin would not improve in FY15 as previously forecast. The OGP margin for FY14 was 40.93%.

1162 Now the particulars of knowledge do not allege that Myer knew that its OGP margin would not improve in FY15. Rather, the particulars of knowledge do not rise in substance above an allegation that Myer had no reliable basis to anticipate modest growth in its OGP margin for FY15 on FY14. I agree with Myer that this is information of a different character to the OGP margin information as pleaded. Further, it was not put to any of Myer's witnesses that they had formed the view at any relevant time that Myer's OGP margin would not increase in FY15. Further, the applicant did not advance any evidence to suggest that the OGP margin information was material, nor has it adduced any evidence seeking to quantify any price inflation caused by the alleged failure to disclose the OGP margin information. So, for example, the 19 March 2015 announcement stated, inter-alia, that Myer now expected a decrease in the OGP margin in H2 FY15. But Mr Houston in dealing with the 19 March 2015 announcement did not identify this information as being relevant or as contributing to the abnormal price decline. Similarly, Mr Molony ignored the OGP margin information in his report.

The NPAT information

1163 Let me turn to the NPAT information, which in some respects is the essence of the applicant's case. The applicant alleges that as at 11 September 2014 Myer knew that its full year 2015

NPAT would be materially lower than in FY14. Put in such terms, the applicant's case clearly fails.

1164 There are three points that should be observed in relation to the NPAT information.

1165 First, as Myer points out, it is information that is absolute or unqualified ("would be … lower"). It is not information that is concerned with a risk or possibility that NPAT would be lower.

1166 Second, it is information that the forecast NPAT would be "materially lower". In my view, materially lower in this context means at least 5% lower, although Myer contended for closer to 10% lower, a submission which I should say now I reject. ASX Guidance Note 8 discusses the concept of materiality when considering changes to earnings guidance as generally falling somewhere within a range of a variation of 5 to 10%. In my view, equal to or greater than 5% is and should have been the relevant standard in the present context.

1167 Third, the information alleged, being a forecast or prediction is necessarily an opinion or judgment. So, the applicant's allegation that Myer through its directors and/or CEO or CFO was "aware" that NPAT would be materially lower than in FY14 necessarily requires it to prove that Myer held that opinion. But Myer did not hold that opinion at the time of the 11 September 2014 representation and only appears to have held it around 9 December 2014. Let me elaborate on this aspect in this context.

1168 The issue of when a company is aware of information that is or consists of an opinion was addressed in the *Grant-Taylor* litigation.

1169 In *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402, Allsop CJ, Gilmour and Beach JJ considered various aspects of the continuous disclosure provisions. In that case, the allegedly non-disclosed information fell into three categories; the trial judge's findings on a fourth category were not appealed. Part of the non-disclosed information was that BBL was insolvent on 29 November 2008. Relevantly for present purposes, the applicant submitted that the fact of BBL's insolvency was "information" and that BBL's directors ought to have come into possession of that information on 29 November 2008. This was in the context where it was admitted at trial that BBL was insolvent as at 29 November 2008. BBL submitted that insolvency was a matter of opinion and that listing rule 3.1 did not operate to require the directors to form opinions that they did not hold.

1170 At first instance, Perram J expounded the relevant principles (*Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723 at [156]) as follows:

> The word "information" appears in both Listing Rule 3.1 and also in the definition of "aware" in Listing Rule 19.12. I should be surprised if "information" in Listing Rule 3.1 did not include opinions. For example, if the directors did in fact form the opinion that the company was insolvent it is difficult to see that Listing Rule 3.1 could be ignored on the basis that it did not apply to opinions. It is more likely that Listing Rule 3.1 should be construed as requiring the disclosure, all other requirements being satisfied, of opinions actually held or possessed. And, if "information" includes opinions in Listing Rule 3.1, it is difficult to see that it does not bear the same meaning in the definition of "aware" in cl 19.12. If directors hold opinions about market sensitive matters which are not generally available then, subject to the other requirements and exceptions in the ASX Listing Rules, these are to be disclosed to the market. However, that observation needs to be understood in the context of *Jubilee*. The opinion of a single director would rarely be the correct information to assess from a disclosure perspective. Ordinarily, the relevant views are those of a board majority. This case does not raise any issue about the position of minority opinions and it is not necessary to express any concluded view on that matter, however.

1171 Perram J then asked "what then of opinions not actually held"? His Honour answered this question as follows (at [157] to [160]):

> The plaintiffs submitted that BBL should have become aware of the fact of its insolvency on 29 November 2008 for a number of reasons to which I shall return. However, leaving that to one side, I do not think that the plaintiffs' argument can be reconciled with the actual language of the definition of "aware". What is required is that the information – on the present hypothesis, an opinion – ought reasonably to have come into the directors' possession in the course of their duties. These words are not apt to describe the formation of an opinion. One does not come into possession of an opinion when one forms one because the phrase "come into possession" conveys the concept of receipt and the concept of "receipt" suggests an antecedent act of possession by another. Where the constructive knowledge limb of the definition of "aware" is applied to information which is an "opinion" what enlivens it is an opinion – not of the directors but of some other person – which reasonable diligence on the directors' part would have brought to their attention. What it does not require is for the directors to form an opinion.
>
> To give an example, if an opinion of senior counsel that a company was insolvent were included in its board papers then the company would be aware of that opinion within the meaning of the definition. Reasonable diligence on the part of the directors – that is reading the board papers – would have brought it to their attention. Leaving aside issues such as privilege, confidentiality and the need for its full context to be considered (that is *Jubilee*) it would be subject to Listing Rule 3.1. On the other hand, Listing Rule 3.1 is not engaged where the directors of a company should have, but did not, realise the implications of information of which they were aware.
>
> This conclusion is consistent with, although it is not identical to, the Court of Appeal's conclusions in *Jubilee* at [89]-[90] …
>
> In *Jubilee* the conclusion reached was that information which would have existed if certain business decisions had been made was not information within the definition of "aware". This is not the same question as whether an opinion which should have been formed is information within that definition but the structure of the reasoning in *Jubilee* supports the conclusion I have reached that the same approach is involved.

1172 On appeal, the Full Court (at [74] to [76]) summarised Perram J's approach as follows:

> The primary judge considered the existence of a state of insolvency as both a question of fact and as an opinion. His analysis proceeded on that basis.
>
> The primary judge was of the view that Listing Rule 3.1 and the concept of "information" included opinions (such as of insolvency) that were held by the board of a company or a relevant person. But he concluded that Listing Rule 3.1 was not apt to *require* directors to form an opinion. The language of *coming into possession* (Listing Rule 19.12) of information was apt to apply to the coming into possession of the opinions of others (if that were relevant), but not to requiring the board to form an opinion when it in fact did not.
>
> Thus the primary judge approached the matter by requiring proof that:
>
> (a) the directors or executive officers of BBL were actually aware of BBL's insolvency (or had that opinion);
>
> (b) the fact of BBL's insolvency should have become known to the directors or executive officers; or
>
> (c) an opinion that BBL was insolvent existed and should have become known to the directors or executive officers.
>
> (Original emphasis.)

1173 Perram J's analysis and findings on the issue of "awareness" were affirmed on appeal at [172] to [187]. I should note, lest there be a doubt, that I would also incorporate into these reasons what the Full Court said at [91] to [124]. There is no need to repeat such themes in these reasons.

1174 Now taking the NPAT information, the allegation is that the board of Myer, Mr Brookes and Mr Ashby were aware at relevant times that Myer's NPAT for FY15 would be materially lower than $98.5 million. But applying the reasoning in *Grant-Taylor*, listing rule 3.1 is not engaged where the officers of a company should have, but did not, realise the implications of information of which they were aware. The officers are not required to form an opinion based upon information they know or ought to know of and then disclose that information to the market.

1175 Accordingly, in order to succeed the applicant had to prove that Myer through its directors or identified officers had actually formed the opinion that its NPAT in FY15 would be materially lower than $98.5 million.

1176 Now in my view this was not established until around 9 December 2014.

The relevance of 10 September 2014

1177 The applicant says that unlike the BBL board in *Grant-Taylor*, on 10 September 2014 the Myer board deliberately and expressly addressed the critical question whether it would or would not give a profit forecast to the ASX based upon Myer's FY15 budget. The Myer board decided not to do so and that was because it formed the same opinion in 2014 as it had formed in both 2012 and 2013, namely that Myer's internal budgeting was not sufficiently robust or reliable to enable Myer to make a public FY15 profit forecast. That was the "opinion" formed by the board of Myer collectively in September 2014 and that "opinion" informed its decision not to make an announcement. According to the applicant in effect the board said: "we do not have sufficient confidence in this budget to make an FY15 profit forecast based upon it. We will state only two expectations for FY15, namely of increases in sales and the rate of OGP, nothing more".

1178 The applicant says that the fact that the Myer board decided not to release to the ASX any FY15 profit forecast based upon the FY15 budget is important to the outcome of this case. It proves that an opinion had in fact been formed by the Myer board, namely that the NPAT which was predicted in the FY15 budget was not sufficiently reliable for release. For that reason, Mr Brookes should not have relied upon the FY15 budget to make representations about FY15 profits on Myer's behalf. He was acting contrary to the board's "opinion", as expressed in its unanimous resolution on 10 September 2014.

1179 So it is said by the applicant that Mr Brookes, being in possession of exactly the same information as the rest of the board, and knowing full well that the board had decided on 10 September 2014 not to make a public profit forecast in respect of FY15 based upon that same information, nevertheless did so. Accordingly the applicant says that this is not a case like *Grant-Taylor*, where the applicant contented for a legal obligation to form an opinion about something, in the absence of evidence that such an opinion had been formed or expressed by anyone in authority. Within Myer, the relevant opinion had in fact been formed as at 10 September 2014 and it was well known to all of the members of the board, including Mr Brookes.

1180 It is also said that the fact that Mr Brookes took it upon himself alone to countermand the decision of the board and give an FY15 NPAT forecast to the groups of analysts and journalists to whom he spoke on 11 September 2014 is a difference between the facts of the *Grant-Taylor* case and the facts of the present case.

1181 Further, the applicant says that insofar as the reasoning in *Grant-Taylor* says that what is critical is the view of a majority of the board, that was satisfied in this case. Indeed there is no suggestion that even Mr Brookes himself dissented from the decision of the board taken on 10

September 2014. Instead, he appears to have assumed that, despite that clear decision, he was free to make a forecast on behalf of Myer on the following day.

1182 Significantly, so the applicant says, Mr Brookes justified to himself what he did on 11 September 2014 by saying that the board had implicitly authorised it. He thereby confirmed two important things. First, he correctly considered that he was not simply expressing a personal opinion but was talking on behalf of Myer itself. Second, he considered (wrongly) that the board had implicitly authorised him to make his FY15 profit forecast, thereby confirming that he considered that he needed the board's imprimatur to speak on behalf of Myer.

1183 I reject all of these submissions made by the applicant. They are a mish-mash of concepts. On no view did the board form the opinion asserted. At most it formed the view that it would not give guidance. I will return to discussing the 10 September 2014 board meeting in a later part of my reasons.

1184 Further, the applicant says that the case has nothing to do with constructive knowledge.

1185 In its submissions, Myer says:

> TPT first alleges that Myer was "aware" of the No Reasonable Grounds Information. Specifically, it alleges that Myer was aware on 11 September 2014 that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million. The allegation made is one of awareness on 11 September 2014. There is no allegation of an awareness being acquired after 11 September 2014. Further, the case advanced is, and can only be, one of actual awareness (and not of constructive awareness). That case requires TPT to prove that Myer actually held the opinion as at 11 September 2014 that it had no reasonable grounds for representing that it would achieve NPAT in FY15 in excess of $98.5 million.

1186 The applicant says that Myer's references to "actual awareness" and "constructive awareness" proceed upon misconceptions of both the applicant's case and the operation of s 674. The applicant says that in this case, an opinion had plainly been formed because the Myer board had decided that it was inappropriate for Myer to make a forecast of increased profits in FY15. So it is said that the distinction between actual and constructive awareness is a red herring in that context. The applicant says this case has nothing to do with constructive awareness of anything. I am prepared to take the applicant at its word and put to one side constructive awareness. But this hardly avails the applicant, for I have rejected its so called opinion case concerning 10 September 2014, and accordingly on 11 September 2014.

(b) The new continuous disclosure claim advanced by the applicant

1187 The applicant's closing submissions assert the following in relation to its continuous disclosure claim.

1188 First, officers of Myer became aware during October 2014 of information in the form of new FY15 profit forecasts which seriously undermined, if not directly contradicted, Myer's "more than FY14" profit forecast made on 11 September 2014 and which obliged Myer to withdraw, or at least qualify, its September 2014 profit forecast.

1189 Second, by 2 October 2014 knowledge of the very significant risk that Myer would not earn greater profits in FY15 than it had earned in FY14 was plainly in the possession of senior executives of Myer and ought to have been the subject of an announcement to the market clarifying, qualifying or retracting entirely what Mr Brookes had represented on 11 September 2014. It does not matter that the draft forecast had not been presented to the board of Myer. It existed, and it was known to sufficiently senior executives to mean that the requirements of ASX listing rule 3.1 had been satisfied by this time.

1190 Third, Myer's internal forecasts caused Myer to be aware that there was a very significant risk that it would not earn materially greater profits in FY15 than it had earned in FY14 and was very likely to earn profits materially below those earned in FY14, by at least the dates pleaded.

1191 But such a claim fails at least to the extent of the time frame prior to 21 November 2014.

1192 First, the draft forecasts that were in existence did not reflect any view of an officer of Myer as to likely NPAT until on or after 21 November 2014.

1193 Second and relatedly, the documents relied on by the applicant prior to this time save perhaps for the 17 November approved reforecast were draft and incomplete working documents, which in many instances in fact included forecast NPAT of *more* than $98.5 million.

1194 But on and after 21 November 2014 Myer had formed various opinions which in my view should have been disclosed.

1195 As I have said, in the context of and given the fact that the 11 September 2014 representation had been made, Myer should have disclosed to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 was not likely to be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

1196 Now in a sense these are cascading possibilities because making any one disclosure *may* have removed the need for any later disclosure in the sequence that I have just outlined.

1197 In my view on the evidence, Myer can be taken to have held such an opinion as to the likely FY15 NPAT on each of the above dates and accordingly there should have been disclosure of such an opinion under listing rule 3.1 and s 674.

(c) Materiality – general

1198 On the question of the materiality of information one needs to consider whether the information is such that "a reasonable person would expect, if it were generally available, to have a material effect on the price or value of" MYR ED securities (s 674(2)(c)(ii)).

1199 Section 677 gives guidance on this question stating that a reasonable person would be taken to expect information to have a material effect on the price or value if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the MYR ED securities.

1200 From the evidence it would seem that Myer determined materiality in terms of the need for the disclosure of its own forecast of NPAT *principally* on the basis of whether it was consistent with or materially different from the Bloomberg consensus as to NPAT. If the latter, Myer would consider making a disclosure.

1201 Now there are a number of problems with taking such an approach.

1202 First, it is not consistent with listing rule 3.1.

1203 Second, it is not consistent with s 674(2)(c)(ii) read in the light of s 677. Let me dwell on this aspect for a moment. These statutory provisions talk about a reasonable person and what might influence them. But the Bloomberg consensus is a median or mean of a small set of analysts and their expectations. It is narrower than the “reasonable person” perspective. Indeed many investors would not even know or be aware of Bloomberg consensus. Indeed there was no one figure for this consensus. Moreover, it diverged from Myer’s own version of the consensus. So, even assuming for present purposes that the consensus for the FY15 NPAT forecast was well under FY14 NPAT and that this had been so soon after the 11 September 2014 representation, that in no way denies that a reasonable person knowing of the 11 September 2014 representation would or would be likely to be influenced in deciding whether to acquire MYR ED securities if told later that Myer had changed its own forecast or reached a different opinion such that the expected FY15 NPAT was now likely to be materially under FY14 NPAT.

1204 Third, Myer’s own continuous disclosure policy does not support such a narrow view of materiality. It is only down the back-end that the following is said in section 6.9:

> **Review of analyst reports and forecasts**
>
> The Company recognises the importance placed on reports by stockbroking analysts.
>
> Any comment by the Company to an analyst in relation to an analyst’s report or financial projections should be confined to errors in factual information and underlying assumptions provided such comment of itself does not involve a breach of the Company’s continuous disclosure obligation.
>
> The Investor Relations Manager will maintain a record of analysts’ earnings forecasts and provide a summary report of these forecasts to the CFO on a regular basis.
>
> The CFO will monitor the analysts’ forecast earnings relative to the Company’s own internal forecasts and any financial forecasts previously published by the Company. In determining analysts’ consensus, the Company may use a number of methods, including plotting analysts’ forecasts and determining a range, calculating an average, mean or median figure (including by excluding outliers) or by obtaining a figure from a third party information provider. If the CFO becomes aware of a divergence between analysts’ consensus and the Company’s internal forecasts which may have a material effect on the price or value of the Company securities, the CFO will refer the matter immediately to the Committee for consideration as to whether an announcement should be made to the ASX.
>
> As with any other deliberations of the Committee, it is important that any consideration given by the Committee to any matter referred by the CFO must be shared without delay with the Chair or, in his absence, the Chair of the Audit Committee. Where a decision is made to make an announcement about the Company’s profit outlook, it is of critical importance that the Company provides clear guidance to the market regarding the Company’s view of profit outlook.

> During an analyst briefing, if the Company is concerned that the analyst's 'forecast' diverges from the Company's internal expectations, then there is a risk that even a carefully scripted communication limited to previously disclosed information may be interpreted by the analyst as a 'down grade' and thus amounts to 'selective disclosure'.
>
> Accordingly, analyst briefings should not be used to manage analyst's expectations. If necessary (e.g. consensus analyst forecasts diverge from the Company's expectations) a public ASX release must be made.

1205 Now these stipulations are fine so far as they go and I have no problem with them. If a company perceives there to be a material discrepancy between a company's own forecast and market consensus, then it should give some consideration to making a disclosure. But that is quite a different thing from saying that the company should define materiality *only* or *principally* in terms of a divergence. Neither the legislation nor Myer's own policy justified such a course.

1206 Indeed if one thinks about it for a moment various difficulties are revealed.

1207 First, assume the company put out a false statement as to NPAT. But assume that analysts had appeared to work this out so that Bloomberg consensus roughly reflected the correct position in terms of NPAT expectation. The logic of Myer's position is to say that there would be no obligation to correct under listing rule 3.1 or s 674. This would be a bizarre outcome and the antithesis of the legislative policy. Further, it would put to nought the text and effect of, inter-alia, ss 674(2)(c)(ii) and 677.

1208 Second, there is a circularity to Myer's approach. The Bloomberg consensus is only as good as the analysts' expectations. But the analysts' expectations are themselves based on the company's own disclosures of information. Therefore it is anomalous for the company to justify not making a disclosure on the basis of no divergence with consensus where the consensus itself is foundationally based on the company's own disclosures of financial information. Indeed, the company can be taken to know that the consensus is only as good as the quality and quantity of information put out by the company.

1209 Third, there is an important qualitative difference which is glossed over in Myer's attempted justification of its own approach. Say an analyst has formed his own view of the likely range of NPAT of $90 to $100 million with an estimate of $95 million. So the estimate is the average of the analyst's educated guess of the expected upside and downside. Now say the company comes out and announces its *own* estimate of $95 million. This is qualitatively much more valuable information to the analyst. Speculation by the analyst is replaced by the company's considered view. Further, the analyst's speculated upside of $100 million has now been removed. What does the analyst then do with his estimate? If he is a Myer sceptic he may create a new range of $85 to $95 million with a new average of $90 million. In other words, he may take the company's own view of its likely NPAT as his new *upside* and work down from that. Now these are all musings on my part. I only make them to show that a company's view of its own likely NPAT is not the same as an analyst's view of NPAT.

1210 Let me move to another matter. There is a forensic problem with Myer's use of Bloomberg consensus. First, its own figures for consensus diverged from the figures published by Bloomberg. Second, there was no transparency in the evidence as to how Myer calculated its own consensus figures. I will deal with these issues when I address causation and loss.

1211 One final matter before proceeding further. I have found against Myer in terms of materiality. Now you might ask how then I could not find for the applicant on loss. But the answer is relatively straight-forward. First, the test for materiality is looser and lower as s 677 reveals. Even if consensus had been factored into market price, and I will return to this later, that does not deny the materiality of Myer's changed expectation or opinion in relation to its own NPAT estimate in light of the 11 September 2014 representation. Second, the applicant's own mode of proof to show share price inflation and ultimately loss was such that it rose or fell on consensus and changes thereto. I will return to these matters later.

(d) Materiality – application

1212 The applicant's submissions as to materiality rely on the evidence of Mr Molony and Mr Houston.

1213 Now Myer submits that the alleged no reasonable grounds information was not information which a reasonable person would expect to have a material effect on the price or value of MYR ED securities. In this regard as to the no reasonable grounds information, there is no evidence to suggest that this information was material. Mr Molony did not consider this information in any way, and nor did Mr Houston.

1214 But the applicant says that Myer is wrong to suggest that there is no evidence that the no reasonable grounds information was material. Mr Molony gave the following relevant evidence concerning that matter.

1215 He said that "[t]here's no way that an equity analyst would ignore a chief executive of Myer standing up with a result and telling them that he thought that FY15 earnings would increase – in terms of them going back to the office and writing their research". Given the materiality of the announcement itself, it is self-evident that its withdrawal on the grounds that Myer had no grounds for making the representation would be just as, if not more, material.

1216 This was also confirmed by Mr Molony's evidence concerning the 25 September 2014 information, in respect of which his opinion was that a finding of unreliability in respect of the FY15 H1 forecast alone would be material. Mr Molony's analysis is also applicable in respect of the no reasonable grounds information on each date on and from 11 September 2014. Mr Molony said there that:

> [a]n announcement of this nature specifying that a relatively recent financial forecast was now unreliable and a reforecast was required would be highly unusual in the Australian market, especially for a major retail business. The absence of any commentary on the implications for the previously announced FY15 guidance for Myer would also be highly unusual. Each of these factors would have been regarded as a negative by investors and the Myer share price would likely have fallen.

1217 Further, Mr Molony also expressed the opinion that, if the CEO and the CFO were to identify that a profit forecast was unreliable (which is the equivalent of Myer disclosing an absence of reasonable grounds), then "they've done so on the basis that there's some perspective on materiality which has been breached".

1218 Mr Houston also addressed this topic in his first report. Mr Houston concluded there that the no reasonable grounds information "had important implications for the market's expectations as to Myer's future earnings" and also "as a matter of confident inference, that it was price sensitive information for Myer."

1219 Now Myer asserts that the applicant acknowledged the immateriality of the no reasonable grounds information on the basis of a submission that the disclosure of that information at or about the time when Mr Brookes made his representation would not have been likely then to have had a significant effect on the Myer share price. But the applicant says that misses the point. Had the no reasonable grounds information been disclosed when Mr Brookes made his FY15 profit forecast, the result would have been to erase the FY15 NPAT forecast from the relevant considerations of market participants in connection with Myer's prospects. In other words, it would likely have simply maintained the status quo in connection with Myer's FY15 earnings prospects, and therefore its share price as it stood on 11 September 2014. It is for this reason that the applicant submitted that had the no reasonable grounds information been disclosed at that time, it is unlikely that there would be any effect upon the share price. However, that is not a concession that the no reasonable grounds information was not material. In fact what happened was that Mr Brookes' FY15 NPAT forecast gained wide circulation as a result of its republication by the analysts and the newspapers, which meant that the market was trading on a materially uninformed basis until 19 March 2015 and in the absence of the publication of the no reasonable grounds information. That is a different scenario and it is consistent with that scenario that the evidence of Mr Houston and Mr Molony was given.

1220 I agree with the applicant that the no reasonable grounds information if it existed would be material. The fact is though that it did not exist. No relevant opinion was ever formed.

The NPAT information

1221 Whether an announcement by Myer at some time after 11 September 2014 as to its expected NPAT would have, and be expected by a reasonable person to have, a material effect on the price of MYR ED securities depends to some extent on prevailing market expectations as to Myer's NPAT. Mr Houston gave evidence as to market expectations as to FY15 NPAT over the relevant period. He measured those market expectations by reference to Bloomberg consensus, referred to interchangeably as Bloomberg BEst. That is a similar measure to the one that Myer's directors used for market expectations. I note that the applicant's other expert, Mr Molony, also gave the following evidence:

> However, in my opinion it is important to recognize that Myer's internal analysis of 'consensus' estimates of sales and NPAT cannot be viewed as a comprehensive view of market expectations. This 'consensus' simply refers to the estimates of a limited number of 'sell side' Research Analysts (i.e. analysts working at investment banks and brokers). These forecasts do not include any reference to the expectations held by institutional investors or retail investors. In addition, the so called 'consensus' does not differentiate between Research Analysts — the views of each Research Analyst's estimate are considered equally important. In my experience investors strongly differentiate between the Research Analysts based on the respective individual's track record and reputation in equity research.
>
> Therefore, whilst consensus forecasts are highly relevant to understanding market expectations for Myer they do not necessary reflect the views of all investors, fail to distinguish between Research Analysts with varying track records and are generally not publicly available to all investors. Therefore, other things being equal, an actual sales or earnings result or future guidance which is consistent with consensus estimates of Research Analysts may be followed by a share price movement that is quite inconsistent with the so called 'consensus' estimates due to the factors mentioned above. In short, there is not necessarily any consensus between the Research Analysts as a group and the market itself which hears and reacts to many things other than the views expressed by Research Analysts.

1222 Whilst Mr Molony qualifies this statement by noting that consensus forecasts do not necessarily reflect the views of all investors, he does not provide any evidence as to what other materials a reasonable person may look to discern market expectations, and he does not provide any evidence to suggest that market expectations were in fact any different to the consensus forecasts which he identifies. Further, Dr Prowse's evidence was that there was some statistically significant correlation between changes in Bloomberg consensus and changes in the Myer share price.

1223 But as I have indicated already, the NPAT information was material *irrespective* of Bloomberg consensus if one focuses upon the language of ss 674(2)(c)(ii) and 677.

1224 And as I have indicated, the question is on what basis would a reasonable person expect that telling the market that Myer expected to have NPAT of less than $98.5 million would have any effect, let alone a material effect, on the price or value of MYR ED securities. At the least "mum and dad" investors would not be aware of consensus figures, and therefore may continue to be influenced by the 11 September 2014 representation.

1225 Further, Myer had a large retail shareholder base. Those investors would not be aware of consensus figures, and in my view they would likely have been influenced by a disclosure of expected NPAT of less than $98.5 million.

1226 But I do accept that nearly 58% of MYR ED securities were held by the top 20 shareholders, and the vast majority of such securities were held by institutional investors. Further, there is economic literature suggesting that institutional rather than retail investors make the trading decisions which impact the market and affect the price of securities (see, for example, *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [106]). But nevertheless there were likely to be retail investors that would or might move the price of MYR ED securities.

1227 Now Myer says that the applicant's assertion of a material effect, and a reasonable expectation of a material effect, is also significantly undercut by the objective evidence. In terms of what happened on 2 March 2015 when Myer, through statements made by Mr McClintock, confirmed that Myer's NPAT in FY15 was likely to be lower than in FY14, market expectations, as measured by Bloomberg consensus, did not change in response to this disclosure. Further, on 19 March 2015, the movement in consensus was caused by the disclosure of a forecast below consensus, and consensus moved into line with the disclosure, thereby further confirming no more than that market participants were unaware that Myer's NPAT for FY15 was likely to be in the order of $75m to $80m. Following the 19 March 2015 announcement, consensus was within the range set out by Myer.

1228 Now all this is very well. But none of this negates materiality in terms of ss 674(2)(c)(ii) and 677 although it is relevant to share price inflation and loss.

2 and 19 March 2015

1229 Let me deal with another matter.

1230 As to what occurred on 2 March 2015, Myer submits that the objective evidence is against the applicant's assertions of materiality because there was no change in market expectations following Myer's reaffirmation on 2 March 2015 that it was measuring its disclosure obligations against consensus.

1231 The so-called reaffirmation on 2 March 2015 occurred in the course of an impromptu briefing to stock market analysts after the appointment of Mr Umbers. In the course of this Mr McClintock stated that Myer's profit expectations for FY15 were consistent with Bloomberg consensus, without explaining how that may have been measured. Now assuming that analysts were ad idem as to what he meant by his reference to Bloomberg consensus, his comments were not a release to the market as a whole.

1232 In cross-examination, Mr Houston agreed that by 2 March 2015 anyone would have realised that Myer's FY15 NPAT was now expected to be around $90m.

1233 Further, Mr Houston's report shows that the Bloomberg consensus forecast numbers did not move on 2 March 2015. According to Myer the fact that Bloomberg consensus did not move on 2 March 2015 indicates that the NPAT information was not new information. This may be accurate at this point at some level, although as I have said above the statutory notion of materiality is not defined by Bloomberg consensus or changes thereto. Indeed, as the applicant put it, the response of the market as a whole is not measured simply by the change in Bloomberg consensus numbers.

1234 Let me deal with another point which is worth noting concerning the potentially continuing effect of the 11 September 2014 representation.

1235 As the applicant points out, the fact that Myer was benchmarking its continuous disclosure obligations by reference to the Bloomberg consensus was first notified to analysts in the conference call held on 2 March 2015 to announce the retirement of Mr Brookes and the accession of Mr Umbers. And a number of analysts who participated in the call noted the discrepancy between what had been represented to them by Mr Brookes about FY15 NPAT in September 2014 and what was now being said by Mr McClintock.

1236 Further, the discrepancy between what Mr McClintock advised the analysts on 2 March 2015 and what Mr Brookes had advised them in September 2014 was drawn explicitly to the attention of the board in Ms Gunn's email dated 3 March 2015 titled "Analyst Research and market feedback" in the fourth dot point on the page: "The announcement confirmed that a 10% earnings drop (Bloomberg consensus) is Myer's continuous disclosure reference point, not the EPS growth referenced by Bernie prior to Christmas".

1237 In terms of 2 March 2015 and focusing on the statutory test for materiality, I do not consider that anything which occurred on that date negates the statutory materiality of the information which I say ought to have been disclosed. But I do accept that it is unhelpful to the applicant's case on share price inflation and loss given the methodology that Mr Houston used.

1238 Let me turn to 19 March 2015.

1239 The applicant submits that the share price movement following the announcement made by Myer on 19 March 2015 that "The Company now expects FY2015 NPAT to be between $75-80 million (excluding one-off costs)" confirms the materiality of the pleaded information.

1240 But the information announced on 19 March 2015 is different from the pleaded information on which the applicant relies, and does not provide any sound basis from which to infer or confirm materiality.

1241 Moreover, as I have said, I have rejected Mr Houston's counterfactual disclosure.

1242 Mr Houston relied on the movement in the price of MYR ED securities on 19 March 2015 to assert that the "relevant contradictory information" was price sensitive. However, during cross-examination, Mr Houston conceded that the movement in analysts' consensus of Myer's FY15 NPAT on 19 March 2015 was not due to the market being informed that Myer's FY15 NPAT would be below its FY14 NPAT, but rather due to it being informed that it would be below analysts' consensus. Mr Houston's report assumed that share price inflation was demonstrated and measured it by reference to decreases in analysts' consensus in accordance with the fixed relationship of 0.97/1. Hence, Mr Houston needed to conclude that the movement in analysts' consensus on 19 March 2015 was entirely due to the announcement of the NPAT information, rather than Myer's forecast NPAT being beneath analysts' consensus, to conclude that the NPAT information was price sensitive.

1243 Mr Houston's approach concerning 19 March 2015 was flawed.

1244 Indeed it would seem that the movement in consensus was caused by the disclosure of a forecast NPAT below consensus where consensus then moved into line with the disclosure. This movement was because market participants seem to have been unaware that Myer's NPAT for FY15 was likely to be in the order of $75m to $80m, rather than being unaware that Myer's NPAT for FY15 was likely to be lower than $98.5m.

1245 But none of this says anything about statutory materiality as I have discussed above. Bloomberg consensus and the changes thereto should not be confused with statutory materiality.

1246 On this aspect I generally agree with Mr Molony who concluded that:

> whilst consensus forecasts are highly relevant to understanding market expectations for Myer they do not necessary reflect the views of all investors, fail to distinguish between Research Analysts with varying track records and are generally not publicly available to all investors. Therefore, other things being equal, an actual sales or earnings result or future guidance which is consistent with consensus estimates of Research Analysts may be followed by a share price movement that is quite inconsistent with the so called 'consensus' estimates due to the factors mentioned above. In short, there is not necessarily any consensus between the Research Analysts as a group and the market itself which hears and reacts to many things other than the views expressed by Research Analysts.

1247 In summary, Myer cannot use Bloomberg consensus figures and how they moved to answer the statutory materiality question.

1248 Accordingly, the following information which was not disclosed satisfied statutory materiality:

(a) that by no later than 21 November 2014 Myer's likely NPAT for FY15 was not likely to be materially above the FY14 NPAT;

(b) that by no later than 9 December 2014 Myer's likely NPAT for FY15 was around $92 million;

(c) that by no later than 22 December 2014 Myer's likely NPAT for FY15 was in the range of $89 to $90 million;

(d) that by no later than 5 January 2015 Myer's likely NPAT for FY15 was around $90 million;

(e) that by no later than 21 January 2015 Myer's likely NPAT for FY15 was in the vicinity of $90 million;

(f) that by no later than 9 February 2015 Myer's likely NPAT for FY15 was in the vicinity of $90 million; and

(g) that by no later than 27 February 2015 Myer's likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

(e) Myer's continuous disclosure policy and ASX Guidance Note 8

1249 Let me first say something about Myer's continuous disclosure policy.

1250 Myer had a continuous disclosure policy in force during the period with which this case is concerned with the relevant sections being part 5 and part 6. Part 5 is entitled "Public comments / statements" and refers to the Myer media relations policy. Part 3 of the media relations policy is entitled "Verbal comment" and states:

> [t]he requirements of ASX Listing Rule 3.1 on continuous disclosure should be kept in mind at all times when making public comment. This means that, as a general rule, no information should be released which is not already in the public domain.

1251 The applicant submits that Mr Brookes' comments to the journalists on 11 September 2014 about FY15 NPAT were made in breach of that rule of the Myer continuous disclosure policy. I tend to agree, but I am not sure where any of this takes the applicant.

1252 In respect of the comments which Mr Brookes made to the stock market analysts on the same day, the relevant section of the continuous disclosure policy is Part 6, entitled "Financial markets communications". Paragraph 6.1 states:

> [a]t all times when interacting with the financial community, the Company must adhere to its continuous disclosure obligation and must not selectively disclose material price sensitive information to an external party unless that information has first been released to the ASX.

1253 The applicant says that the explicit FY15 NPAT forecast given by Mr Brookes was material price sensitive information within the meaning of paragraph 6.1 of the policy. That information had not first been released to the ASX when Mr Brookes stated it to the analysts, in breach of clause 6.1 of Myer's policy.

1254 Paragraph 6.2 of the Myer continuous disclosure policy is entitled "Authorised spokespersons" and states relevantly:

> [a]uthorised spokespersons must not provide any material price sensitive information that has not already been announced to the market through the ASX nor make comment on anything that may have a material effect on the price or value of the Company's securities.
>
> No guidance on actual forecast financial performance will be provided to any external party that has not already been provided to the market generally.

1255 Again, the applicant says that what Mr Brookes said to the analysts on 11 September 2014 was a breach of paragraph 6.2. I also tend to agree. But where does any of this go?

1256 Paragraph 6.8 is entitled "Review of briefings, meetings, visits and presentations" and requires that:

> [i]mmediately following any briefings, meetings, visits or presentations referred to in this section 6 … the Senior Executive involved will review the matters discussed and presented (including any questions and answers provided).
>
> Where he/she believes any information has been disclosed inadvertently which may have a material effect on the price or value of the Company's securities, he/she must immediately report the matter to the General Counsel and Company Secretary, the CEO or the CFO for review by the [Myer Continuous Disclosure] Committee for immediate disclosure to the ASX.

1257 The applicant says that this rule appears also to have been breached in the present case, since there is no record within Myer of any review having been undertaken by the Continuous Disclosure Committee (or anybody else) of what Mr Brookes had said to the analysts or the journalists on 11 September 2014, nor any reference of those matters to the General Counsel and Company Secretary of Myer. All true. But again, so what?

1258 Many of Myer's directors gave evidence that they were not aware until some time later of what Mr Brookes had said to the analysts and the journalists on 11 September 2014, despite the fact that his FY15 NPAT increase forecast had been widely reported in the media. Examples include Mr Myer, who said he did not read the transcripts but likely learned from subsequent media reports, Mr Cornell, who did not recall when or how he found out some time later, and Ms Brennan who did not recall teleconference or newspaper reports but referenced internal Myer summary of analysts' reports. Ms Brennan gave evidence of seeing a summary of analysts' reports. That summary was attached to an email sent by Mr Brookes to the Myer directors on 14 September 2014. The summary does not refer to Mr Brookes having represented to the analysts that Myer would achieve higher NPAT in FY15. Mr Thorn was uncertain when he first learnt of what Mr Brookes had said on 11 September 2014 but said that "it would have been within a few days … after the presentation to analysts".

1259 The applicant submits that an inference arises that these breaches of the Myer continuous disclosure policy occurred because of a misunderstanding within Myer about the nature of its continuous disclosure obligations in circumstances where its CEO had made an informal but explicit profit forecast to the market of the sort made by Mr Brookes. I tend to accept this submission, but again where does it go?

1260 Now several Myer directors (but significantly, not Mr Brookes) gave evidence that they did not consider that what Mr Brookes had said was a profit forecast at all, because it was not done by way of formal written ASX release by Myer. Mr McClintock did not think it had the formality of a binding commitment. Ms Froggatt did not think it was to a broad audience or in line with formal written statements. Mr Thorn distinguished it from a board statement to the ASX and market generally. Mr Cornell described it as unscripted, and distinguished it from formal written guidance. But this appears to have been a misunderstanding of the continuous disclosure laws to the extent that it was suggested that it could be ignored or that if circumstances changed, there would be no obligation to correct.

1261 The fact is that the 11 September 2014 representation was made by Mr Brookes as the CEO. If Myer later formed a view of likely NPAT that differed, it was bound to correct it, whatever Bloomberg consensus may have been and whether or not what had been said by Mr Brookes was or was not formal guidance.

The Guidance Note

1262 Let me now discuss ASX Guidance Note 8, although I will return to it in a later section when discussing in detail the no reasonable grounds question concerning misleading or deceptive conduct. The Guidance Note states the ASX's views about the meaning and application of ASX listing rules 3.1 to 3.1B on continuous disclosure. The original version of the Guidance Note was published in 1998 and the version current at the time of the matters which give rise to this proceeding was issued on 1 January 2014. The Guidance Note is in some respects a reliable description of the meaning and effect in law of ASX listing rule 3.1 and its interaction with the continuous disclosure obligations in the Act and the misleading or deceptive conduct provisions.

1263 Now according to Myer, the Guidance Note does not take the applicant very far because the approach taken by Myer to its disclosure obligations is not inconsistent with the principles there discussed by the ASX. In summary, Myer says that:

(a) Mr Brookes' verbal statement was not published guidance as contemplated by the ASX or "de facto earnings guidance" as contemplated by the ASX;

(b) the ASX did not consider what had been said to be de facto earnings guidance as contemplated by the Guidance Note;

(c) in circumstances where guidance was not given, the ASX did not identify any materiality threshold that should be considered or applied and expressly referred to a "consensus estimate" being an appropriate guide; and

(d) if contrary to the above it was assumed that Mr Brookes' comment did constitute published guidance as contemplated by the ASX, then the ASX identified materiality thresholds (e.g. expected variance from the guidance) as recommendations. Under those thresholds, an expected variation from published earnings guidance, especially during the early part of the year and prior to key trading periods, of close to or more than 10% would be required. So on the facts of this case, Myer did not need to disclose anything earlier than it did even applying the ASX's recommended materiality thresholds.

1264 Now I would note several points.

1265 First, neither the Act nor the listing rules use the concept of "guidance", and they do not erect any rule by reference to it. Therefore I do not think that such a label and whether it applies or not to the 11 September 2014 representation is particularly definitive.

1266 Second, the ASX in the Guidance Note speaks of "guidance" as follows (pp 44 and 45):

> **1. How does an entity determine what the market is expecting its earnings for the current reporting period to be?**
>
> ASX considers that the best and most appropriate base guide to use for these purposes is:
>
> - if an entity has published earnings guidance for the current period, that guidance;
> - if an entity has not published earnings guidance for the current reporting period and it is covered by sell-side analysts, the earnings forecasts of those analysts; and
> - if an entity has not published earnings guidance for the current reporting period and it is not covered by sell-side analysts, its earnings for the prior corresponding.
>
> Each of these measures is only a guide to what the market is expecting. As mentioned previously, market expectations can be set or modified by the disclosures the entity makes to the market over the reporting period.

1267 I do accept that as these measures are "only a guide to what the market is expecting", even if the 11 September 2014 representation could be construed as earnings guidance published by Myer, the ASX expressly states that this would only be a guide as to market expectations. And this leaves it open to identify other factors which may demonstrate that the market expectations have not been influenced by the comment.

1268 Third, I agree with the applicant's contention that what Mr Brookes said was "de facto earnings guidance". The Guidance Note provides the following examples of de facto earnings guidance:

> For example, a comment that the entity:
>
> - is "happy" or "comfortable" with, or expects its earnings to be "in line with", analysts' forecasts or consensus estimates; or
> - expects its earnings to be in line with, or a particular percentage range above or below, the corresponding prior period,
>
> is de facto earnings guidance.

1269 In my view the comment was specific enough to constitute earnings guidance. But my reasons and conclusions do not necessarily turn on that characterisation.

1270 Fourth, in terms of analysts' forecasts, the Guidance Note says as follows:

> In terms of using analyst forecasts for the current reporting period to measure market expectations, there are a number of approaches that an entity may legitimately use. Some entities may use the 'consensus estimate' as a central measure of analyst forecasts. They may obtain this from an information vendor or they may calculate it for themselves. If they feel that the consensus estimate is being distorted by an obvious outlier that is out of line with their own internal forecasts, they might also adjust the consensus estimate to exclude that outlier. Other entities may not use consensus at all, but simply plot the various analyst forecasts and if all or most of them are clustered within a reasonable range, treat that range as representing the market's view of their likely earnings.

1271 According to Myer, what this demonstrates is that the ASX recognises that a specific consensus number does not have to be calculated in any particular way, and that the company has a number of ways to look at analysts' forecasts in order to obtain a view as to the market's view of their likely earnings, which may be a range. But this does not take Myer far in my view given the statutory test for materiality.

5% or 10% difference – what is material?

1272 Neither the Act nor the listing rules address the magnitude by which an entity's earnings must decline from those in a prior statement, whether written or verbal, for the decline to be material. The only guidance on the topic is in the Guidance Note and that only relates to the situation where published earnings guidance has been given. It is instructive to set out the relevant pages (pp 45 to 47):

> **2. What is a material difference for these purposes?**

This can be a difficult question to answer. Much will depend on the circumstances involved.

…

Given the many variables involved, ASX does not consider it appropriate to lay down any general rule of thumb or percentage guidelines on when a difference in earnings compared to market expectations ought to be considered to be market sensitive and therefore disclosed under Listing Rule 3.1. ASX would simply repeat its suggestion previously that an officer of an entity who is faced with a decision on this issue ask two questions:

(1) "Would this information influence my decision to buy or sell securities in the entity at their current market price?"

(2) "Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?"

If the answer to either question is "yes", then that should be taken as a cautionary indication that the information may well be market sensitive and may therefore need to be disclosed to ASX under Listing Rule 3.1.

Where an entity has published earnings guidance for the current reporting period and it expects its earnings to differ materially from that guidance, it needs to give careful consideration to its potential exposure under section 1041H for misleading conduct, as well as its responsibilities under Listing Rule 3.1 and section 674. The basis for liability under section 1041H is different to section 674. Section 674 obliges an entity to release updated information about its earnings under Listing Rule 3.1 where a reasonable person would expect that information to have a material effect on the price or value of the entity's securities. Section 1041H on the other hand, in practical terms, obliges an entity to update its published earnings guidance where failure to do so would mislead or be likely to mislead someone.

ASX would therefore recommend that an entity consider updating its published earnings guidance for the current reporting period if and when it expects its earnings for the period to differ materially from that guidance. For these purposes, ASX would suggest that entities apply the guidance on materiality in Australian Accounting and International Financial Reporting Standards, that is:

- treat an expected variation in earnings compared to its published guidance equal to or greater than 10% as material and presume that its guidance needs updating; and

- treat an expected variation in earnings compared to its published guidance equal to or less than 5% as not being material and presume that its guidance therefore does not need updating,

unless, in either case, there is evidence or convincing argument to the contrary. Where the expected variation in earnings compared to its published earnings guidance is between 5% and 10%, the entity needs to form a judgment as to whether or not it is material. Smaller listed entities or those that have relatively variable earnings may consider that a materiality threshold of 10% or close to it is appropriate. Very large listed entities or those that normally have very stable or predictable earnings may consider that a materiality threshold that is closer to 5% than to 10% is appropriate.

1273 The Guidance Note is instructive in terms of the ASX's view as to whether an "earnings surprise" is market sensitive, that is, it is of such a magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities. Its view in summary is that where an entity has published earnings guidance:

(a) an entity need not consider updating the published guidance if the expected variation in earnings is equal to or less than 5%;

(b) an entity should presume the published guidance needs updating if the expected variation is equal to or greater than 10%; and

(c) where the expected variation is between 5 to 10%, the entity needs to form a judgment as to whether or not it is material.

1274 If one assumes for the moment that what Mr Brookes said on 11 September 2014 was "published earnings guidance" within the meaning of the Guidance Note, a question arises as to what level of expected variation from its "guidance" should be treated as relevantly material.

1275 Mr Brookes' comment was that Myer anticipated NPAT in FY15 to be greater than $98.5m but not by any specific amount, although in my view it was implicit that it would be materially above.

1276 The ASX's view is that "smaller listed entities" or those that have "relatively variable earnings" may consider 10% to be the appropriate materiality threshold while "very large listed entities" or those that have "very stable or predictable earnings" may consider that a materiality threshold that is closer to 5% is appropriate.

1277 In FY15, Myer did not have very stable or predictable earnings nor did it have a history of very stable or predictable earnings. Instead, its earnings were relatively variable. Myer's earnings were not only variable from year to year but within any given year.

1278 In FY15, Myer was not a very large listed entity. Between 11 September 2014 and 18 March 2015, Myer's market capitalisation varied between a high of approximately $1.26 billion and a low of approximately $0.77 billion. Mr Houston stated that the average market capitalisation for domestic companies listed on the ASX was $787m to $876m during his control period of March 2014 to March 2015. Hence, Myer was of average to slightly above average size. It was not a "very large listed entity".

1279 Mr Cornell gave evidence as to why the question whether an expected variation was material (and whether it was material at closer to 5% or 10%) might in fact change throughout the year. In particular, his evidence was that because of the very lumpy profitability of the business based around December and January, at the start of the year the materiality issue would be very different to the point in time when the key Christmas trading period had passed.

1280 Mr Brookes also explained that where between 5% to 10% a decision to disclose might be made may also depend on an analysis of the current trend. For example, the evidence showed an improving trend in the critical two weeks between 23 December to 5 January, which would be relevant in considering such issues.

1281 Myer says that it is logical that an entity with variable earnings should have a threshold of more than 10%. If the threshold were smaller, there is a risk that it may make an announcement only to find that trading then improves so that the announcement was unnecessary. This would result in the market being provided with unnecessary and potentially confusing and misleading information. The same point can be made in relation to smaller entities which are more likely to have variable earnings due to their smaller scale and greater focus on one line of business.

1282 Myer say that all of this suggests that even if the Guidance Note is treated as the appropriate guideline for continuous disclosure purposes, and it is assumed that Mr Brookes' statement was "guidance" and so set the appropriate benchmark, there is no analysis or evidence to suggest that Myer ought to have made a disclosure earlier than it did. I disagree. What Myer knew on and after 21 November 2014 was clearly material *in the light of the 11 September 2014 representation*.

1283 Further, in my view the 10% threshold of materiality referred to in the Guidance Note is not the correct threshold in the circumstances of this case. Mr Brookes had represented higher NPAT for FY15. In my view a decline of 5% or more would have been material to the market. Indeed this would have confirmed an over-all trend of declining NPAT that had been experienced by Myer for some years. I agree with the applicant that the context of that decline in Myer's profit performance must be borne in mind. Confirmation of that trend of profit declines would have been material to the market in the circumstances Myer found itself in in FY15.

1284 Further, to the extent that I need to find it, I reject Myer's argument that the better view is that the 11 September 2014 representation was not earnings guidance as contemplated by the ASX.

Such a submission is based upon the Guidance Note, but this is inconsistent with the reasoning of the Guidance Note which is clear that a statement made in circumstances such as those of Mr Brookes' statement on 11 September 2014 is earnings guidance within the meaning of the Guidance Note.

(f) Was the information "generally available"?

1285 Section s 674(2)(c)(i) requires that the applicant prove that the information was "not generally available" before disclosure is required. Section 676 addresses when information is "generally available":

> **676 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).

1286 Myer says that the pleaded information was generally available. It argued as follows. At all times on and from 11 September 2014 the majority of analysts' reports forecasted that Myer's NPAT in FY15 would be below its NPAT in FY14. Forecasts contained in analysts' reports are "deductions, conclusions or inferences made or drawn from" "readily observable matter" and are, accordingly, information that is "generally available". Myer says that it is readily apparent that analysts draw conclusions and make deductions from "readily observable matter" since they draw conclusions from disclosures made by ASX listed companies. Myer says that in the present case those forecasts and reports indicated that it was likely that Myer's NPAT in FY15 would be lower (or materially lower) than in FY14, or that a "conclusion or inference" could be drawn from those forecasts or information in those reports. And the media reported comments from analysts which questioned the likelihood of Myer's profits growing.

1287 Myer says that it was a view widely held within the market that Mr Brookes' anticipation of profit growth would not come to fruition. So, the pleaded information was generally available, given that the market had formed the view that is in accordance with the no reasonable grounds information and the NPAT information. Accordingly, Myer says that the continuous disclosure claim must fail.

1288 I reject such arguments.

1289 I agree with the applicant that reasonable evidence of the information not being generally available prior to 19 March 2015 is contained in the exchange between Mr Kierath of Morgan Stanley and Mr McClintock on 2 March 2015 where Mr Kierath asked Mr McClintock if he was "prepared to stand behind Bernie's comments that he thought that profits could rise, or would rise this year". Mr McClintock responded that he "won't make any further comment in relation to it" because any such comment would be giving profit guidance, which it was Myer's policy not to give. Mr McClintock's comment that "[o]ur disclosure obligations are linked to the Bloomberg consensus" did not correct the market's understanding. It was inconsistent with the Guidance Note. Further, even if consensus were a proper guide, "consensus" remained at $91m for FY15 NPAT, meaning that depending on Myer's tolerance threshold for updating the market an NPAT in excess of $98.5m remained on the cards as $91m was 7.6% less than $98.5m. From the exchange between Mr Kierath and Mr McClintock it may be observed that Myer had not already and would not then correct Mr Brookes' statement and the market was left uninformed. No correction was made until the publication of the half-year results on 19 March 2015.

1290 Further, I agree with the applicant that it is difficult to extrapolate from the existence of Bloomberg consensus forecasts below $98.5m that information that Myer's FY15 NPAT would be below that figure was "generally available".

1291 Further, in my view and in most cases, analysts' forecasts cannot be fairly characterised as "deductions, conclusions or inferences made or drawn from" "readily observable matter". Analysts' forecasts are themselves predictions as to future events (i.e., forecast earnings) and thus are inherently matters of supposition. The Explanatory Memorandum to the Corporate Law Reform Bill 1993 (Cth) expressly stated at [250] that matters of supposition do not fall within the definition of "information" for the purposes of continuous disclosure. It was not feasible for Myer's *own* expectations as to its future earnings to be made generally available merely via equities analysts or let alone a consensus NPAT figure.

1292 Further, on a related but separate point, there is US authority to the effect that analysts' reports are not generally available. In *Re Faberge Inc* 45 SEC 249 at 255-6 (1973), the Securities and Exchange Commission (US) expressed the view that public disclosure would occur if information was disseminated in a manner which was calculated to reach the marketplace generally, such as by way of a public release of information in the media. On the other hand, a recommendation made by a particular securities analyst to his or her clients would typically have a restricted circulation and would therefore not necessarily amount to public disclosure of information. The consequence must also be that a consensus figure made available only through an expensive subscription service offered by Bloomberg Inc would not be "generally available" within the meaning of s 676.

(g) Listing rule 3.1A

1293 Myer relies on the defence under listing rule 3.1A, which I have set out earlier.

1294 The applicant's only argument to suggest that listing rule 3.1A does not apply is because the third limb (listing rule 3.1A.3) is not satisfied. Notwithstanding this concession, the fact that listing rule 3.1A.1 and 3.1A.2 are satisfied and the bases on which they are satisfied are relevant to note.

Listing rule 3.1A.1

1295 Myer says that all information generated in relation to Myer's forecast NPAT for FY15 was generated for the internal management purposes of Myer. The Guidance Note recognises that forecasts clearly fall within the ambit of listing rule 3.1A.1. The Guidance Note says at [5.6]: "Management documents such as budgets, forecasts, management accounts, business plans, strategic plans, contingency plans, decision papers, minutes of management meetings and the like clearly fall within this category, as do board papers and board minutes. Professional advice (e.g., from lawyers, accountants and financial advisers) will also usually fall within this category".

1296 Further, information which consists of views or predictions as to future trading of a company including in relation to forecast NPAT, are necessarily matters of supposition, and fall within the ambit of listing rule 3.1A.1 on this second basis.

1297 Further, Myer says that the "information" which the applicant seeks to rely on in its continuous disclosure claim (e.g. draft internal forecasts in October and November) are insufficiently definite to warrant disclosure inter-alia because:

(a) none of these reforecasts as to NPAT in FY15 were presented to, let alone approved by, the board;

(b) the documents and information which the applicant points to in this regard were incomplete and comprised draft working documents that were subject to further work and did not reflect the views of management let alone senior management or any officer as to expected NPAT;

(c) the documents and information which the applicant points to in this regard contained identified "opportunities" which would result in FY15 NPAT in excess of $98.5 million, and the applicant's analysis largely proceeds on the basis that these forecasts should be treated as if they were final documents, as if they represented senior management's views, and as if opportunities should be ignored (whilst risks should be taken into account);

(d) more developed and considered internal documents during (and after) this period included FY15 NPAT forecasts in excess of $98.5 million; and

(e) the draft documents on which the applicant relies pre-date the very significant Christmas/New Year trading period and therefore carry with them a relatively high degree of speculation and uncertainty until that trading period has concluded.

1298 Accordingly, Myer submits that the requirements of the defence in listing rule 3.1A.1 are met on three separate bases:

(a) because the information was generated for the internal management purposes of the entity;

(b) because the information comprised matters of supposition; and

(c) because the information was insufficiently definite to warrant disclosure.

1299 I agree with this.

Listing Rule 3.1A.2

1300 As to the requirement in listing rule 3.1A.2 that the information be confidential:

(a) the various "forecast" documents relied on by the applicant, and indeed all forecast work, were confidential;

(b) Myer's employees, and its senior executives, were bound by express confidentiality obligations (in addition to their general law duties to maintain confidences) that required them to, inter-alia, keep confidential information received by, or generated by, them in the performance of their duties at Myer; and

(c) there is no suggestion by the applicant that the information contained in the forecasts or the forecasts themselves was no longer confidential or had become public in any way.

Listing Rule 3.1A.3

1301 The third aspect of listing rule 3.1A is that a reasonable person would not expect the information to be disclosed. The ASX's view, as set out in the Guidance Note at [5.9], is that:

> As a general rule, information that falls within the prescribed categories in Listing Rule 3.1A.1 and that meets the confidentiality requirements in Listing Rule 3.1A.2 will also satisfy the reasonable person test in Listing Rule 3.1A.3. The very reason why the categories in Listing Rule 3.1A.1 are prescribed is because they reflect a value judgment on the part of ASX that a reasonable person would not expect that type of information to be disclosed, at least while it remains confidential.

1302 The Guidance Note at [5.9] goes on to explain that the "reasonable person test in listing rule 3.1A.3 has a very narrow field of operation". That comment follows on directly from the passage quoted above. What the ASX is thereby saying is that where listing rules 3.1A.1 and 3.1A.2 are satisfied it will only be in very limited circumstances that listing rule 3.1A.3 will not also be satisfied.

1303 The applicant submits that the reasonable person test is not satisfied here for the reason that Mr Brookes had made his public forecast on 11 September 2014. I agree.

1304 Now Myer says that the corollary of the applicant's submission would be that any ASX listed company which has given earnings guidance would be required to announce to the market any corrections thereto. So be it.

1305 Further, Myer says that its position is consistent with the Guidance Note, which stated (p 47):

> **3. When does an entity become aware that its earnings for the current reporting period will be materially different from market expectations?**
>
> In ASX's opinion, for an entity to have to disclose under Listing Rule 3.1 market

> sensitive information about an expected difference in its earnings for the current reporting period compared to market expectations, there needs to be a reasonable degree of certainty that there will be such a difference. [Listing Rule 3.1 does not require the disclosure of matters of supposition or matters that are insufficiently definite to warrant disclosure (see the second bullet point under Listing Rule 3.1A.1) provided the requirements of Listing Rules 3.1A.2 and 3.1A.3 are also met].
>
> The fact that an entity's earnings may be comparative and materially ahead of or behind market expectations part way through a reporting period does not mean that this situation will prevail at the end of the reporting period. Its earnings may change due to changes in the many variables that can affect an entity's earnings over a reporting period. They may also change because the entity adjusts its business plans in response.
>
> The market's expectations also may change over the course of a reporting period as it factors in changes in general economic conditions and absorbs the various disclosures the entity has made over that period.
>
> Consequently, disclosure issues about market sensitive earnings surprises are generally more likely to arise towards the end of the reporting period than at the beginning, when there will be comparatively greater certainty as to whether the entity's earnings for the period are going to differ materially from market expectations.

1306 But I do not see how any of this assists Myer. We are dealing here with the need to correct what the CEO said.

1307 Indeed the applicant sensibly does not dispute that, had Myer not made an express public disclosure of its anticipated NPAT for FY15, listing rule 3.1A would probably have applied to the versions of the forecasts prepared after 11 September 2014 and the information contained in there would not have been required to be disclosed in the ordinary course.

1308 But I agree with the applicant that after Mr Brookes had made his public forecast on 11 September 2014, the "reasonable person" test in listing rule 3.1A.3 would no longer have been satisfied in terms of necessary or desirable corrective information. This is explained in section 5.9 of the Guidance Note which states:

> the reasonable person test in Listing Rule 3.1A.3 has a very narrow field of operation. It will only be tripped if there is something in the surrounding circumstances sufficient to displace the general rule described above. Two prime examples would be:
>
> - where an entity has "cherry-picked" its disclosures, disclosing "good" information of a particular type that is likely to have a positive effect on the price or value of its securities but then declining to disclose "bad" information of the same type that is likely to [have] a negative effect on the price or value of its securities, on the pretence that it is not market sensitive or is protected from disclosure by Listing Rule 3.1A …; or
> - where the information needs to be disclosed in order to prevent an announcement of other information under Listing Rule 3.1 from being misleading or deceptive.

1309 The Guidance Note goes on to say (p 38) that the reasonable person test also reinforces that listing rule 3.1A does not operate to protect information from disclosure if that information is required to be released in order to correct or prevent a false market. This is because a reasonable person would expect a listed entity, acting responsibly, to immediately disclose any information necessary to correct or prevent a false market in its securities.

1310 It is surprising to me that Myer would contest such a proposition.

1311 Further, section 7 of the Guidance Note is entitled "Particular disclosure issues" and addresses in its early parts various forms of earnings guidance (see sections 7.1, 7.2 and 7.3). Relevant to the present case is section 7.2, which states as follows:

> 7.2 De facto earnings guidance
>
> A listed entity which has a policy of not giving earnings guidance needs to be careful in its communications with security holders, analysts and the press that it does not make statements that could be construed as de facto earnings guidance. For example, a comment that the entity:
>
> - is "happy" or "comfortable" with, or expects its earnings to be "in line with", analysts' forecasts or consensus estimates; or
> - expects its earnings to be in line with, or a particular percentage range above or below, the corresponding prior period,
>
> is de facto earnings guidance.
>
> If ASX becomes aware of such a comment being made in a public forum or to an investor, analyst or journalist, it may ask the entity to issue a statement to the market confirming the comment so that the whole market is informed of the guidance it has given [presumably using its powers under Listing Rules 3.1B, 18.7 and/or 18.8]. In the case of comments about analysts' forecast or consensus estimates, ASX may ask the entity to clarify in the statement which particular analysts' forecasts are being commented on, the range of those forecasts and, if the range is relatively wide, where within that range the entity expects its earnings to fall.

1312 Section 7.3, entitled "Earnings surprises", notes that the market's expectations of a company's earnings will often be a material driver of the price or value of its securities and those expectations may have been set by earnings guidance which the entity has given to the market.

1313 Footnote 185, on p 43 of the Guidance Note, states that "references to 'earnings guidance' should be read broadly as covering any type of guidance that an entity may give in relation to its expected earnings for the current reporting period regardless of the particular measure used (eg, operating revenue, EBITDA, EBIT, underlying profit before tax, underlying profit after tax, statutory profit after tax, or earnings per share)". The Guidance Note states:

> If an entity becomes aware that its earnings for the current reporting period will differ

> materially (downwards or upwards) from market expectations, it needs to consider carefully whether it has a legal obligation to notify the market of that fact. This obligation may arise under Listing Rule 3.1 and section 674, if the difference is of such magnitude that a reasonable person would expect it to have a material effect on the price or value of the entity's securities … alternatively, in the case of an entity which becomes aware that its earnings for a reporting period will differ materially from earnings guidance it has published to the market, it may arise under section 1041H, because failing to inform the market that its published guidance is no longer accurate could constitute misleading conduct on its part.

1314 The Guidance Note states that this raises five important issues, the first of which is entitled "How does an entity determine what the market is expecting its earnings for the current reporting period to be?" (p 44). The answer is given immediately below: "ASX considers that the best and most appropriate base guide to use for these purposes is: if an entity has published earnings guidance for the current period, that guidance". Footnotes 192 and 193 explain that this includes earnings guidance which the entity may have given because it expected its earnings for the current reporting period to differ materially from market expectations and it also applies even when the entity is covered by sell-side analysts and their earnings forecasts differ from the entity's published guidance. This is because the published guidance comes from the source that can reasonably be expected to have the best information about the entity's likely earnings for the current reporting period, the entity itself. Hence, the ASX would only expect an entity which has published earnings guidance to make an announcement to the market about an earnings surprise if its earnings were going to be materially different from its published guidance. I agree with the applicant that that is the position in which Myer was placed certainly on and after 21 November 2014.

(h) Summary

1315 For the foregoing reasons, in my view Myer contravened listing rule 3.1 and s 674 by not making the disclosures on and from 21 November 2014 that I have set out previously concerning its expected NPAT for FY15.

THE "NO REASONABLE GROUNDS" CLAIM AND OTHER CLAIMS

(a) The pleaded "no reasonable grounds" claim

1316 Let me now address the "no reasonable grounds" claim. The claim has the following elements. It is said that the 11 September 2014 representation in relation to anticipated profit growth in FY15 was a representation with respect to a future matter, namely, that Myer expected to achieve an NPAT in excess of $98.5 million in FY15. But it is said that Myer had no reasonable grounds for making that representation, and accordingly it is taken to be misleading by reason of s 769C(1) of the Act. So, the 11 September 2014 representation was conduct by Myer in relation to a financial product that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the Act.

1317 Section 1041H provides:

> 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.

1318 Relevantly, s 769C provides:

> (1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;
>
> the representation is taken to be misleading.

1319 The general position is that a representation involving the state of mind of the maker, for example, a prediction or opinion, ordinarily conveys that the maker had a reasonable basis for that state of mind. That representation will be falsified on proof of the absence of a reasonable basis for the state of mind.

1320 In determining whether a person held reasonable grounds for a representation of opinion, the relevant inquiry is into whether the facts possessed by him were capable of supporting the opinion that he held.

1321 A person will have had reasonable grounds for making a representation with respect to a future matter if there are facts which are sufficient to induce that state of mind in a reasonable person.

1322 The question whether there were reasonable grounds for the making of a profit forecast is to be resolved by looking at whether the relevant director had made a genuine assessment as to the appropriateness of the forecast. If such a genuine assessment had been made, there would be reasonable grounds to support the making of the forecast.

1323 Now in my view it is not in doubt that the 11 September 2014 representation was made and that it was a statement of opinion with respect to a future matter; further, let it be accepted that it impliedly represented that reasonable grounds were held. But the applicant has the burden of proving that Myer did not have reasonable grounds for making the representation.

1324 In my view, the applicant has failed to demonstrate an absence of reasonable grounds at any time before 21 November 2014. On and after that time the 11 September 2014 representation should have been corrected.

1325 The applicant's case is particularised as follows:

> The Respondent had no reasonable grounds for making the representation because:
>
> (a) the Respondent on 11 September 2014 in its ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014" disclosed to the market an expectation and strategy for the 2015 financial year whereby the Respondent said that:
>
> (i) its underlying cash cost of doing business would increase by approximately 3% (a cost increase of approximately $30 million); and
>
> (ii) it would incur additional expenditure of between $35 and $50 million on renewal costs, of which the majority would be classed as operating expenditure;
>
> which was expected to result in an overall cost increase of $60 million (11 September 2014 "Preliminary 2014 Myer Holdings Ltd Earnings Call", answer given by Bernie Brookes to question by Michael Courtney, Bank of America Merrill Lynch Analyst) to $70 million (John Durie, "McClintock runs out of reasons to retain Brookes", The Australian, 13 September 2014);
>
> (b) the Respondent's stated expectation of increasing NPAT in the 2015 financial year was therefore reliant upon the Respondent increasing its revenue (sales), but the Respondent's sales had declined from $3.3 billion in the 2010 financial year to $3.1 billion in the 2014 financial year, and the Respondent's expectations as to the basis for sales growth disclosed to the market on 11 September 2014 for the 2015 financial year were speculative (see: "Preliminary 2014 Myer Holdings Ltd Earnings Call" and ASX & Media Release concerning "Myer Full Year Results ending 26 July 2014"); and
>
> (c) the Respondent on 11 September 2014 was able to specifically identify only approximately $100 million in increased sales, based on the assumed effect of refurbished and new stores and online sales (11 September 2014 "Preliminary 2014 Myer Holdings Ltd Earnings Call", answer given by Bernie Brookes to question by Shaun Cousins, JP Morgan Analyst) which given an operating gross profit margin of approximately 41% could only add approximately $41 million to the Respondent's EBITDA,
>
> indicating that the Respondent's expectations of revenue growth capable of outweighing the Respondent's increased costs, so as to justify the representation of increasing NPAT in the 2015 financial year, lacked reasonable grounds.

1326 It is also said that:

> The Respondent had no reasonable grounds for making the representation because:
>
> …
>
> (d) the respondent's board had decided unanimously on 10 September 2014 that it could not, or alternatively would not, make a forecast of its profits increasing

in the 2015 financial year above the 2014 level.

First limb of the no reasonable grounds claim

1327 The substance of the applicant's particulars in sub-paragraphs (a) to (c) that I have just set out is to:

(a) note Myer's stated expectation as to increased costs for FY15 of $60 to $70 million and proceed on the basis of an assumed increase in the CCODB of this amount;

(b) assume an OGP margin of 41%; and

(c) contend that Myer did not have a reasonable expectation as to revenue (sales) growth of at least $150 million which would be required, at the assumed OGP margin of 41%, to offset the CCODB increase of $60 to $70 million; $150 million (sales) x 41% (OGP margin) gives increased revenue of $61.4 million which must outweigh increased CCODB to generate increased profit.

1328 So on this aspect, the applicant's case as to Myer having a lack of reasonable grounds is focused on Myer's expectation of increased sales, and in particular its allegation that an expectation of an increase in sales around $150 million was unreasonable because sales had declined from FY10 to FY14 and the basis for sales growth in FY15 was speculative, and Myer was only able to identify in the public statements to which the applicant refers approximately $100 million in increased sales based on the assumed effect of new and refurbished stores and online sales.

1329 Accordingly, this aspect of the pleaded claim in alleging an absence of reasonable grounds focuses on whether Myer had reasonable grounds to expect a sales increase of around $150 million. The applicant does not allege that there was anything unreasonable about any cost or OGP margin forecasts or assumptions adopted by Myer.

1330 But at this point I accept Myer's point that the pleaded case ignores the fact that:

(a) Myer had the ability, if necessary, to cut costs to protect its NPAT and its assumed costs figures included significant costs that could be cut; and

(b) Myer's forecast OGP margin for FY15 was in fact 41.86% and not the 41% which the applicant's particulars assume.

1331 Accordingly, having regard to these two matters, the assumption in the particulars that an increase in sales of around $150 million was necessary to generate profit growth is overstated.

Moreover, I would say now that the allegation, namely, that Myer's expectations for sales growth of this magnitude taking place lacked reasonable grounds, has no substance.

1332 First, the applicant refers to the fact that Myer's sales had declined from $3.3 billion in FY10 to $3.1 billion in FY14, and that Myer's expectations as to sales growth were speculative. But as to the applicant's apparent reliance on the decline in Myer's sales from FY10 to FY14, Myer's Annual Report for FY14 contains the following graph, which portrays Myer's sales in the period referred to by the applicant:

1333 This graph shows that sales had increased albeit slightly from FY12 to FY14. And as to FY14 sales in particular, the evidence before me established that total sales were maintained in FY14 at the same level as FY13 despite the disruption from four of Myer's top 25 stores being under refurbishment and two store closures. Further, there was comparable store sales growth of 1.2 per cent for FY14, and 2.1 per cent in the fourth quarter of FY14, which covered the period after the Federal Budget on 13 May 2014 and the downturn in the consumer sentiment index. Further, Myer had delivered comparable store sales growth in eight of the last nine quarters.

1334 Accordingly, the mere fact of a decline in sales from FY10 to FY14 did not provide a sound factual basis for the drawing of an inference that Myer's expectation of an increase in sales for FY15 was unreasonable or speculative.

1335 Second, it is alleged that the expected sales increase was unreasonable because Myer was only able to identify in the public statements referred to by the applicant approximately $100 million in increased sales based on the assumed effect of new and refurbished stores and online sales. Now the specific identification of increased sales of approximately $100 million refers to an answer given by Mr Brookes during his call with analysts on 11 September 2014. But Mr

Brookes' comments were not purporting to exhaustively identify the areas of increased sales. Rather, such comments were made in response to a specific question about new and refurbished stores. Further, Mr Brookes referred to sales growth of "over" $100 million. I agree with Myer that Mr Brookes' reference to $100 million in sales growth in this context is no adequate foundation to find that expected sales growth of higher than this amount was not based on reasonable grounds.

1336 Further, there was evidence explaining how Myer's expectation of an increase in sales of substantially in excess of $150 million was arrived at. As accurately summarised in Myer's submissions, Myer's forecast and expected sales growth of around $176 million compared to FY14 was based on a number of specific and identified matters. First, it was based on the impact of two new stores that were to be opened during FY15, with the estimated sales for these new stores being based on a large amount of work undertaken over a number of years. Second, it was based on the impact of the redevelopment or refurbishment being completed of at least four stores, with the estimated sales from this work having been developed based on a detailed analysis of the predicted impact of the redeveloped and refurbished stores. Third, it was based on forecast growth in online sales of about $40 million in FY15 compared to FY14. Fourth, it was based on various merchandise initiatives which were forecast to generate increased sales. The key merchandise initiatives included the introduction of new brands, the extension of existing brands, development of MEBs on more of a "design led" basis, the introduction of "Giftorium" which was a dedicated area in each Myer store that contained products that were suggested Christmas gifts, and the launch of the "Find Wonderful" advertising campaign in Q2.

1337 I agree with Myer that there is no evidence to suggest that any of those specific matters were not based on reasonable grounds.

1338 Further, as a cross-check to the sales numbers arrived at, Myer then analysed its forecast sales on a "comparable sales" basis. This involved Myer comparing the forecast sales for FY15 to the sales generated by the same stores that operated in FY14 i.e. ignoring new stores, refurbishment effects etc. The result of this comparison was that the budgeted sales figure of $3,325 million involved comparable sales growth of about 1% from FY14, which was less than the comparable sales growth in FY14 compared to FY13 (which was 1.2%).

1339 Further, as is well apparent from other evidence, Mr Brookes' statement constituting the 11 September 2014 representation was based on a number of matters including not only the detailed budget which had been prepared, but also the buffer between the budgeted NPAT figure of $107 million and the FY14 NPAT of $98.5 million, as well as other buffers within the budget itself, including significant costs that were able to be reduced if necessary.

1340 For these reasons, the first limb of the no reasonable grounds claim as pleaded fails.

Second limb of the no reasonable grounds claim

1341 The applicant's pleaded case, in sub-paragraph (d) of its particulars that I have set out earlier is that Myer had no reasonable grounds for making the representation because Myer's Board "had decided unanimously on 10 September 2014 that it could not make a forecast of its profits increasing in the 2015 financial year above the 2014 level".

1342 I will return to analysing this point shortly.

Other claims

1343 The applicant has also made other claims inter-alia to the effect that:

(a) the 11 September 2014 representation was a continuing representation;

(b) there was a failure to correct such a continuing representation; and

(c) there was separate misleading or deceptive conduct.

1344 I will also return to these other claims later.

1345 But first I propose to spend some time discussing aspects of the 11 September 2014 representation.

(b) The 11 September representation

1346 It is convenient to deal with a number of topics under this head.

Mr Brookes' FY15 NPAT forecast made on 11 September 2014

1347 Mr Brookes repeated several times in his comments made to the analysts and to the journalists Myer's expectation of increased NPAT for FY15. His comments were unqualified and made no reference to the forecast being based upon Myer's FY15 budget or any other disclosed source.

1348 Towards the end of his formal presentation and prior to the questions asked by analysts Mr Brookes stated "[w]e will therefore not only have anticipated sales growth, but anticipated profit growth this year". In answer to a question asked by Mr Courtney of Bank of America

Merrill Lynch, Mr Brookes responded "[now] what we're saying to the market is we're going to get topline growth and net profit growth … [s]o the sales growth is the key to it. That's what the driver is obviously of our net profit growth this year".

1349 Mr Freeman of Macquarie Group stated "[y]ou made a comment, Bernie, that you're guiding for a net profit increase [in] 2015 on 2014 despite this additional investment. Is that correct?" Mr Brookes responded "[t]hat is correct, yes". In answer to a question raised by Mr Thomas on the same page concerning the negative consumer confidence index numbers, Mr Brookes stated "[s]o immediately you've seen a dump down in consumer sentiment and that does reflect almost daily if not weekly in our sales. So patchy at the moment but they are, I would add, in line with our expectations at the moment. So we're not concerned that anything we've presented today is at a risk because of our current trading environment".

1350 When discussing these matters later that morning with the journalists, Mr Brookes stated "over the next 12 months, we'll see an improvement in sales and an improvement in net profitability". Mr Brookes was reminded by Ms Mitchell, a Fairfax journalist, that he had forecast in the previous year that "2015 was the year that it was all going to come to a head". Mr Brookes responded by confirming "that hasn't changed" and said "[a]nd we've said to the market, that we're going to increase our net profit this year. So, we're getting increase in sales, an increase in net profit". He also confirmed the net profit forecast in response to a question from Ms Knight explicitly referring to Myer forecasting a better net profit result in 2015. He also responded to a final question from Ms Mitchell concerning the current trading environment, stating that current trading "[is] in line with our expectations. If it wasn't, we probably wouldn't be saying that we're going to make more sales and profit than last year in the announcement that we did today". The latter comment suggests that Mr Brookes may have misunderstood what was actually included in and excluded from the ASX announcement which Myer made on 11 September 2014. He may have forgotten that the comment about increased NPAT had been removed from the draft version of the ASX announcement shown to the board on 10 September.

1351 Further, there were numerous newspaper articles and analysts' reports in which Mr Brookes' forecast of Myer's increased NPAT in FY15 were reported. I agree with the applicant that the consequence of all of these publications, but in particular the publications in the daily newspapers published after 11 September 2014, was that Myer had for all practical purposes at the least given de facto earnings guidance, albeit not one published to or by the ASX on the company announcements platform. But that does not matter for the purposes of this case, because it was more likely that ordinary members of the public would learn about the profit forecast by reason of the fact that it was published in the newspapers than would have been the case had it been published only on the ASX company announcements platform.

1352 Now the publication of Mr Brookes' representations to such a wide audience changed the paradigm under which Myer had been operating since 2012, when it ceased to make profit forecasts. In 2014 it recommenced making public profit forecasts and Myer therefore came under an obligation to carefully assess at regular intervals whether its business performance in the course of FY15 meant that that forecast was or was not likely to mislead the market.

1353 Mr McClintock recognised that "if a company gives guidance around that profit figure…then, in fact, you have a…dual obligation, in some respects, to both – both that guidance and to…consensus". Mr Myer, on the other hand, considered that it made no difference. Even if Myer made a public forecast of profit, his view was that the company needed only to consider the difference between Myer's actual expectations and the consensus from time to time. The reason why Mr McClintock considered that no such obligation arose for Myer in 2014 was because he considered that Mr Brookes had not in fact given profit guidance to the market. According to Mr McClintock, guidance only happens when a company gives it formally (i.e. by ASX announcement) and informal guidance (which he considered Mr Brookes gave) can be ignored by a board. Other Myer directors gave similar evidence. In my opinion this view is wrong in law.

1354 This phenomenon was described by the ASX in its Guidance Note in [7.2]. The ASX there explained (at 43) that "[a] listed entity which has a policy of not giving earnings guidance needs to be careful in its communications with security holders, analysts and the press that it does not make statements that could be construed as de facto earnings guidance". It went on to provide examples of "de facto earnings guidance" as including a comment that the entity "expects its earnings to be in line with, or a particular percentage range above or below, the corresponding prior period".

1355 In a footnote on the same page but in relation to earnings surprises and how the market's expectations are set, the ASX provided the following inclusive explanation of "earnings guidance":

> References to "earnings guidance" should be read broadly as covering any type of guidance that an entity may give in relation to its expected earnings for the current

> reporting period regardless of the particular measure used …

1356 The Guidance Note (p 44) says that "ASX considers that the best and most appropriate base guide to use for these purposes [determining what the market is expecting its earnings for the current reporting to be] is: - if an entity has published earnings guidance for the current period, that guidance …". In footnote 193 to that statement, the ASX clarified that:

> [t]his applies even where the entity is covered by sell-side analysts and their earnings forecasts differ from the entity's published guidance. This is because the published guidance comes from the source that can reasonably be expected to have the best information about the entity's likely earnings for the current period – the entity itself. Hence, ASX would only expect an entity which has published earnings guidance to make an announcement to the market about an earnings surprise if its earnings were going to be materially different from its published guidance. It would not expect an entity which has published earnings guidance which is still current to make an announcement about an earnings surprise just because analysts were forecasting a different result.

1357 Only if an entity has not published guidance will the earnings forecasts of analysts be an appropriate measure of the market's expectations for an entity's earnings.

1358 Further, I agree with the applicant, and contrary to Myer's submissions, that the audience for the representation cannot sensibly be regarded as limited to the equities analysts or the journalists who participated in the question and answer segments of each of the presentations. It is plain that the analysts' presentation was also open to the public to view online. All that was required of members of the public ("investors") was that they "register their name, email and company to access the webcast". The recording was also intended to be, and was, made available afterwards on Myer's website. There can therefore be no suggestion that the analysts presentation was made only to a small group of sophisticated market participants. Whilst the journalists who participated in the presentation to journalists may have had a greater understanding of financial information than their readers, it would be unreasonable to imbue them or their readers with any special level of financial sophistication such that they should be regarded as capable of divining that a company's own profit forecast should be given no weight. Mr Brookes' representation was made to members of the public, many of whom were ordinary investors, as well as to sophisticated market participants. Whilst some sophisticated market participants might have taken a more nuanced view of the representation concerning Myer's expected FY15 profit, it cannot be inferred that ordinary investors, who were direct recipients of the representation through participating in the webcast or viewing the archive, or indirect recipients through newspaper articles and the like, treated the representation as anything other than being grounded on a rational foundation by reason of the maker's knowledge and expertise.

Mr Brookes' representations were made on Myer's behalf

1359 Further, in my view Mr Brookes, in his capacity as Myer's CEO, was authorised to speak on Myer's behalf to the analysts and journalists on 11 September 2014. Myer's continuous disclosure policy stated that Mr Brookes was authorised to speak to both equities analysts and journalists:

(a) at cl 6.2: "[t]he only Company representatives authorised to speak on behalf of the Company to major investors and stockbroking analysts are: … the CEO …"; and

(b) in the Media Relations Policy at cl 3: "[v]erbal comment to the media, such as a telephone interview or a face-to-face interview, generally can only be made by the Chair, the CEO or his/her specifically nominated delegates" and "[v]erbal comment on Company policy, acquisitions, matters which could affect the Company's share price or which relate to other sensitive matters (such as the Company's performance, Government policy, economic or political issues) may only be made by the Chair, the CEO or his/her specifically nominated deputy".

1360 But even in the absence of Myer's continuous disclosure policy's express authorisation, Mr Brookes' status as Myer's CEO meant that he had ostensible authority to speak on Myer's behalf.

1361 Moreover, Mr Brookes confirmed in his evidence that, in his own mind, what he had said to the analysts and journalists on 11 September 2014 was, in effect, an ASX announcement and said that "[a]ny words that I used during that presentation is disclosure to the market".

1362 Further, the analysts' and journalists' treatment of Mr Brookes' statement was consistent with Mr Brookes' evidence. It is also consistent with the treatment of "de facto earnings guidance" in the Guidance Note.

1363 Now Myer appeared to assert that what Mr Brookes said was a personal representation made by Mr Brookes on his own account, not a representation made by Myer itself. But Mr Brookes was speaking for Myer, not himself personally.

1364 Further, the applicant's case directly addresses Mr Brookes' activities in his capacity as CEO, as Myer's most senior representative. Mr Brookes' personal views, and those of any other individual director or officer of Myer, provide no defence to Myer. Mr Brookes believed he was speaking on 11 September 2014 with the imprimatur of Myer's board. Apparently he was wrong about that. But he correctly considered that he was speaking for Myer itself not on his own personal account.

1365 Further, the fact that Mr Brookes was speaking for Myer and not just for himself personally is reinforced by the words which he used when he made the representation that Myer expected to achieve NPAT in excess of $98.5 million in FY15. The words Mr Brookes used in both presentations conveyed that the representations he made were (a) Myer's corporate expectations, not merely Mr Brookes' personal opinion; and (b) representations as to Myer's expected performance in FY15, which was a corporate profit forecast, not a mere personal opinion, and in respect of which s 769C required reasonable grounds.

1366 Mr Brookes, speaking on Myer's behalf, said in the course of his presentation to the analysts on 11 September 2014:

> Bernie Brookes: "We will therefore not only have anticipated sales growth, but anticipated profit growth this year."
>
> …
>
> Bernie Brookes: "Now what we're saying to the market is we're going to get topline growth and net profit growth."
>
> …
>
> Rob Freeman (Macquarie Group Analyst): "Just to clarify an earlier comment, topline should go up next year, factoring new stores and refurbs. You made a comment, Bernie, that you're guiding for a net profit increase 2015 on 2014 despite this additional investment. Is that correct?"
>
> Bernie Brookes: "That is correct, yes."

1367 And in the course of the presentation to journalists on 11 September 2014, he said, inter-alia:

> Bernie Brookes: "This reflects the confidence that the business has and the Board have. But over the next 12 months, we'll see an improvement in sales and an improvement in net profitability."
>
> …
>
> Bernie Brookes: "And we've said to the market that we're going to increase our net profit this year. So, we're getting increase in sales, and increase in net profit."

1368 Mr Brookes' language during these presentations demonstrated a clear distinction between the times when he conveyed his own opinion (e.g., through the use of the personal pronoun "I") and those when he spoke on behalf of Myer (e.g., through the use of the collective, or corporate, pronoun “we”). An example is provided in the passage in which Mr Brookes said “we’re going to get topline growth and net profit growth”. Mr Brookes also said the following things:

> I think the reason that we can afford to spend AUD35 million to AUD50 million – which you’re right, actually almost AUD60 million – the reason we can afford to spend that amount of money is the sales graph this year. The two new stores combined with the four refurbs coming back on, doubling the online business, the new brands, all provide us with a vehicle – by which the topline growth that we talked about.
>
> Now what we’re saying to the market is we’re going to get topline growth and net profit growth. So despite the fact that we’re investing a sizeable amount of money to make sure we get those two factors in future years, we’re balancing what we return back in net profit to our shareholders with what we think we need to invest in the future to make us a leading edge retailer.

1369 There was thereby a clear delineation made between Mr Brookes’ personal opinions and the representations which he made on behalf of Myer. Whilst “I think” are not the only words used by Mr Brookes to convey when he was giving a personal opinion, it is telling that in the course of the presentation to analysts and in the significantly shorter presentation to journalists he used that expression numerous times. On the other hand, Mr Brookes’ use of “we” and “we’re” consistently referred to Myer or Myer’s own position and may only be construed as Mr Brookes’ making representations about the relevant underlying facts on Myer’s behalf. Indeed, aside from when Mr Brookes was explicitly giving his own opinion (often as prefaced with the words “I think”) he was making representations on Myer’s behalf.

1370 From the extracts set out above, the representation of an expectation on the part of Myer can be seen to have been conveyed by the words “anticipated”, “we’re going to get”, “guiding for”, “we’ll see”, and “we’re getting”. “We’re going to get”, “we’ll see” and “we’re getting” are redolent of confident prediction.

1371 In the passage “not only have anticipated sales growth, but anticipated profit growth”, the word “anticipated” takes an adjectival form. In terms of the definition of “anticipated” as an adjective, the Oxford English Dictionary states the following relevant definition of “anticipated”:

> 3. Apprehended beforehand, looked for, expected.

1372 The language used by Mr Brookes to describe Myer’s FY15 profit expectations was not that of mere personal opinion. Rather, his language confidently conveyed Myer’s considered expectation of improved FY15 NPAT performance.

1373 As forward-looking statements setting out Myer's expectations as to its profit in FY15, Mr Brookes' statements made on behalf of Myer fall into a category of representation which, as the Guidance Note correctly states, requires reasonable grounds. The Guidance Note identifies, in section 7.1 on page 43, that:

> As a forward looking statement, earnings guidance must have a reasonable basis in fact or else it will be deemed to be misleading, with all the significant legal consequences that entails. For this reason, appropriate due diligence needs to be applied to the preparation of earnings guidance. The underlying figures and assumptions should be carefully vetted and signed off at a suitably senior level before the guidance is released.
>
> Since it is the directors who are ultimately responsible for confirming that an entity's financial statements have been prepared in accordance with applicable accounting standards and give a true and fair view of its financial performance, it will also generally be appropriate for the guidance to be approved by the board before it is released.

1374 There is no suggestion that where de facto earnings guidance is given any different legal consequence ensues.

1375 The assertion made by Myer that "[i]t is important to recognise that the 11 September 2014 Representation was a representation of opinion: that Myer anticipated NPAT growth in FY15" is inconsistent with the treatment in the Guidance Note of earnings guidance as any forward-looking profit representation which requires a reasonable basis in fact. Whilst the characterisation of a representation as a statement of opinion or an assertion of fact can be vexed, the guidance published by the ASX in the Guidance Note and by ASIC in the form of Regulatory Guide 170 concerning the disclosure of prospective financial information, which has application to conduct under s 1041H of the Act and which is referred to in the Guidance Note, indicate that the content, context and subject matter of the representations made by Mr Brookes on 11 September 2014 all made representations as to a future matter (Myer's FY15 NPAT) in respect of which reasonable grounds were required, not merely the maker's bona fide holding of an opinion.

The relevance of the 10 September 2014 resolution

1376 Myer's board had resolved unanimously on 10 September 2014 that Myer would not make a forecast of its profits increasing in FY15 above the level achieved in FY14 in the form of the draft ASX announcement given to the board for consideration. Mr McClintock's evidence was that the decision not to give guidance was unanimous: "all the decisions in the boards that I lead are by consensus, I guess. So, yes, at the end of it people all agreed that that was the right decision", and that he regarded the board's decision as having included Mr Brookes.

1377 The applicant says that the resolution to approve an ASX announcement making no mention of a profit increase shows that Myer's "corporate mind" was set against giving an FY15 profit forecast. So too does the evidence of the other directors. But assuming all of that, where does this take the applicant? It does not show that no reasonable grounds were held for what was said on 11 September 2014. Let me go through the evidence further.

1378 Mr McClintock said that "my recall is that in the discussions that I had as both director and chairman that the decision was made not to give guidance", that "the decision on [10 September 2014] not to give guidance was not based upon the budget, it was based upon a general principle of how a company should best inform the market", and, when asked if Myer had studiously avoided making any comment about anticipated net profit growth for 2015 in the announcement to the market, Mr McClintock said "that's true. Because I felt that that would clearly give guidance and I thought that was not appropriate".

1379 Ms Froggatt described the board's decision as reflecting that "[w]e felt, on balance, based on the unpredictability of the consumer market, that it was wise to not give guidance and that's what we did". Ms Froggatt also described what Mr Brookes had said as follows: "there was no agreement by the company that that would be communicated. It wasn't to a broad audience. It wasn't substantiated in any way. It was at odds with all of our listed communication and at odds with the written presentation that is then released to the market and at odds with our written statement to the ASX".

1380 Mr Thorn, after agreeing that he was taken by surprise by what Mr Brookes said to the analysts and the journalists on 11 September 2014, was asked if that was "because your understanding was that at the board meeting on 10 September 2014 the board had made a clear decision that there would not be any profit guidance given to the market in respect of the 2015 financial year?" to which Mr Thorn answered "Yes". Mr Thorn then continued: "[m]y recollection of that meeting was that there had been a decision not to make any statement in the release or at the presentations on the guidance for the '15 year".

1381 Mr Myer was asked whether it was his view that the FY15 budget was not to be the basis of any public forecast in respect of the anticipated NPAT in FY15 to which he responded: "[t]hat was my view and that was the background to my view about not providing formal profit guidance". He later said that "we had taken the decision the prior day – the prior day not to give profit guidance and that was my – that continued to be my view". Mr Myer was uncertain as to what Mr Brookes had actually said to analysts and journalists and the circumstances in which he had made those statements.

1382 Mr Cornell said that "it appears that the board made a decision not to put [an NPAT forecast] in their announcement. That's for sure". When asked whether it came as a surprise to him that Mr Brookes had made a profit forecast in his discussions with the analysts and the journalists the following day, Mr Cornell said "[w]ell, it did come as a surprise".

1383 Ms Brennan was asked "the board had made a definite decision on the 10th not to do it. You then learn Brookes, despite that decision, has done it on the 11th; correct?" to which Ms Brennan responded "Yes. I don't know when I found out, though".

1384 Whilst Mr Brookes' evidence was that he "walked out [of the 10 September 2014 board meeting] with an understanding that we were making an announcement that said that we were going to increase our sales and increase our net profits", all of the non-executive Myer directors gave evidence that it was Mr Brookes alone who had formed a view inconsistent with the unanimous decision arrived at by the board.

1385 The applicant says that in acting as Myer's delegate in delivering presentations to analysts and journalists, Mr Brookes had no authority to act inconsistently with Myer's decision not to make any forecast of increased NPAT in FY15. Further, the applicant says that given the decision made by Myer not to make any statement concerning its profit expectations for FY15, Mr Brookes could have no reasonable grounds for his statements made to analysts or journalists in circumstances where he was speaking for Myer, not simply expressing a personal or private opinion. But such a proposition is a non-sequitur.

1386 The applicant says that the clearest evidence of the absence of a reasonable basis for Myer making any public representation about its forecast FY15 NPAT is the fact that the Myer board on 10 September 2014 unanimously resolved (apparently with Mr Brookes' consent) that Myer would not make any public representation whatsoever about its expected NPAT for FY15. It is said that fact "fundamentally undermines" Myer's defensive case that there was a reasonable basis for it to make the public representation which it made through Mr Brookes on the following day. The applicant says that it is difficult to think of circumstances in which there could be a reasonable basis for the CEO of a company to make a public representation about a price-sensitive matter on behalf of that company when the board of the company has, on the day before, carefully considered that very question and unanimously decided (in the presence of, and with the apparent concurrence of, the CEO himself) that no such announcement should be made.

1387 The applicant says that in circumstances where the Myer board had unanimously resolved that no such representation could or would be made by or on behalf of Myer to the market, it was misleading or deceptive for Mr Brookes to have done exactly that on the following day, because the board's decision necessarily meant that there was no reasonable basis to do so and therefore s 769C of the Act is engaged. Mr McClintock's evidence was that if, hypothetically, the ASX had asked Myer to clarify what its expectations were for FY15 NPAT in light of Mr Brookes' representations to the analysts and journalists: "We would have said that that's the current thinking of the company…but this is by no means guidance that will bind us for the rest of the year. And I think in our situation we would have had to have made that clear". Two things are implicit in that answer: first, the confident and unqualified forecast of increased FY15 NPAT would not have been made by Myer in the way Mr Brookes made it; and second, as soon as Myer's expectations varied from Mr Brookes' representation of increased NPAT in FY15, Myer would have been obliged to so inform the market.

1388 But the evidence negates the allegation that the board had decided unanimously that it *could* not make a forecast of its profits increasing in FY15. Rather it was decided that it *would* not.

1389 The board did not pass a unanimous resolution in the terms suggested by the applicant. What the board resolved at the 10 September 2014 board meeting, as recorded in the minutes for that meeting, was to "approve the draft ASX Release and Analysts Presentation as amended …". The "amended" version of the ASX Press Release and Analysts Presentation removed the draft (square bracketed) comment of "FY2015 NPAT growth in the vicinity of 5 percent". It may have been understood by the other directors to be implicit in what was resolved that no forecast of profits increasing in FY15 would be made in any other way, although none of the directors actually recalled the specific terms of what was discussed at the 10 September 2014 board meeting, but that is not what was resolved. It would appear that Mr Brookes did not come away from the board meeting with the same understanding as the other directors or, at least, some of them. Further, the understanding of the other directors as to what was decided or resolved is not as clear as the applicant asserts. It is clear from the evidence that the board, putting to one side questions of whether their views were correct, saw the "guidance" which they decided not to give as being different from the comments made by Mr Brookes, which they did not see as "guidance".

1390 Mr McClintock's evidence was that in his view Mr Brookes had "said something which was … different from what the board had decided not to say" and that "I certainly did not believe at the time that Bernie's remarks constituted guidance of that kind [the kind that the Board had decided not to give]. So I guess there is a difference between what the board decided and what Bernie did the following day".

1391 Ms Froggatt said that what Mr Brookes said was in her view consistent with the spirit of what the board had said in the formal ASX release, albeit that it said "something more" than had been said in the ASX documents.

1392 Mr Myer's evidence was that when he found out what Mr Brookes had said he "didn't feel any particular discomfort that that remark had been made".

1393 Mr McClintock's evidence was that the board's decision not to include the proposed guidance in the ASX release was not based on a lack of confidence that the profit projection in the FY15 budget was reliable or that it would be realised or achieved. Rather the decision not to give guidance was based on a philosophical view that he held. Mr McClintock considered the budget to be realistic and therefore considered that NPAT in FY15 would be greater than $98.5 million. When questioned about Mr Brookes' statement on 11 September 2014, he said:

> I might say Bernie, of course, and the Board did believe the statement at the time. There was always an expectation at that point that we would do better than last year…
>
> I believed that we would do better than ninety – than the previous year. I mean, you've got to put it – you've got to put yourself in our context. We saw last – we saw the previous year as sort of an aberration. It doesn't look like an aberration now, but at the time – and we had the new stores opening. We had the refurbishments. We were very confident we would do better.

1394 Mr McClintock subsequently repeated that evidence, stating that as at 11 September "our view of the end of the year was still ahead [of FY14 NPAT]". When Mr McClintock was asked about what, hypothetically, Myer would have done if the ASX had required Myer to make an announcement about its anticipated profit for FY15 following Mr Brookes' comment, his evidence was that it would have confirmed Mr Brookes' comment.

1395 Mr Myer's evidence was to similar effect, being that a lack of confidence by the board that it would reach the profit projected in the budget was not one of the reasons why the board did not wish to make a profit forecast in FY15. He was confident that Myer would reach the projected profit for FY15. Mr Myer's evidence was that his support for not giving guidance was like Mr McClintock philosophical, in the sense that he preferred not to give guidance as a general rule, there being no obligation to do so.

1396 Further, the evidence of other directors was consistent with that of Mr McClintock and Mr Myer.

1397 Mr Cornell's evidence was that he had a predetermined view that it is better to be conservative and therefore not give guidance, but that "at the time I thought that there was a strong rationale for the budget and in my mind I don't recollect having an issue with the budget number". Further, he did not recall holding a view in September 2014 that the FY15 budget was unrealistic or was unlikely to be achieved, or that it was in doubt or in significant doubt, and that he would not have formed such a view based on the limited results during August and early September. So, Mr Cornell's evidence was that he was not troubled or concerned by Mr Brookes' statement.

1398 Ms Brennan's evidence was that she would not have approved the FY15 budget if she did not think that it was realistic and reasonably achievable. Further, as at 10 September 2014 she had not formed a view that the FY15 budget was unrealistic or was unlikely to be achieved. Further, her evidence was that the results of Myer for August did not cause her to think that Myer was unlikely to achieve the FY15 budget.

1399 Ms Froggatt gave evidence that she would not have approved a budget at only $98.501 million because that was lower than her expectations. Her evidence was also that her reason for not approving a release which had guidance of profit growth in the vicinity of five per cent was not based on a lack of confidence as to the reliability of the budget. Further, Ms Froggatt's evidence was that as at 10 September 2014 she would not have considered that Myer was unlikely to achieve the FY15 budget because it was behind in the month of August. The result for August alone would not cause her to doubt the achievability of a budget approved a month earlier in July. Ms Froggatt also gave evidence that if, as at 11 September 2014, the ASX had required Myer to either confirm, retract or qualify the 11 September 2014 representation, she would have confirmed it.

1400 Mr Thorn's evidence was that in September 2014 he did not recall thinking that the FY15 budget was unrealistic or unlikely to be achieved, or that it was in significant doubt. Further, the results for August would not have caused him to form the view that the FY15 budget was unrealistic or was unlikely to be achieved, or that it was in significant doubt. Mr Thorn also gave evidence that if, as at 11 September 2014, the ASX required Myer to either confirm, retract or qualify the 11 September 2014 representation, he would have confirmed it.

1401 Accordingly, on 11 September 2014 Mr Brookes was expressing an opinion:

(a) that he genuinely held;

(b) that each of the other directors of Myer held;

(c) that other members of senior management held; and

(d) which opinion was based on reasonable grounds.

1402 The applicant in closing submissions sought to advance the no reasonable grounds claim on a further basis by reference to the different proposition that Myer had no reasonable grounds for the 11 September 2014 representation because the board had resolved that Myer would not make a forecast of profits in the form of the draft ASX announcement given to the board.

1403 The applicant therefore overstates the position to say that there was a unanimous resolution that Myer would not make a forecast of its profits increasing in FY15 even if it can be said that there was no formal approval of the forecast by Mr Brookes.

1404 Even if one puts to one side what was actually resolved or decided by the board, and treats what occurred at the 10 September 2014 Board meeting as if it was a unanimous resolution of the board that Myer would not make a forecast of its profits increasing in FY15, the claim that this means that Myer did not have reasonable grounds for the statement of opinion by Mr Brookes in the form of the 11 September 2014 representation fails.

(c) The reasonable grounds

1405 In addition to what I have said, the applicant says that the fact that Myer did not have reasonable grounds for representing that it anticipated achieving increased NPAT in FY15 may also be inferred from the following matters.

1406 First, the applicant refers to the board's recognition of the inherent unpredictability of Myer's business and profits. Mr McClintock gave evidence that "the volatility of this business is such that to give guidance which locks you in for a full 12 months is in fact inappropriate in a business of this kind". Ms Froggatt said that "[w]e felt, on balance, based on the unpredictability of the consumer market, that it was wise to not give guidance and that's what we did". Mr Cornell gave evidence that "I think it would be generally accepted good business in retail that you don't give guidance. … I would … have a predetermined view that if it's not necessary to give guidance then you should not do so because retail is such a volatile business, it's better to be conservative".

1407 Second, the applicant refers to Myer's underperformance against budget in the immediately preceding years. Mr Brookes agreed that in each of FY13 and FY14 the budget had been much more optimistic than those years turned out to be. Ms Froggatt gave evidence that Myer's board had in mind the unreliability of Myer's budgets when the time came to approve the FY15 budget. Mr Myer, who had a long experience of Myer's business performance: (a) agreed that Myer "had undershot its budgets in each of 2011, 2012, 2013 and 2014"; (b) agreed that "in 2014 at the NPAT level it had undershot [budget] by a very considerable margin, more than 18 per cent"; and (c) when asked about whether the company's budgeting had been reliable, replied "[u]nreliable – there had been a number of factors. But, yes, the company had missed budget". Mr Cornell, after agreeing that Myer had missed its FY14 budget, linked Myer's inability to achieve its budget in prior years to his reticence to give guidance for FY15 performance "because of that volatility in performance".

1408 Third, the applicant refers to Myer's FY15 budget being explicitly formulated so as to: (a) satisfy market expectations; (b) respond to analysts' criticisms; and (c) achieve various NPAT / EPS targets, rather than to reflect the realistically achievable performance of the business, given likely trading conditions and ongoing costs growth. In addition, Mr Ashby, who was principally responsible for the development of the FY15 budget, agreed that "the budget not only needs to align Myer's targets to its strategy but also it needed to reflect more confidence in the strategy". The existence of targets can be observed in an early version of the budget. Mr Brookes also confirmed that the budget "should reflect the five-year strategy document".

1409 Fourth, the applicant refers to the existence of adverse economic conditions and low consumer confidence.

1410 Fifth, the applicant refers to Myer's poor start to the year. It may be noted that the essential facts underlying the emails sent on 14 and 15 September 2014 were within Myer's knowledge by 11 September 2014. The following chart shows that even five days prior to the 11 September 2014 announcement, and only six weeks into the financial year, Myer's sales were $13.8m behind budget and buying gross profit was already $7.5m behind budget.

MYER HOLDINGS LIMITED
Sales and Buying Gross Profit
FY2015 - weeks 1 to 33

B. Cumulative (calculated from weekly figures shown above)

	Sales				Buying Gross Profit (BGP)		
	Week ending	Sales ($m)	Budget ($m)	Actual v Budget	BGP ($m)	Budget ($m)	Actual v Budget
Week 1	2-Aug-14	43.1	40.6	6.2%	12.5	11.9	5.0%
Week 2	9-Aug-14	85.4	86.8	-1.6%	31.8	32.6	-2.5%
Week 3	16-Aug-14	129.6	136.2	-4.8%	50.4	53.5	-5.8%
Week 4	23-Aug-14	176.8	186.5	-5.2%	71.5	76.3	-6.3%
Week 5	30-Aug-14	225.9	238.5	-5.3%	91.7	98.5	-6.9%
Week 6	6-Sep-14	284.4	298.2	-4.6%	115.6	123.1	-6.1%
Week 7	13-Sep-14	332.7	351.5	-5.3%	136.4	145.8	-6.4%

1411 Sixth, the applicant refers to Myer's failure to follow continuous disclosure policy by giving confirmatory guidance to the ASX. Whilst Myer's failure to comply with its own continuous disclosure policy by making an immediate disclosure to the ASX may be explained, it may also be inferred that Myer's failure to make an immediate disclosure was a result of Myer being put into the difficult position of being required to confirm the statements made by Mr Brookes which it may be inferred Myer could not do, as it no longer had confidence in its ability to achieve the budgeted earnings, or any earnings in excess of $98.5m in FY15.

1412 Seventh, the applicant refers to Myer's satisfaction about the immediate decline in consensus to a level materially below the minimum FY15 NPAT implied by the 11 September 2014 representations.

1413 Now whilst some of the above followed the making of the representations on 11 September 2014, the assessment of the existence of reasonable grounds does not preclude examining evidence of later events which may throw light upon the overall probabilities. But hindsight is to be avoided.

1414 The applicant says that the above matters support a finding that Myer did not have reasonable grounds for making the representations which it made on 11 September 2014. But I disagree. None of these matters whether separately or cumulatively demonstrate an absence of reasonable grounds at this time, particularly in the context of the detailed chronology that I have previously set out. Further, in my view the FY15 budget and the manner in which it was prepared was more than an adequate foundation to establish reasonable grounds.

1415 Now as one would expect, Myer's directors, and its senior executives, were aware of and considered the fact that Myer had not met its budget in the preceding two years, and considered this as part of the process of satisfying themselves that the FY15 budget was realistic. The board's preference as a matter of general policy or philosophy not to give formal guidance had nothing to do with any view that the FY15 budget was unrealistic or would not be achieved (let alone any view that FY15 NPAT would not increase on FY14 NPAT).

1416 Further, Mr McClintock's evidence was that he was aware of the results in previous years as against budget, but this did not cause any lack of confidence in either the FY15 budget or management's ability to forecast accurately ("your question that started this was did we have confidence that our management was competent and understood the business and could produce a budget that we could give significant weight to, and my answer is still yes").

1417 Mr Myer's evidence was that he had regard to the results in the preceding years, and in FY15, looking ahead, he had confidence in the forecast NPAT of $107 million. In particular, this was because Mr Myer had regard to the "what was going on in the business" in FY15, which was different from the preceding years.

1418 Ms Brennan noted that whilst the board was "always mindful of the past" it combined this consideration with "the future strategies of the business".

1419 It is therefore apparent that underperformance against budgets in past years had been consciously considered by the board, and that having regard to this, and the plans for the business in FY15, the board (and management) was confident in the FY15 budget. Implicit in the applicant's submissions is a submission that because sales in particular had been flat in FY13 and FY14 there was no basis to think that sales would increase as forecast in FY15. But this ignores the substantial changes to the business taking place in FY15 that I have detailed earlier.

1420 Further, the applicant has relied upon Myer's budget being formulated so as to: (a) satisfy market expectations; (b) respond to analysts' criticisms; and (c) achieve various NPAT / EPS targets, rather than to reflect the realistically achievable performance of the business, given likely trading conditions and ongoing costs growth. But I agree with Myer that the applicant's submissions in this regard are superficial and do not establish the ultimate proposition that it puts, namely, that the budget did not reflect the realistically achievable performance of the business.

1421 Further, the applicant suggests that the existence of adverse economic conditions and low consumer confidence supports its no reasonable grounds case. But various matters can be put against this.

1422 First, the applicant does not previously identify the "adverse economic conditions" on which it relies.

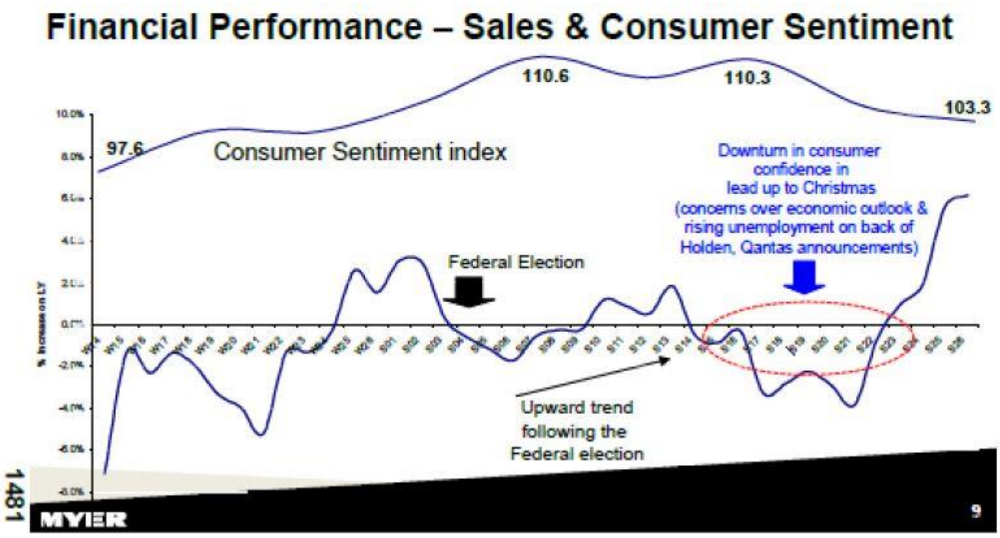
1423 Second, its reference to "consumer confidence" appears to be a reference to the Westpac consumer confidence index. The implicit proposition appears to be that this indicator was so significant that it should have caused Myer to form the view that its NPAT in FY15 would not increase on FY14. But such a case is speculative.

1424 Third, as explained by Mr McClintock, the fact of a decrease in consumer confidence in FY14 could in fact lead to greater confidence of an increase in profits during FY15, because "it [the decrease] … was seen as something that had impacted on the 2014 figure, which we did not think would be repeated [in FY15] … we didn't think broadly that those impacts of the budget and the election which had impacted the previous year would – would be replicated".

1425 Fourth, as also explained by Mr McClintock, there was no basis on which Myer could know whether low consumer sentiment, as evident immediately following the Federal budget, would be replicated in the key months of FY15 in Q2 (December/January) and Q4 (June/July).

1426 Fifth, the implicit proposition that there is some clear or meaningful correlation between Myer's performance and the consumer sentiment index is unsupported by evidence and overstated. For example:

(a) The evidence demonstrated that the consumer sentiment index and the sales performance of Myer did not show any particular correlation. This is evident from the following graph:



This lack of correlation was reinforced by evidence that 2008 was one of Myer's best profit years (and in that year the consumer sentiment index was as low as 79.01, and was much lower than in FY14).

(b) Mr McClintock's evidence was that the relationship between consumer sentiment and performance did not correlate in the way suggested by the questions put to him.

(c) Mr Cornell disagreed that there was some linear or simplistic relationship between the index and Myer's performance.

(d) The evidence was that a downturn in the consumer sentiment index could provide opportunities for Myer. For example, it could serve to increase the sale of MEBs as a proportion of overall sales, and thereby increase Myer's profit margin.

(e) May, June and July 2014, and the decline in the consumer sentiment index, showed Myer's strongest like-for-like (also referred to as comparable, or same stores) growth since 2010. Myer was therefore heading into FY15 with strong recent comparable sales growth, and new and refurbished stores about to come into operation.

1427 Sixth, the consumer sentiment index was only one of many factors that Myer took into account. Other factors included:

(a) Myer's own research done by an independent third-party agency;

(b) home mortgage interest rates, which affect discretionary expenditure;

(c) petrol prices;

(d) the general share market (as many Myer customers invest in equities);

(e) competitor activity; and

(f) marketing activity.

1428 Further, the applicant has submitted that the first six weeks of results for FY15 were so significant that Myer's budgeted NPAT of $107 million, as reflected in the FY15 budget approved on 16 July 2014, should have been not only abandoned, but reduced by more than 8%. But the evidence is not consistent with this position.

1429 Myer's witnesses gave evidence that they did not, or would not, consider that the fact that results in August were behind budget as being a reason for considering that Myer could not achieve the FY15 budget figures, including in relation to sales and NPAT, and that they did not hold this view.

1430 Mr Brookes was asked whether results in the first six weeks of the year would cause him to doubt the reliability of the FY15 budget. His evidence was:

> No, not at all, for a couple of reasons. Firstly, we were looking at four to five very, very low-volume weeks of, sort of, 40 to 45, 49 million that reflects only a small portion, and making a call in the first four weeks that both the sales and profit forecast was wrong was certainly not the case. …

1431 His evidence was that most of Myer's sales and profits are made in the key trading periods of December/January and June/July.

1432 Further, results in Q1 had historically not been a good predictor of sale and profit trends for the remainder of the year. As Mr McClintock put it, the results in Q2 were expected to be very different from Q1, and:

> the second quarter is a – is a set of business judgments all – all of its own. The actual trend that you get in August, September, October doesn't tell you very much about November, December and January. So the judgment calls that we made about the strength of those months that we made back when the budget was formed – we didn't think that the first quarter really seriously undermined our view of what we could achieve over that Christmas period.

1433 Further, Myer had the ability to reduce costs if necessary to protect the NPAT position.

1434 Further, there was an 8% "buffer" between the forecast NPAT of $107 million and FY14's NPAT of $98.5 million.

1435 Further, the applicant submits that Myer's continuous disclosure policy required Myer to confirm the statements made by Mr Brookes, and that the fact that it did not do so leads to an inference that it no longer had confidence in its ability to achieve the budgeted earnings, or any earnings in excess of $98.5 m in FY15. But this submission is built on flawed premises. The first is that the continuous disclosure policy required Myer to confirm the statements made by Mr Brookes. The second is a non-sequitur.

1436 Let me say something further about the FY15 budget that in my opinion provided the requisite reasonable grounds for the 11 September 2014 representation.

1437 I accept that there is a distinction to be drawn between mere expressions of personal opinion, the way in which Myer seeks to characterise Mr Brookes' representation, and representations of opinion or judgment which are calculated to convey that they are based upon rational grounds. Where it is implicit that a representation of opinion is grounded on a rational foundation by reason of the superior knowledge and expertise of the maker, rational grounds involving an application of the relevant expertise supporting that opinion are required. Further, I do not doubt that a representation concerning anticipated current financial year NPAT, made by a company's CEO on behalf of the company, is made on the implied basis that reliable information exists which justifies the opinion. This is supported by Mr Molony's evidence that:

> Just to put it very simply – the chief executive of an ASX company, coming out in the result and specifying, as Mr Brookes did, on the earnings call and to journalists that FY15 NPAT is going to increase relative to FY14: that can't be – the importance of that cannot be underestimated, even if it's not written up in a formal way in the research [analysis]. This is the most important person in the business, who's sitting on the most information, active in the sector; he has been running the business since it IPO'd. He understands the interaction between ASX disclosures and market prices. He deliberately told the market that FY15 would be higher than FY14 …

1438 It may be noted that Mr Brookes cited access to internal Myer business performance information as grounding the representation of increased profit in FY15 in the course of the presentation to journalists where he said, on the basis of otherwise unannounced sales results for the year-to-date, that they were "in line with our expectations. If it wasn't, we probably wouldn't be saying that we're going to make more sales and profit than last year in the announcement that we did today". The effect of this statement was to inform his audience that his representation concerning FY15 NPAT was made on the basis of rational and probative information.

1439 In my view the evidence establishes that there were reasonable grounds for Myer to make a representation that it expected to achieve NPAT in FY15 in excess of $98.5 million.

1440 The evidence of Mr Brookes as to the basis on which he made his statement was as follows:

> My comment about anticipated sales and profit growth was based on:
>
> (a) the Budget that had been prepared and approved by the Board;
>
> (b) my knowledge of the detailed process used to arrive at that Budget, and my confidence in the individuals involved in preparing the Budget;
>
> (c) my confidence in the investments we had made and the strategies in place which I considered likely to result in a significant increase in sales and profit in FY15, and in particular, the two new stores due to open in FY15 and the completion of a number of refurbishments, the investment in the information technology infrastructure underpinning the online business, and the anticipated increase in sales of MEBs;
>
> (d) the fact that at that time the Budget was for NPAT of $107 million for FY15,

and we had just announced the FY14 actual NPAT of $98.5 million, and we therefore had a "buffer" of $8.5 million between our anticipated NPAT and FY14's NPAT. That is, for FY15 we could "miss" budget by up to 8% and still be on a par with FY14 NPAT;

(e) as noted above, the Budget provided for an 85% MAIP payment. In September 2014, I was conscious that if EBIT and sales growth for FY15 were ultimately below budget, then at least 80% of the MAIP provided for in the Budget would not be paid. This provided an additional buffer which gave me confidence about anticipated profit growth for FY15 on the FY14 result; and

(f) additional costs saving which could be achieved if necessary, by (for example) reducing wage costs, not using the CEO One Time Costs or implementing savings in information technology or other areas (for example, through the 'Hot Tubs' process described above).

1441 Such evidence and other evidence more broadly discloses the following reasonable grounds for the 11 September 2014 representation.

1442 First, there was the existence of the FY15 budget which forecast FY15 NPAT of $107 million.

1443 Second, there was a detailed process used to arrive at the budget, which process Mr Brookes had knowledge of, that involved experienced retailers within Myer preparing the budget or aspects of it. These experienced retailers included Mr Brookes, Mr Ashby, Mr Stapleton and Mr Sutton. None of them recalled thinking that the FY15 budget was unrealistic or unlikely to be achieved or anyone saying that to them. Further, none of them would have agreed to the FY15 budget if it was unrealistic or unlikely to be achieved.

1444 Third, there was evidence as to the reasonableness of the key underlying assumptions and factors which led to the budgeted NPAT of $107 million, which matters led all relevant Myer officers (including, in particular Mr Brookes), to consider it likely that there would be an increase in sales and profit in FY15. Mr Brookes' evidence is that he had confidence in the investments Myer had made and the strategies it had in place. This included matters such as new stores, store refurbishments, investment in the online business and plans to increase sales of MEBs.

1445 Further and generally, the evidence in relation to the preparation of the FY15 budget shows the following. There was a detailed and thorough process by which the budget was prepared, and the NPAT forecast was arrived at. Further, the budget, and the figures and details underlying it, served several important purposes in relation to the internal management of Myer's business, including determining what stock to purchase and providing the metrics against which the payment of bonuses to senior management would be measured. An unrealistic budget was likely to have negative effects on the business. There was no incentive, and in fact there were many positive disincentives, for management to propose an unrealistic budget to the board. Further, the key personnel who were involved in the preparation of the budget had significant retail experience, and Mr Brookes had confidence in those individuals. Further, all of the key assumptions in the budget had been carefully considered, and there was evidence from Mr Brookes and Mr Ashby as to why those assumptions were reasonable. Further, there was evidence that the budget would not have been presented to the board for approval unless all of the senior management of Myer being the EGMs agreed with the budget.

1446 Such evidence provides a sufficient basis for a conclusion that there were reasonable grounds for the forecast FY15 NPAT of $107 million, and accordingly for a statement that Myer anticipated NPAT in FY15 above the $98.5 million achieved in FY14. Moreover, the fact, if it be the case, that there was scope for alternative opinions to be held as to a realistic NPAT for FY15, does not mean that Myer lacked reasonable grounds for the figure it arrived at.

1447 Fourth, the FY15 budget was considered and approved by Myer's board. The board of Myer consisted of well qualified and experienced individuals, who were experienced directors and had significant retail experience. As such, the directors were individually and collectively well placed to consider the budget presented to them, to identify the key assumptions and matters that were important to the budget, and to question management about those matters and form a view as to the reasonableness of the metrics and assumptions used, and therefore the overall reasonableness of the budget.

1448 Fifth, there is the fact that there was a "buffer" of $8.5 million between the budgeted NPAT of $107 million for FY15, and FY14 NPAT of $98.5 million. Myer could therefore miss its anticipated NPAT by around 8% and still have NPAT greater than FY14.

1449 Sixth, there were additional buffers available to Myer due to the inclusion of significant costs in the budget which could be removed if Myer was otherwise not meeting budget. In particular, the FY15 budget made a provision of $12 million for bonus payments to its senior management (MAIP). If earnings and sales forecasts in the budget were not being met or exceeded, then MAIP payments would not be made or made in anything like the amount provided for. Further, the FY15 budget included around $17 million in what are referred to as "CEO One Time Costs". These were essentially discretionary one-off or non-recurring costs that the CEO could determine whether to incur. These costs would typically only be incurred if the business was going well. If sales performance was lower than expected these costs could be cut back. So there was an additional buffer of up to around $29 million in the budget which, if performance of the business was worse than projected, could be removed before consideration was given to specific cost cuts in other areas.

1450 Now the applicant appears to submit that:

(a) Myer has not identified facts and circumstances which make its continued reliance on the budget reasonable as at 11 September 2014; and

(b) it may be inferred that by 10 September 2014 Myer's board did not have a confident expectation that Myer could achieve NPAT of $107 million, or any other figure in excess of $98.5 million.

1451 As to (a), Myer's witnesses gave cogent evidence as to why the results in the first six weeks of FY15 did not change their view, reached when the budget was approved, that an NPAT of $107 million was achievable, and accordingly that the results in those six weeks did not cause them to reach a view that NPAT in FY15 would not be in excess of $98.5 million. And as to (b), the inference which the applicant has sought to draw is not made out for the reasons I have previously discussed.

1452 Let me deal with another matter that the applicant belatedly raised concerning a communication with the board on 14 September 2014.

1453 The applicant says that other evidence also supports the conclusion that Mr Brookes' representation of increased FY15 NPAT lacked a reasonable basis. When Mr Brookes circulated to the board on 14 September 2014 the internal Myer investor relations department's summary of the responses to the analysts' call, Mr Brookes said that he was pleased that, despite what he had told them, the analysts had downgraded their profit forecasts for FY15. He said: "The pleasing news is that the median NPAT consensus has fallen 14% to $92m and this reflects in the share price".

1454 The applicant says that this confirmed three things.

1455 First, Mr Brookes himself had no real confidence in the FY15 budget NPAT forecast of $107m, otherwise the $92m "median NPAT consensus" could not possibly have been "pleasing news".

1456 Second and alternatively, Myer did not in fact assess its continuous disclosure obligations only by reference to the Bloomberg consensus. The $92m consensus NPAT forecast referred to by Mr Brookes is 14% less than the $107m NPAT shown in the FY15 budget and yet there is no suggestion in Mr Brookes' email that Myer had any obligation to inform the market that Myer would earn more, which there would have been if Myer genuinely believed it would earn $107m, but the Bloomberg consensus was $92m. The applicant has a fair point. But this is nothing to do with showing an absence of reasonable grounds for the 11 September 2014 representation.

1457 Third, $92m is also $6.5m (6.6%) less than the $98.5m NPAT which Myer had in fact earned in FY14, and yet there is no suggestion in Mr Brookes' email that Myer had any obligation to correct the market, which there would have been if Myer genuinely believed that it would earn more profit in FY15 than it had earned in FY14. Again, this is a fair point. But it does not show an absence of reasonable grounds.

1458 The applicant says it may readily be inferred that the reason why Mr Brookes expressed his satisfaction that the consensus NPAT had declined to $92m was because he considered it would give Myer some leeway in the event that Myer earned less profit in FY15 than he had represented to the market that day. In other words, on the day after he made the representation about the increased FY15 NPAT, Mr Brookes was not only contemplating that Myer's FY15 profit would be lower, but he confirmed to the Myer board that he was happy that the analysts had not believed what he said to them and were forming different and more pessimistic conclusions about FY15. There is a superficial charm to this submission, but it does not go anywhere near to displaying an absence of reasonable grounds.

1459 In essence, the applicant submitted that the 14 September email should be read:

(a) such that Mr Brookes was implicitly saying to the Board, "I don't believe in this budget";

(b) to confirm that Mr Brookes did not have a real and genuine belief in the worth of the budget; and

(c) to confirm that the $107 million figure in the budget was a mere "hope", as presented in the applicant's counterfactual disclosure, and not Myer's "expectation" on 11 September 2014.

1460 But all of this is a substantial over-statement. Mr Brookes addressed the 14 September email in the second Brookes affidavit. Mr Brookes explained what he meant by his comments in the email, and gave evidence that:

> As at 14 September 2014 when I sent the Email, I continued to hold the view that Myer was likely to achieve the budgeted NPAT figure of $107 million or a figure relatively

close to this, and certainly a figure above the FY14 NPAT of $98.5 million.

1461 As part of his evidence, Mr Brookes explained why he had referred to news of the consensus drop as being “pleasing” or “good”. At the hearing on 5 December 2018 Mr Brookes was cross-examined about the 14 September email and his evidence in relation to it, but on a limited basis. I accept his affidavit evidence, which was not substantially impugned.

Summary

1462 In my view, the applicant has not shown that Myer lacked reasonable grounds for making the 11 September 2014 representation.

(d) A continuing representation? A failure to correct?

1463 Now as I say, Mr Brookes on behalf of Myer made the 11 September 2014 representation.

1464 The first question to consider is whether the representation was a continuing representation.

1465 Myer says that there is no proper basis to treat Mr Brookes as having repeated or remade his representation on subsequent days. This is for the following reasons.

1466 It is said that the applicant has not alleged that a representation was made on a day after 11 September 2014. All it has alleged is that the representation that Myer expected to achieve NPAT in excess of $98.5 million in FY15 was “continuing”. The applicant confirmed in its submissions that what was meant by the allegation that the representation was continuing was simply that the representation was made on 11 September 2014 and was not withdrawn.

1467 Further, Myer says that the applicant’s case now appears to be that Myer should be treated as if it remade or repeated the representation of 11 September 2014 on at least 189 occasions, being each day after 11 September 2014 up to and including 18 March 2015. So, the applicant submits that Myer was “continuing to represent, by its silence” its earlier statement made on 11 September 2014. But Myer says that the applicant does not explain how silence amounts to the making of a representation.

1468 Further, Myer says that there are numerous matters which tell strongly against any conclusion that Mr Brookes’ statement on 11 September 2014 should be treated as being “repeatedly remade”, such that s 769C can be invoked over the period.

1469 First, the statement was verbal and in general terms which did not identify a firm number or specific range for NPAT.

1470 Second, the representation alleged by the applicant was only one as to what Myer expected to achieve. There was nothing in the terms of what Mr Brookes said which suggested that he was stating Myer's expectation on any date other than 11 September 2014, or that Mr Brookes was intending to repeat the statement on each day after 11 September 2014.

1471 Third, the verbal comments were made in the context of accompanying written materials. In particular the verbal presentation to the analysts was accompanied by the written presentation, which included statements, inter alia, that "forward-looking statements … are current only as at the date of this release". Further, the ASX & Media Release, under the heading "Analyst and investor briefing", and immediately following a reference to this briefing (which provided a link to the webcast and accompanying slides), stated that "forward-looking statements … are current only as at the date of this release" and that "Subject to law, Myer assumes no obligation to update such information". On a reasonable reading of those comments, they would be understood to apply to both written statements in the ASX & Media Release and the oral briefing which the release in substance incorporated (or which accompanied it). Even if one could artificially construe such qualifications as relating to the written material only, it is difficult in context to think that anyone listening to Mr Brookes' comment would not have treated these qualifications as being equally applicable to what he said. That is, there is no basis to think that anyone would consider that statements in written form would be current only as at the date of release, but that oral statements, made concurrently with the written release, would present estimates that were current not only as at 11 September 2014 but as at all future dates. Accordingly, any person who listened to Mr Brookes' comments would therefore have done so in the context of express statements that such comments were current only as at the date of the release.

1472 Fourth, analysts and any investors who went to the trouble of accessing the briefing materials would recognise, and be aware of, the known volatility of profit for Myer and in the sector more generally. The possibility that expectations as to NPAT may change as the year progressed would be obvious to such an audience.

1473 Fifth, there is the evidence as to how the statement was treated by analysts, from which it can be inferred how the target audience understood the statement. In short, analysts did not treat what Mr Brookes said as "formal guidance" or "guidance", meaning that they did not take it to be a statement which became the yardstick for Myer assessing its continuous disclosure obligations.

1474 Sixth, it is unrealistic to treat a person as continuously remaking an earlier representation by reason of their silence. For example, to treat Mr Brookes as actually repeating, and therefore making, his 11 September 2014 representation on each day from 12 September 2014 to 18 March 2015, which he did not in fact do, is contrived and divorced from reality, especially when regard is had to the matters set out above. At most, it might be said that by silence a party impliedly represents that having regard to the continuous disclosure regime there is no need to make a further statement about its expectations as to NPAT. There is no basis to find that by such silence the party makes an actual representation by repeating an earlier statement.

1475 Seventh, although the applicant says that in support of its case that there was a "continuing representation" is Mr Brookes' evidence which the applicant says served to confirm that his representation of increased FY15 NPAT was a continuing representation, all that Mr Brookes said was that if he was to make a further statement of Myer's expected NPAT as at 14 September 2014, he would have repeated his comment three days earlier. But all that confirms is that nothing had changed in that three day period. It provides no basis to find that Mr Brookes' evidence supports the view that the representation of 11 September 2014 was repeated or remade on 14 September 2014 or at more temporally remote dates. All it indicates is that Mr Brookes believed that analysts were still aware of the representation of 11 September 2014 on 14 September 2014.

1476 Now Myer accepted that a non-disclosure case or failure to correct case may arise when a "continuing representation" is made which is not corrected when it becomes known to the maker that what has been represented, though accurate when made, has become false. A continuing representation in this sense is no more than a conclusion that the representation continues to have effect and is capable of being relied on, such that a failure to correct it when it is known that it is false may be misleading. But this is conceptually distinct from a representation that is repeatedly or even continuously made or remade, such that s 769C may apply.

1477 Myer says that the general principle as to a "continuing representation" of this type is summarised in *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 149 at [283] to [284] (Einstein J):

> The proposition summarised by Romer LJ in *With v O'Flanagan* [1936] Ch 575 at 583 is plainly correct:
>
> > "If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually

> entered into, owing to a change in circumstances, the representation then made would be to the knowledge of [A] untrue, and B subsequently enters into the contract in ignorance of that change in circumstances and relying upon that representation, A cannot hold B to the bargain."

> In short a representation may, depending always upon the precise circumstances in which it was made and upon later circumstances, have a continuing effect during the period of time following the date upon which the representation was made. The relevant period of time dealt with in the authorities is, for obvious reasons, invariably the period between the point in time when the representation was made and the point in time when it is acted upon by the representee, often by concluding a contract. Hence the springing up of the suggested duty upon the representor not to leave the representee under an error when the representation requires to be corrected, failing which correction, the representee continues ignorant of the intervening change of circumstances, and goes on by relying upon the representation as having continuing effect.

1478 Accordingly, Myer says that:

(a) first, an obligation to correct may arise if the earlier representation is "to the knowledge" of the representor untrue;

(b) second, this principle is based on the continuing effect of the representation after the date on which the representation was made;

(c) third, the representee must have acted on, that is relied on, the earlier representation which has not been corrected.

1479 To similar effect, in *Skiwing Pty Ltd t/as Cafe Tiffany's v Trust Co of Australia Ltd (Stockland Property Management Ltd)* (2009) 255 ALR 339 at [19] it was stated:

> One circumstance in which a representation might be regarded as a continuing one is where a representation, not initially misleading or deceptive, has been falsified to the knowledge of the representor. It has been suggested that in such a case there may be a duty to speak. Reliance on the representation may become actionable even though it was accurate when made. In this sense the representation is said to be a continuing one: see for example *Australian Securities and Investments Commission v Solution 6 Holdings Ltd* (1999) 30 ACSR 605; [1999] FCA 398 at [25]–[35] and *McGrath* at [147].

1480 So, the continuing representation cases are typically cases where a particular representation has been made with the aim of inducing a counterparty to enter into a particular transaction, and is in this context treated as a representation having a continuing effect such that there is a "duty" to correct it if it becomes to the knowledge of the maker incorrect. Generally, actual knowledge as to the falsity of the earlier statement is required before a duty to correct arises. But it may be sufficient if a party ought to have known of the falsity of the earlier statement. But Myer says that whilst that position may be arguable in the case of a representation of fact, it is not in relation to a representation that is based on a state of mind, such as a statement of intention, opinion or expectation. This is because it would amount to saying that the representor ought to have formed an opinion that was different to the opinion they previously held and then conveyed that new opinion to the representee. That contention in my view is not without its logic.

1481 Myer says that in this case it is important to focus on the representation that the applicant alleges was made and on which it bases its case, namely, "that [Myer] expected to achieve NPAT in excess of $98.5 million in the 2015 financial year". Mr Brookes' statement therefore concerned, and was a representation as to, an expectation by Myer as to a future state of affairs, being its NPAT at the end of FY15. That expectation of NPAT in excess of $98.5 million could only be falsified so as to give rise to a duty to correct if that expectation changed. An expectation is, of course, a state of mind. Myer says that its expectation on a subject as important as annual profit can only be constituted, according to principles of corporate attribution, by the views of the most senior members of its management ultimately responsible for the annual profit, in particular Mr Brookes as the CEO and, possibly, a member of the EGM such as Mr Ashby, or its board of which Mr Brookes was a member.

1482 Now in a "failure to speak" case the issue of whether silence is misleading is assessed by focusing upon the reasonable expectations of the target audience. That is, silence will not be misleading "unless the circumstances … give rise to the reasonable expectation that if some relevant fact exists it would be disclosed" (*Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41 (Gummow J) quoting French J in *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 46-054 at 53195; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [17] to [19] (French CJ and Kiefel J)). The "relevant fact" here is the expectation of Myer as to its NPAT in FY15.

1483 In this case, Myer says that there are two significant matters to which the "reasonable expectation" test directs attention.

1484 The first matter is that a reasonable expectation of disclosure would only arise if the expectation of Myer as to its NPAT changed. To put it another way, there would not be a reasonable expectation of the disclosure of draft or incomplete forecasts or forecasts that had not yet been approved of and, accordingly, that did not reflect the views of senior management and in particular the CEO, CFO and the board.

1485 But in my view, and as I have previously said, that expectation did change. And Myer should accordingly have made corrective disclosures. As I have said, in the context of and given the fact that the 11 September 2014 representation had been made, Myer should have corrected this by disclosing to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 was not likely to be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

1486 As I have already said, these are cascading possibilities because making any one correction *may* have removed the need for any later correction.

1487 In my view on the evidence, Myer can be taken to have held such an opinion or an expectation as to the likely FY15 NPAT on each of the above dates and accordingly there should have been disclosure of such an opinion to correct the 11 September 2014 representation. By not having so corrected at each of these points in time, Myer engaged in misleading or deceptive conduct in contravention of s 1041H.

1488 The second matter raised by Myer is that the reasonable expectation test must also have regard to the context in which Myer's obligation to disclose matters to the market arises, and in particular its obligations under s 674. A reasonable expectation of disclosure in the context of a listed company subject to the continuous disclosure obligations in s 674 of the Act and the listing rules may only arise in circumstances where disclosure is required under the continuous disclosure regime. Myer says that a reasonable person would not expect Myer to disclose information that does not need to be disclosed under s 674. I tend to agree. But none of this helps Myer because I have found that Myer contravened listing rule 3.1 and s 674 from 21 November 2014 by not making the requisite disclosures in any event.

(e) A separate misleading conduct claim

1489 The applicant advances a misleading conduct case based on a range of publications between 21 October 2014 and 3 March 2015, which it is said did not disclose any information about the earnings forecast matter.

1490 The claim is pleaded, in a single paragraph, as follows:

> [Myer's] failure to disclose between 11 September 2014 and 19 March 2015 any information about the earnings forecast matter, including when it published each of the:
>
> (a) Myer Holdings Limited 2014 Annual Report on 21 October 2014;
>
> (b) "Q1 2015 Myer Holdings Ltd Corporate Sales Call" on 11 November 2014;
>
> (c) Myer Holdings Limited Annual General Meeting Chairman's Address on 21 November 2014;
>
> (d) "Myer Holdings Ltd Strategic Review Conference Call" on 2 March 2015;
>
> (e) ASX & Media Release of 2 March 2015 entitled "Myer announces CEO succession and update on strategic review to transform business for future growth"; and
>
> (f) Letter to shareholders on 3 March 2015;
>
> was conduct by the Respondent that was misleading or deceptive or was likely to mislead or deceive, in breach of s 1041H of the Act (including by reason of the operation of s 769C of the Act in the circumstances alleged in paragraphs 13 and 14 above).

1491 The pleaded claim is therefore that conduct on each of the identified dates was misleading, because the publication of the identified material was not accompanied with a disclosure of any information about the earnings forecast matter.

1492 Now I agree with Myer that this claim in the present context does not add anything to the continuous disclosure claim and the misleading or deceptive conduct claim as I have articulated and discussed in the previous section. But in any event the following points can be made in relation to two of the dates identified by the applicant as being the dates on which misleading conduct occurred.

1493 First, Myer did not know the "information about the earnings forecast matter" as at 21 October 2014, and it can therefore have had no obligation to disclose what it did not know. Part of the information on which the applicant relies is the NPAT information (i.e. that NPAT in FY15 would be materially lower than $98.5 million). But that information was not known to Myer as at 21 October 2014.

1494 Second, Myer did not know the "information about the earnings forecast matter" as at 11 November 2014, and it can therefore have had no obligation to disclose what it did not know.

1495 Let me make some general observations.

1496 The allegations of misleading or deceptive conduct are said to arise by reason of Myer's silence or non-disclosure in specific announcements to the ASX in two ways.

1497 First, if there was an existing breach of Myer's continuous disclosure obligations, implying that there was materially price sensitive information which Myer was obliged to disclose but had not, the failure to make a corrective disclosure on the identified dates when Myer published announcements to the ASX or otherwise communicated with the market was misleading or deceptive. But this turns on the determination of whether Myer breached its continuous disclosure obligations at any time in the period from 11 September 2014 until the publication of the corrective disclosure on 19 March 2015. As I have said, I have found that Myer so breached from 21 November 2014, that is, at the time of the annual general meeting.

1498 Second and alternatively, by each of the relevant dates, it is said that additional information existed which meant that Myer no longer had reasonable grounds for the representation made on 11 September 2014, with the effect that a failure to correct was misleading or deceptive. I have dealt with this earlier.

1499 In summary, I accept the applicant's separate misleading or deceptive conduct case in terms of items (c) to (f) as set out above in the applicant's pleaded case.

CAUSATION AND LOSS ANALYSIS

1500 In shareholder class actions, applicants have typically advanced a market-based or indirect causation theory. This is different from the US "fraud on the market" theory. The latter recognises that reliance given the US statutory elements must be proved, but comes up with the device of the rebuttable presumption to ensure in the first instance that individual issues do not swamp common issues relating to reliance. The former does not require reliance at all, whether one is considering either or both of factual causation and normative causation.

1501 Further, applicants have advanced one or more of the following measures of loss.

1502 One measure is the difference between the price at which the shareholder acquired his interest and the true value of that interest; this is the "true value measure".

1503 Another measure is the difference between the price at which the shareholder acquired his interest and the market price that would have prevailed but for the contraventions; this is the "inflation-based measure", which itself relies upon market-based causation. The inflation-based measure is, in basic terms, measured by reference to the price paid upon acquisition and the market price that would have prevailed absent the alleged contraventions assessed by reference to the level of share price inflation at various points in time identified by the relevant event studies.

1504 Yet another measure is the difference between the price paid for the shares and whatever is left in hand upon a sale of the shares; this can be described as the "left in hand measure".

1505 Finally, there is the measure based upon the difference between the position the shareholder is in at the date of the trial as a result of acquiring the shares and the position he would have been in if he had not acquired the shares; I will describe this as the "no transaction measure".

1506 Now in the present case, the applicant is only advancing a case on behalf of itself and all group members based on the inflation-based measure. Although the applicant also originally advanced the true value measure, this method has now been abandoned.

1507 In summary, Myer has contended that the applicant's case on causation and loss fails for the following reasons.

1508 First, the sole causation case advanced by the applicant being market-based causation fails as a matter of law.

1509 Second, the approach for assessing share price inflation adopted by Mr Houston necessarily leads to the conclusion that there is no share price inflation and therefore no loss in this case. It is said that on Mr Houston's evidence, on 19 March 2015 the market was reacting to news that Myer expected FY15 NPAT to be below consensus, with the market already having factored in Myer's confirmation on 2 March 2015 that it was tracking against consensus and therefore below FY14 NPAT. Accordingly, Myer says that it necessarily follows from Mr Houston's evidence that there is no loss in this case.

1510 Third, Myer says that the applicant's evidence fails to establish any share price inflation in relation to any of the claims it brings for additional reasons, including the following:

(a) The applicant's evidence assesses the wrong counterfactual as a matter of law.

(b) The applicant's evidence assesses a counterfactual that does not correspond to the pleaded case.

(c) The applicant's evidence that the pleaded information was price sensitive is unsustainable.

(d) The applicant's analysis of share price inflation is based on an event study concerning the 19 March 2015 announcement, which is different from any disclosure that should have been made by Myer and from the assumed counterfactual disclosure.

(e) The counterfactual disclosure on which all of the applicant's evidence as to loss is based is not established by the evidence.

(f) Further, some or all of the items that Mr Houston assumes would be discounted or ignored by the market in his "upper bound" counterfactual assumption were not reasonable. Accordingly, on any view the alleged inflation would be significantly lower than claimed, including equal to zero. In particular, if the "upper bound" counterfactual assumption is increased so that it is in excess of Bloomberg consensus, it necessarily follows from Mr Houston's evidence that there is no share price inflation.

(g) Further, the counterfactual disclosure on which all of the applicant's evidence as to loss is based is temporally limited to the specific disclosure of that information immediately after 11 September 2014. But the applicant's evidence does not address the disclosure of that or different information at later points in time.

1511 Fourth, in any event and based upon the detail of the event studies of the 19 March 2015 announcement conducted by Dr Prowse and Mr Houston, Myer says that the evidence of Dr Prowse should be preferred and his results as to abnormal share price decline following 19 March 2015 should be accepted.

1512 As I have previously indicated, Mr Houston has used the wrong hypothesised counterfactual disclosure. Further, when one uses the correct counterfactual disclosure it would seem, given how the event study analysis has been carried out and using the inflation based measure of loss, that there is no meaningful share price inflation and accordingly no loss. This is because Mr Houston used Bloomberg consensus estimates as a proxy for market expectations as to

NPAT which he said was factored into the price of MYR ED securities. But the correct counterfactual disclosure concerning FY15 NPAT would have disclosed, in essence, similar figures to that of the Bloomberg consensus save with two qualifications. First, the disclosure required by Myer on 21 November 2014 would not have mirrored that consensus. Second, Myer's disclosure would have reflected its own opinions as to NPAT which, as I have said, were of a different quality to the Bloomberg consensus. I will elaborate later.

1513 But first let me turn to the question of market-based causation. As I have indicated at the outset, I accept the applicant's position on market-based causation.

(a) Market-based causation

1514 In 2011 as a commercial silk I was provoked to publish an article analysing this topic ("Class actions: Some causation questions" (2011) 85 ALJ 579-596 at 583 to 586). I did so in answer to a first-class article by Damian Grave, Leah Watterson and Helen Mould (Grave D, Watterson L and Mould H, "Causation, Loss and Damage: Challenges for the New Shareholder Class Action" (2009) 27 C&SLJ 483-505) who had attempted to pour cold water on market-based causation.

1515 Let me begin by repeating some of that analysis as a starting point for my present consideration.

1516 In shareholder class actions, there are various causation possibilities including: (a) establishing reliance; (b) satisfying a form of indirect causation; or (c) invoking the US "fraud on the market" causation theory. In terms of the legal causation test relevant to misleading or deceptive conduct, s 1041I requires establishing "loss or damage by conduct of another person". It has a similar focus to s 82 of the *Competition and Consumer Act 2010* (Cth). The word "by": (a) expresses the notion of causation without defining or elucidating it (*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525); (b) may embrace practical or common sense concepts of causation of the type discussed in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, but must yield to the primacy of the ordinary meaning of the statute (*Wardley* at 525); (c) only requires that the contravention be *a* cause of the loss, in the sense of the contravention materially contributing to the loss, rather than *the* cause or the predominant cause (*Henville v Walker* (2001) 206 CLR 459 at [14], [61], [69], [70], [106], [109], [163]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [62]).

1517 For the s 674 contravention, the legal causation test requires the connecting feature of "resulted from" (see s 1317HA). But how are these legal tests to be applied forensically?

1518 The first causation mechanism, establishing direct reliance, is the conventional means for establishing causation in misleading or deceptive conduct claims. That is, did the relevant shareholder read (or hear) and rely upon the content of the various published announcements, reports or accounts? And many cases have looked at such reliance questions, which are not common issues but rather specific to individual investors. Reliance may be a sufficient condition for establishing causation, but is it a necessary condition? This is an open question in shareholder class actions, particularly where the conduct involves non-disclosure to the market or misleading or deceptive conduct by omission. But at least the following can be said.

1519 First, the statutory language of "by" does not in and of itself suggest that it is a necessary condition.

1520 Second, although past cases in the misleading or deceptive conduct sphere focus on establishing reliance, that experience does not establish the induction that all such cases must establish it; one explanation for the de facto position may be that reliance was the only causation theory advanced in those cases due to the misplaced bias in favour of importing into the statutory test concepts from common law causes of action.

1521 Third, the "passing off" scenario cases do not suggest that the person having the cause of action need establish any reliance for himself, albeit that the potentiality for third party reliance is not irrelevant. More generally, cases in other contexts have accepted that reliance is not a necessary condition for causation; see *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [11] (fn 59), [143], *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529 and *Smith v Noss* [2006] NSWCA 37 at [27].

1522 Fourth, and contrary to these three points, Grave et al, in their article have argued that policy considerations support the view that reliance remains the appropriate test in market-based shareholder class actions. They state: "If the purpose of implementing the continuous disclosure regime was to assist people to evaluate their investment alternatives and encourage greater research by investors, dispensing with the need to prove reliance would not appear to be consistent with these objectives" (Grave et al at 487). This has support from *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 at [21] and [22], namely: "[the predecessor to s 1041H] should not be given a scope whereby an investor entering into a transaction could recover even if it knew the truth of the underlying misrepresentation, or was indifferent to its truth, and proceeds nonetheless". But s 1041I(1B) of the Act and s 12GF(1B) of the *Australian Securities and Investments Commission Act 2001*

(Cth) (the "contributory negligence" style defences) may suggest a policy of not reading down the primary liability causation provisions to necessarily require reliance. But you can flip this argument.

1523 Fifth, a difficulty in the thesis that you need to show reliance arises directly in the misleading or deceptive conduct context where silence is the principal focus (see e.g., *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31). How can a shareholder be said to rely upon unaware undisclosed information? But perhaps this issue can be finessed by saying that you can rely on conduct and circumstances in which the information not disclosed was material, so leading to reliance on the half-truth. But you can see the conceptual difficulties in asserting that reliance is a necessary condition. And this problem is even more acute when you get into the direct territory of listing rule 3.1 and s 674, which is beyond the half-truth scenario. The investor may have read nothing at all but merely assumed that in paying the market price, such a price reflected all information disclosed and disclosable to the market under listing rule 3.1. But another way to finesse the reliance question may be to express it nebulously in terms of an investor (or agent) "relying" upon the integrity of the market and the market price reflecting all such information. But you are then moving into indirect territory and into areas to which the investor may not have turned his mind. But then a broad view of "reliance" may not necessarily require the formation of a positive belief, although the US cases assume that it does, hence their innovative device of the "rebuttable presumption".

1524 The second causation mechanism, the indirect causation theory or market-based causation theory, steps outside the classic reliance theory. Grave et al describe it as the "mere inflation theory", but their label undersells it. It involves the following reduced causation chain for the inflation scenario:

Non-disclosure of material information by the company to the market	→	The listed price for the securities being inflated by such non-disclosure	→	Investors purchasing the securities "on market" at the inflated price

1525 Now various points.

1526 First, it is difficult to see how such a causation theory is necessarily excluded by the plain meaning of the statutory language for causation. The language for misleading or deceptive conduct causation is "by". For a s 674 contravention and the s 1317HA remedy, the wording is "resulted from", although nothing turns on this difference. Moreover, textual and contextual analysis of the broader statutory framework is not inconsistent with such a theory. And broadening the scope further, gleaning the legislature's hypothesised singular purpose from this textual and contextual analysis or even beyond that horizon does not establish a purpose that is inconsistent with the or an indirect causation theory being embedded within the statutory language. The statutory language, subject, scope and purpose so permit (see *Travel Compensation Fund v Robert Tambree* (2005) 224 CLR 627 at [45] and [49] per Gummow and Hayne JJ and *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [99] to [101] per Gummow, Hayne and Heydon JJ).

1527 Second, if reliance is not a necessary condition for causation, it implies the inclusion of some indirect causation theory within the statutory language.

1528 Third, if it matters, the indirect causation theory is not inconsistent with a "but for" approach (albeit non-comprehensive) or a "common sense" approach (albeit nebulous).

1529 Fourth, it might be said that it is anomalous to entertain an indirect causation theory which permits recovery by investors who knew or ought to have known the true position of the company's affairs. But actual knowledge may break the chain of causation. Moreover, for misleading or deceptive conduct claims, you do have s 1041I(1B) and s 12GF(1B) available, which embrace actual and constructive knowledge.

1530 Fifth, it might also be said that permitting such a theory means that, strictly, an investor may have a right to recover even if he did not hold any belief as to the integrity of the market price, rather than had knowledge or constructive knowledge of the true position. But practically, most investors, if asked, would say that they held such a belief (or at least that their broker or agent held such belief) at the time of acquisition. For those that did not have such a belief or would have purchased at the same price even if they knew the true position, again, such circumstances may break or negate any causation chain.

1531 All these questions are yet to be worked out. But even an indirect causation theory, if good, may still give rise to individual specific causation questions relating to knowledge, constructive knowledge and "contributory negligence" style defences.

1532 Finally, the third causation mechanism is the US "fraud on the market" doctrine. The doctrine embodies a rebuttable presumption that investors have relied on the integrity of the market price when deciding to purchase on market (*Basic Inc v Levinson* 485 US 224 (1988)). This is a different concept to inferred reliance; see *Gould v Vaggelas* (1985) 157 CLR 215 at 238 discussing the drawing of "natural" inferences in deceit cases. On one view the US doctrine is simply an idiosyncratic rule of evidence. The idea of this doctrine is that "the market is performing a substantial part of the valuation process [which would otherwise be] performed by the investor in a face-to-face transaction" (*Basic Inc* at 244). Of course, the doctrine could only apply to "on market" purchases or "off market" transactions where the market price was the sole price input without any other negotiating influences. But several points.

1533 First, in shareholder class actions, applicants' lawyers have generally not relied on this theory, but rather the indirect causation theory.

1534 Second, the US doctrine, if applied in Australia, would impermissibly rewrite the statutory causation tests. Moreover, why would an Australian court create a new common law evidentiary presumption even if strictly "permitted" to do so?

1535 Third, Grave et al have described the need for the US doctrine's creation as being an artefact of both the requirement to show reliance under s 10(b) of the *Securities Exchange Act 1934* (US) (and r 10b-5 thereunder) and the restrictions placed upon the commencement of class actions under r 23(b)(3) of the *US Federal Rules of Civil Procedure*. A problem had to be solved. US plaintiffs were required to prove a predominance of common issues to get class certification. But reliance is an individual question and necessarily has to be proved in each individual case. Consequently, having to prove reliance on an individual basis results in a predominance of individual issues. Hence, you could not get certification for your class action. Solution? Create the device of the rebuttable presumption. A commonality of reliance is then created. Problem solved. But there is no such problem under Pt IVA of the *Federal Court of Australia Act 1976* (Cth). Class actions automatically proceed if s 33C is satisfied. The balancing between common and non-common issues is at most a s 33N question. Moreover, the Australian statutory causation tests do not necessarily require reliance. The US problem does not arise. The US doctrine is irrelevant. Applicants' lawyers in Australia have prudently not pushed the envelope of their causation theories so far.

1536 Now no case decided since I expressed these views has highlighted any substantial new argument that has thrown any doubt on that analysis. Indeed, Edelman J in *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 at [145] to [182] fortified market-based causation.

1537 Let me now turn to Myer's arguments. I should say that I have set these out in some detail in case there is an appeal. But for my part I do not consider many of these arguments to be useful. They twisted and turned through the various authorities rather than focusing upon the precise statutory language. I would also note that the authority that they sought to dispose of, namely, Brereton J's decision in *Re HIH Insurance Limited (in liq)* (2016) 335 ALR 320 did not concern any breach of the continuous disclosure provisions concerning listing rule 3.1, s 674 and s 1317HA in that context. The relevance of that observation will become apparent later when I explain normative causation in terms of the legal responsibility the statute seeks to impose on a company for an investor's loss and damage flowing from a breach of the continuous disclosure provisions.

Myer's arguments

1538 As Myer points out, the applicant seeks compensation under ss 1317HA and 1325 of the Act in respect of Myer's alleged contraventions of s 674(2) of the Act, or under s 1041I of the Act in respect of Myer's alleged contravention of s 1041H of the Act. Myer submits that these claims must fail because the applicant has not established the causal link necessary to entitle it to compensation under these statutory provisions.

1539 Now it may be accepted that each of these provisions imports a notion of causation, although each uses slightly different language to express the relevant causal linkage between a contravention of the Act and the suffering of loss or damage. In the case of s 1041I the formulation is "by the conduct" of the contravener, whilst s 1317HA stipulates that the damage must have "resulted from" the contravention and s 1325 requires that the loss or damage be suffered "because of" the contravener's conduct; for the moment I will put doubts to one side as to whether s 1325 can be used at all given its apparently ancillary nature (see *Masters v Lombe (Liquidator); In the Matter of Babcock & Brown Limited (In Liq)* [2019] FCA 1720 at [45] per Foster J).

1540 Before proceeding further, let me set out the elements of the applicant's causation case.

1541 It is said that the applicant and group members purchased their MYR ED securities in a market:

(a) regulated by the listing rules and the Act;

(b) in which the price or value of such securities would reasonably be expected to be informed and affected by information disclosed pursuant to the regime thereby established;

(c) in which Myer had engaged in misleading or deceptive conduct or continuous disclosure failures in contravention of the Act; and

(d) where the price at which they purchased their securities had been inflated by Myer's contraventions.

1542 Therefore it is said that the applicant and group members suffered loss because they overpaid for their MYR ED securities, having acquired them in a market where the price had been inflated as a result of Myer's conduct.

1543 Myer asserts that this claim of causation is deficient and inadequate to satisfy the causal requirements underpinning an entitlement to compensation under ss 1041H, 1317HA and 1325 of the Act. This is because it invokes a plea of market-based causation, and eschews, so Myer says, the well-established requirement that in order to establish causation an applicant must prove some form of reliance in the sense that the representation said to be misleading or deceptive must have constituted an inducement to the action or inaction which has caused the asserted loss.

1544 Myer submits that a plea of market-based causation is not an adequate chain of causation for the purposes of the legal concept of causation under Australian law. It also says that to the extent that it holds otherwise, *HIH Insurance* is wrong and should not be followed. Further, Myer says that even if market-based causation does fall within the appropriate scope of the legal responsibility of a company for contraventions of ss 674 or 1041H of the Act, the applicant has failed to prove the facts necessary to establish market-based causation.

1545 Myer says that a plea of market-based causation, even if established, is a plea that is neither adequate nor sufficient to satisfy the requirements of causation necessary to entitle the applicant to relief. To the contrary, it says that the authorities relevantly demonstrate that in order to be actionable a representation said to be misleading or deceptive must have constituted an inducement to the action or inaction which has caused the asserted loss in order to establish the casual chain necessary to entitle a plaintiff to relief.

1546 Myer says that it is well-established that some form of reliance is necessary to complete the causal chain in a claim of misleading or deceptive conduct. It referred to *Wardley* where a plurality (at 525) of the High Court articulated the causal requirement applicable to the relevantly cognate provision in s 82 of the *Trade Practices Act 1974* (Cth) (TPA) in the following terms:

> The statutory cause of action arises when the plaintiff suffers loss or damage "by" contravening conduct of another person. "By" is a curious word to use. One might have expected "by means of", "by reason of", "in consequence of" or "as a result of". But

> the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s. 82(1) should be understood as taking up the common law practical or common-sense concept of causation recently discussed by this Court in *March v. Stramare (E. & M. H.) Pty. Ltd.*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act.

1547 The plurality then observed that in a case of a representation that is said to be misleading or deceptive, this causal requirement would be satisfied by proof of reliance, stating (at 525):

> Here we are concerned with contraventions of s. 52(1) in the form of misleading conduct constituted by misrepresentations. In this situation, as at common law, acts done by the representee in reliance upon the misrepresentation constitute a sufficient connexion to satisfy the concept of causation. And, if those acts result in economic loss, that is, loss other than physical injury to person or property, that economic loss will ordinarily be recoverable under s. 82(1).

1548 Myer submits that the statement of the plurality in *Wardley* was explained in *Ford Motor Company of Australia v Arrowcrest Group Pty Ltd* (2003) 134 FCR 522 as authority "for the proposition that a practical or common sense concept of causation should be applied in cases" involving a representation that is misleading or deceptive but not as "authority for the proposition that an applicant does not need to establish reliance in a claim for damages under ss 82 and 87 for breach of s 52" of the TPA (at [106] to [107] per Lander J, Hill and Jacobson JJ agreeing). Rather, the further statement of the plurality set out above was understood in *Arrowcrest* to have "confirmed that causation in cases of the kind mentioned would be established by proof of reliance" (at [109]). Thus, although it could be accepted that the impugned conduct need not "be the sole or principal inducement for a party", the "corollary of that is not that the misleading or deceptive conduct need not be an inducement for a party" (at [110]). This reflected the observation in *Gould v Vaggelas* that it is sufficient if the representation "plays some part even if only a minor part in contributing to the formation of the contract" in a claim of misleading or deceptive conduct inducing entry into a contract (*Arrowcrest* at [110]).

1549 In *Arrowcrest*, Lander J observed that none of the cases relied upon by Ford "support Ford's contention that causation can be established in a misrepresentation case without proof that the misrepresentations were relied upon" (at [123]). Rather, the cases supported (at [123]):

> a different (but irrelevant proposition …) that an applicant may establish causation in such a case by proving that a third party relied upon the misrepresentations and that party's reliance caused the applicant's damage.

1550 Thus, Ford could not establish loss without proving reliance upon the representations made by Tristar.

1551 Myer points out that the statements by the plurality in *Wardley* were also adverted to in *Digi-Tech (Aust) Ltd v Brand* (2004) 62 IPR 184 in rejecting the appellants' argument that it was not necessary for a party seeking to recover damages to show direct reliance upon misleading conduct by the representor. The appellants' case was put on the basis of an "indirect causation" theory analogous to the market-based causation theory. The appellants' case was characterised in the following terms (at [149]):

> The appellants put their case in this way. They said that if Digi-Tech had not produced misleading and deceptive forecasts concerning the revenue and gross margin of the products, Deloitte would not have produced a valuation to support the price of $72.5m. In the absence of that valuation, or any valuation supporting that price, the investment scheme would not have gone ahead and Mr Urwin would not have proposed the scheme to any of the investors. It was submitted that Digi-Tech's misleading conduct, thereby, caused Mr Urwin to act in a way that led to loss or damage to the appellants. They described this argument as the "indirect causation theory".

1552 In rejecting the appellant's arguments that indirect causation was sufficient, the Court distinguished between two types of cases, the first type of case being one where the misleading conduct had caused others to act to the direct prejudice of the plaintiff and the second type of case being one where the plaintiffs suffered loss because they, themselves, were induced by misleading representations to perform some act or omission by which they were prejudiced. The Court held that proof of reliance is an essential link in the chain of causation in the latter type of case.

1553 The Court explained (at [156]):

> The difference lies in the fact that in the first category of case no conduct on the part of the plaintiff forms a link in the causation chain. In the second category, the inducement of the plaintiff and his or her act or omission causing loss is an essential part of the chain. Without such inducement and a consequential act or omission on the part of the plaintiff there is indeed no linking chain between the misleading conduct and the plaintiff's loss.

1554 This analysis, in the Court's observation, demonstrated "the fallacy of applying the so-called indirect theory of causation" (at [157]). It was clear that "in cases of this kind (misrepresentation inducing a transaction) the courts have required reliance by or on behalf of the plaintiff on the misrepresentation as being essential to the proof of causation as required by s 82(1)" and that "[p]ersons who claim damages under s 82(1) on the ground that they entered into transactions induced by the misrepresentations of other persons must prove that they relied on such misrepresentations and, therefore, 'by' that conduct, they suffered loss or damage" (at [159]). Accordingly, the Court concluded that (at [158]):

> On the assumption that Digi-Tech's forecasts as to the revenue and gross margin of the products were misleading and deceptive, that misleading and deceptive conduct resulted in Deloitte producing, in essence, a misleading and deceptive valuation to support the price of $72.5m. That valuation enabled the investment scheme to be put together and proposed by Urwin to the appellants. But to complete the chain of causation, there must be something linking the appellants' loss to their entry into the investment scheme. That link is the inducement of the appellants and their consequential act of entering into the transaction to their prejudice. Without that link, there is no proof that the misleading conduct caused the loss.

1555 Myer points out that *Digi-Tech* was followed in *Ingot Capital*. That case concerned, inter-alia, ss 995 and 1005 of the *Corporations Law*. Section 995 of the *Corporations Law* prohibited misleading or deceptive conduct in connection with dealings in securities, and s 1005 provided a mechanism for recovery of loss suffered by the conduct of a person in contravention of, inter-alia, s 995. The investors' case for loss under ss 995 and 1005 was put on an indirect basis, namely that the relevant board had been misled and the investors suffered loss or damage by the contravention of s 995 because, if s 995 had not been contravened, the board would not have issued the prospectus and the notes (which were purchased by investors) would not have been issued.

1556 The reasoning in *Digi-Tech* was explained as follows (at [615] and [618]):

> [The court in Digi-Tech] held that the relief so claimed was based on a flawed "but for" test for causation. The Court held that, under s 82(1) of the *Trade Practices Act* (Cth), persons who claim damages on the ground of misleading or deceptive conduct in contravention of s 52, and who allege that they incurred those damages by acquiring something in consequence of such conduct, must prove that they were misled by that conduct. If that is not proved, the plaintiffs fail to establish that the damages claimed were suffered "by" that conduct …
>
> The rationale of *Digi-Tech (Australia)* is that loss incurred by plaintiffs in acting (or refraining from acting) to their prejudice can only be loss caused "by" conduct contravening s 52 if the plaintiffs are misled by that conduct. Likewise, in my view, such plaintiffs can only succeed in cases based on a contravention of s 995 [of the *Corporations Law*] if, in fact, they are misled. I stress that by "such plaintiffs" I mean plaintiffs who claim to have suffered loss brought about by their own actions or omissions coupled with misleading conduct by the defendants.

1557 Further, it was said that *Arrowcrest* was entirely consistent with *Digi-Tech*.

1558 Further, Giles JA rejected the appellants' argument that the observations in *Digi-Tech* were obiter, stating that he did "not regard the Court's supplementary observation that the 'indirect causation theory' was unavailable on pleading grounds as detracting from the considered statements in the passages" in *Digi-Tech* (at [11]). Giles JA explained the contrast drawn in *Digi-Tech* between types of cases in the following terms (at [12]):

> Their Honours were contrasting the kinds of claim, and were not restricting what

> followed to where there was direct inducement of the plaintiff; they were identifying the kind of claim in which inducement of the plaintiff played a part. The distinction drawn in *Digi-Tech (Australia) v Brand* is between cases where conduct on the part of the plaintiff "forms a link in the causation chain" (at 54,242 [156]) and where it does not. Where it does, there must be reliance on the misleading conduct in the manner next explained. Where it does not, there may be recovery if the act of the innocent party induced by the misleading conduct "by its very nature, causes the plaintiff's loss" (at 54,242 [155]), but that is where the plaintiff passively suffers loss from another's act.

1559 Thus, in referring to a case of "misrepresentation inducing a transaction", *Digi-Tech* was referring to "a case where the plaintiff was not a passive sufferer from another's act, but was someone who made a decision to enter into the transaction to which the representation was material" (at [13]). *Digi-Tech* was not confining the requirement of causation in a case of that kind to "direct inducement" but were concerned, instead, that the "decision and the materiality to it of the representation was a link in the causal chain" (at [13]).

1560 Giles JA continued (at [19]):

> Where there is a decision by the plaintiff whether or not to enter into a transaction, any resulting loss or damage is not dictated by the laws of nature. That is not the first class of case, but the second. If the plaintiff would not have had the opportunity to enter into the transaction, that "but for" element does not go beyond a reason why the plaintiff entered into it. Conduct which merely provides the opportunity for the plaintiff to enter into the transaction will not suffice, unless the purpose of s 995 and s 1005 is to provide recompense for loss or damage suffered only because there was the opportunity to enter into the transaction and without regard to materiality of the representation to the plaintiff's decision to enter into the transaction.

1561 In affirming the principles expressed in *Digi-Tech*, Giles JA observed that the requirement that there be some reliance was consistent with the policy underlying provisions like s 1005 of the *Corporations Law* and cognate provisions, like s 82 of the TPA. His Honour observed (at [21]):

> Section 1005 should be applied in a way that promotes provision of correct information to investors and protects them in making investment decisions. But this does not warrant compensating investors regardless of the effect on their decision-making of the misleading conduct. Once provided with correct information, the investors must make their investment decisions. Perhaps in some circumstances a plaintiff enters into a transaction simply because the opportunity to do so is available, when it would not have been available had there not been the misleading conduct, and that plaintiff can be regarded as in like position to the passive sufferer from another's act. That will not be so as a matter of course, and was not so in the present case.

1562 In reaching this conclusion, Giles JA was fortified by the statement of Handley AJA in *Gardiner v Agricultural and Rural Finance Pty Ltd* (2008) Aust Contract R 90-274 at 90,408 at [442] when referring to ss 995 and 996 of the *Corporations Law*, 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". This statement by Handley AJA involved, in Giles JA's opinion, "the correct approach to an action under s 1005 to recover loss or damage suffered by contravention of s 996" (at [41]).

1563 Myer submits that the reasoning and conclusions expressed in each case correctly reflects the causal requirements applicable to a claim based on misleading or deceptive conduct where the defendant's conduct is a link in the relevant chain of causation.

1564 Let me say now that I do not completely accept any such narrow analysis of these cases. Moreover, and importantly, it should be apparent that none of this analysis has anything to do with s 674 and causation analysis concerning a breach of the continuous disclosure provisions.

1565 Now Myer says, putting *HIH Insurance* to one side, that the cases ordinarily cited by proponents of market-based causation, namely, *Janssen-Cilag* and *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd* [2003] NSWCA 84, are entirely consistent with the proposition that a plaintiff must prove some form of reliance on the relevantly misleading or deceptive conduct in order to establish a necessary link in the causal chain. And Myer says that contrary to the position adopted by proponents of market-based causation, neither case eschews the concept of reliance nor supports the proposition that proof of reliance is not part of the causal connection necessary to support a claim for misleading or deceptive conduct. Rather, each case provides further support for the proposition that a plaintiff must suffer loss as a result of someone being induced to act or to refrain from acting by the defendant's wrongful conduct.

1566 So, Myer says that in *Janssen-Cilag*, the plaintiff brought an action against Pfizer alleging that Pfizer made misleading and deceptive representations to consumers through an advertising campaign which caused the plaintiff loss because, as a result of the misrepresentations, members of the public and pharmacists were induced to purchase Combantrin, a drug marketed by Pfizer, instead of the plaintiff's drug, Vermox. The plaintiff's claim was not that it had been misled by Pfizer's misrepresentation but that members of the public had been misled causing the plaintiff's loss. Pfizer resisted an award of damages under s 82 of the TPA on the basis that "only a person who relied on the representation which constituted the contravention of s 52 can recover damages under s 82" whereas the plaintiff "contended that a person who was not himself misled directly by the representation but who suffered injury caused directly by the fact that another person who did rely on the representation was misled or deceived by it can recover damages under s 82" (at 528).

1567 In upholding the plaintiff's claim, it was stated (at 529):

> Section 82 is the vehicle for the recovery of loss or damage for multifarious forms of contravention of the provisions of Pts IV and V of the Act. It is important that rules laid down by the courts to govern entitlement to damages under s 82 are not unduly rigid, since the ambit of activities that may cause contraventions of the diverse provisions of Pts IV and V is large and the circumstances in which damage therefrom may arise will vary considerably from case to case.
>
> What emerges from an analysis of the cases (and there are many of them) is that they do not impose some general requirement that damage can be recovered only where the applicant himself relies upon the conduct of the respondent constituting the contravention of the relevant provision.
>
> Also, a perusal of the provisions of Pts IV and V, the contravention of which gives rise to an entitlement to an applicant for compensation for loss or damage, points to the conclusion that applicants may claim compensation when the contravener's conduct caused other persons to act in a way that led to loss or damage to the applicant …

1568 So, whilst it was accepted that a plaintiff's loss or damage must be caused by the respondent's misleading or deceptive conduct, it was said that there was "nothing in the language of the Act or its purpose to warrant the suggestion that the right of an applicant for damages under s 82 is confined to the case where he has relied upon or personally been influenced by the conduct of the respondent which contravenes the relevant provision of Pt IV or Pt V" of the TPA (at 528).

1569 *Stockland* involved an application of *Janssen-Cilag*. In that case, the respondent had brought a cross-claim against the Stockland group of companies alleging that one of them had made false representations to others within the group that the respondent was responsible for a claim against the Stockland group of companies and was liable to them in negligence. The false representations were said by the respondent to have caused it loss because other entities within the Stockland group of companies formed the view that the respondent was not competent so that, whereas it had previously been making substantial profits from its work for the Stockland group, the respondent no longer had that work and those profits. The applicant resisted the respondent's cross claim for damages on the ground that there was no allegation that the respondent "had relied on the representations", the only reliance alleged being that of others within the Stockland group of companies (at [27]). In rejecting this argument, it was stated, citing *Janssen-Cilag*, that (at [27]):

> there is no requirement in the Trade Practices Act to the effect that damages are recoverable under s52 and s80 only if they are caused to a plaintiff by reason of the plaintiff itself being misled by the representations. A plaintiff may be able to recover

> damages for loss suffered by the plaintiff because others are misled by a defendant's misleading conduct.

1570 Myer says that it is apparent therefore that neither *Janssen-Cilag* nor *Stockland* provide any support for the proposition that reliance is no longer a necessary part of the causal chain in a claim for misleading or deceptive conduct, or that causation may be established without proof of any form of reliance or inducement. Indeed, it says that *Arrowcrest* made it clear that *Janssen-Cilag* "is not authority for the proposition that causation can be established without proof of reliance" (at [115]). It is instead "authority for the proposition that the applicant need not establish that it relied upon the respondent's conduct, but can establish liability by proof that others did, as a result of which the applicant suffered loss" (at [115]).

1571 Now even if all of this be so, in my view it says nothing about causation concerning contraventions of the continuous disclosure requirements.

1572 Further, Myer says that the corollary of the proposition that an applicant may satisfy the causal chain by proving that others relied upon the misleading conduct is not the proposition that reliance is irrelevant to the issue of causation. Indeed, *Arrowcrest* pointed out that *Janssen-Cilag* was not authority for Ford's contention that proof of reliance was not necessary to establish causation, observing (at [116]):

> Indeed if anything it supports the respondent's contention that reliance is a necessary element to establish causation when the conduct complained of is constituted by misrepresentations. The applicant could not have established its case in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* without proof that there was reliance by the consumers.

1573 Further, Myer says that *Arrowcrest* observed that other cases often cited by proponents of market-based causation, namely, *Hampic Pty Ltd v Adams* [1999] NSWCA 455 and *McCarthy v McIntyre* [1999] FCA 805, also provided no support for the proposition that causation may be established without proof of reliance, and were themselves cases in which some form of reliance had been proven. Thus, in *Hampic*, the cleaner that had contracted dermatitis was able to succeed because the respondent's supervisor had read the label and distributed the product to the cleaner in accordance with the label's instructions. *Hampic* was not, therefore, a case of no reliance, but a case of reliance on the conduct by a person apart from the applicant in circumstances where that reliance caused the applicant damage. The same could be said of *McCarthy*, a case where the applicant proved reliance by establishing that the relevant Bank had relied on false trading figures in deciding to advance the applicants a loan which was used by the applicants to purchase a business from the respondent.

1574 Accordingly, as *Arrowcrest* said, cases like *Janssen-Cilag* should properly be understood as supporting the proposition that an "applicant may establish causation in such a case by proving that a third party relied upon the misrepresentations and that third party's reliance caused the applicant's damage" (at [123]), but not as support for any wider proposition concerning the centrality of reliance to the causal requirements applicable to a claim of misleading or deceptive conduct.

1575 But I would just note at this point for the moment that even accepting Myer's analysis of these authorities, it is a non-sequitur to argue that because the current universe of cases have found that:

(a) reliance by the applicant is sufficient to establish causation; and

(b) reliance by a third party is sufficient to establish causation by the applicant,

it follows that reliance *must* be established in either of those two forms in *any* and *every* case. That is to re-write the relevant statutory language. But let me continue with Myer's arguments.

1576 Myer submits that cases like *Janssen-Cilag* and *Stockland* should be understood merely as cases in which the concept of reliance was extended rather than discarded. So in *Digi-Tech, Stockland* was explained on the following basis (at [155]):

> [*Stockland*] followed the approach of *Janssen-Cilag*. *Stockland*, like *Janssen-Cilag* was not a case where the plaintiff claimed damage caused by entering into a transaction induced by misleading conduct. In both cases the misleading conduct had caused others to act to the direct prejudice of the plaintiff. That is to say, the chain of causation was as follows: first, misleading conduct by the defendant; second, an innocent party is induced by the misleading conduct to act in some way; third, the innocent party's act, by its very nature, causes the plaintiff loss. On this basis, no act of the plaintiff contributes to the loss. The chain of causation is complete without there needing to be any act or omission on the part of the plaintiff.

1577 The Court observed that cases like *Janssen-Cilag* and *Stockland* were to be distinguished from a case where a plaintiff suffers loss because it is said to have been induced by misleading representations to perform some act or omission causing it loss. The Court said (at [156]):

> The *Janssen-Cilag* and *Stockland* category of claim is materially different to that which occurs when plaintiffs suffer loss because they, themselves, are induced by misleading representations to perform some act or omission by which they are prejudiced. The difference lies in the fact that in the first category of case no conduct on the part of the plaintiff forms a link in the causation chain. In the second category, the inducement of the plaintiff and his or her act or omission causing loss is an essential part of the chain. Without such inducement and a consequential act or omission on the part of the plaintiff there is indeed no linking chain between the misleading conduct and the plaintiff's loss.

1578 But I would note that even if these cases involve extensions of the concept of reliance, how does it follow from that observation that the boundaries of causation are so limited? It does not. All that such an artificial limitation can be is an article of faith by the opponents of market-based causation. But such a tenet of faith is heretical to the one true faith of statutory interpretation. Let me continue.

1579 Myer also says that its understanding of *Janssen-Cilag* and cases like it is consistent with observations in *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 that "the entitlement to recover loss or damage in a case of misleading and deceptive conduct is not confined to persons who relied on the conduct" in the sense that "a plaintiff need not establish that the plaintiff directly received and relied upon the misrepresentation made by a defendant" (at [1376]). Indeed, Myer says that contrary to the understanding of *ABN AMRO* advanced by proponents of market-based causation, nothing in *ABN AMRO* undermines the force of *Digi-Tech* and *Ingot Capital* or expands the scope of *Janssen-Cilag*. To the contrary, *ABN AMRO* involves no more than the routine application of these cases.

1580 *ABN AMRO* concerned the marketing and sale of an exotically structured credit derivative instrument (Rembrandt Notes) by ABN Amro which had to its knowledge been given an AAA credit rating in contravention of statutory proscriptions on misleading or deceptive conduct. The Rembrandt Notes, which together with the rating concealed and shifted risk, were marketed and sold by ABN Amro to Local Government Financial Services Pty Ltd, which in turn marketed and sold the Rembrandt Notes to municipal councils by, inter-alia, emphasising that the notes carried a AAA rating, which meant that they were investments of a kind that municipal councils were permitted to make in accordance with the relevant Ministerial Order. A basis on which ABN Amro denied liability, both at trial and on appeal, was that it had not directly induced the municipal councils to purchase the Rembrandt Notes so that the element of reliance necessary to establish the causal chain for misleading or deceptive conduct could not be completed.

1581 But the Full Court rejected ABN Amro's contention on the basis that it was not necessary for there to be proof of direct reliance (at [1376]). This did not, however, carry with it the corollary that proof of some form of reliance was irrelevant to the causal requirements applicable to a claim of misleading or deceptive conduct. The Full Court observed that (at [1377]):

> The PA Councils are entitled to rely upon ABN Amro's conduct in disseminating and promoting the rating to LGFS as a step in the chain of causation that led to their losses. Part of that chain of causation was the PA Councils' reliance upon the AAA rating,

> which they would never have received had it not been provided by ABN Amro to LGFS, which would not have happened if LGFS had not relied upon the ABN Representations …

1582 It was not to the point, therefore, that the representations had not been made directly by ABN Amro to the municipal councils. So it was said that "ABN Amro represented to LGFS that the rating could be relied upon and that the rating meant that the CPDO had an extremely strong capacity to meet its obligations … and that LGFS relied on those representations" (at [1379]). And the representations made by ABN Amro to LGFS were a decisive consideration in LGFS's decision to purchase the Rembrandt Notes and to sell them to the municipal councils. In this sense, the representations made by ABN Amro "to LGFS, and LGFS' reliance upon them, were a material cause of the [municipal councils'] decision to invest in the Rembrandt notes" (at [1380]). Therefore, *ABN AMRO* is not a case where causation was established in the absence of reliance.

1583 Moreover, Myer says that the reasoning of the Full Court in *ABN AMRO* needs to be viewed against Jagot J's numerous findings as to the purpose of the representations made by ABN Amro, and the effect of those representations on LGFS and the municipal councils. The secure findings of Jagot J to which the Full Court specifically referred included that:

(a) the representations made by LGFS in reliance on the representations made by ABN Amro constituted an opinion intended to induce the council officers to invest in the product and that, considered in context, many of them constituted a recommendation to invest in the product, noting that the course of dealings between LGFS and the municipal councils meant that "LGFS expected and intended that, in making a decision to invest, the councils would rely on LGFS' advice" (at [1032]);

(b) the municipal councils invested in reliance on their erroneous beliefs induced by LGFS's conduct (at [1160]);

(c) the municipal councils specifically relied on the representation made by LGFS that the Rembrandt Notes were specifically designed for local government which was based on the AAA rating assigned to the Notes; and

(d) the representations made by LGFS, which were derivative of the representations made by ABN Amro, were a "powerful inducement for councils to believe the product was particularly well suited to their investment requirements having regard to the Ministerial Order, the [I]nvestment [G]uidelines and the prudent

> person standard to which councils were subject and the fact that councils deal with public money ultimately required for public purposes" (at [1193]).

1584 Accordingly, Myer says that *ABN AMRO* does not assist proponents of market-based causation. But that is both a distortion and an overstatement. *ABN AMRO* had nothing to say against market-based causation. And clearly it was not defining or limiting the boundaries of causation under the relevant statutory tests.

1585 Myer also says that there is no warrant for attributing any wider operation to cases like *Janssen-Cilag*. Further, Myer says that it would be erroneous to view cases like *Janssen-Cilag* as allowing a party to establish the relevant causal chain by proving reliance by any person. This is contrary to the settled rule that, in order for a party to successfully establish "indirect causation" on the basis of third party reliance, there must be a "sufficient and direct link" or a "requisite element of proximity" (*Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [31]; *Chowder Bay Pty Ltd v Paganin* [2017] FCA 332 at [379]). So it is said that cases like *Janssen-Cilag* do not assist the applicant in this proceeding. And Myer says that they provide no basis for invoking or supporting the concept of market-based causation.

1586 Now Myer had to accept that most of the authorities concerned the requirements of causation applicable to a claim of misleading or deceptive conduct under the TPA or its successor. But Myer says that the principles of causation applicable to such a claim are to be treated as applicable because such provisions are cognate to the provisions of the Act that are in issue in this proceeding. It says that the meaning of the words "by the conduct of another", as deployed in s 1041I, for example, is well-established, both in the context of that provision and its equivalents. Further, it says that whilst the tests for causation in ss 1317HA and 1325 have received less attention than the "by the conduct of" formulation, the words "because of" and "resulted from" must posit a test for causation which is at least as onerous as that required by the term "by".

1587 I would say now that this submission is problematic for a number of reasons.

1588 First, it appears to be premised on a narrow view of causation relating to misleading or deceptive conduct that I do not accept. Reliance of the applicant may be a sufficient condition for such causation. Reliance of a third party may also be enough with other matters. But neither of these mechanisms are necessary conditions.

1589 Second, none of these cases deal with ss 1317HA and 1325 in the context of dealing with s 674.

1590 Third and relatedly, the point is not to just divine the meaning of "by the conduct of", "because of", "resulted from" and "by" in some desiccated and decontextualised way and to argue parity of meaning or relative differences in a vacuum. One has to construe and apply these phrases with and in the context of the primary statutory provision said to be contravened. The relevant factual and normative causation are to be considered in connection with the underlying normative standard said to be contravened.

1591 I will return to these points later. Let me turn for the moment to *HIH Insurance*.

1592 Myer says that I should decline to follow *HIH Insurance*. It is said to be inconsistent with a long line of established authority and wrongly decided, insofar as it holds that market-based causation provides an adequate basis for causation under Australian law. Further, Myer says that policy and principle militate against the conclusion reached in *HIH Insurance*.

1593 *HIH Insurance* concerned a plea of indirect causation in the sense that the plaintiffs "did not essay to prove that they were induced to acquire their shareholdings in HIH by the contravening conduct, or that they did so in direct reliance on the contravening conduct" but instead contended that the requirements of causation were established by reason of the fact that "they acquired HIH shares on the ASX at the then prevailing market price, and that that market price was artificially inflated by reason of the overstated reported financial results" (at [38]). The plaintiffs contended that the requirements of causation were satisfied by the facts that (at [38]):

> (1) the contravening conduct misled the market into attributing an inflated value to HIH shares, (2) the plaintiffs acquired their shares in that inflated market, and (3) the plaintiffs thus paid more than they would otherwise have paid for the same shares.

1594 The defendant demurred, observing that *Digi-Tech*, *Ingot Capital* and *Arrowcrest* had plainly established that reliance was necessary to complete the chain of causation where a person claimed to have suffered loss by reason of the entry into of a transaction and that indirect causation was only available where the plaintiff was a passive participant and a third party has been induced by the misleading or deceptive conduct to act to the plaintiff's prejudice.

1595 His Honour's reasoning on this aspect commenced with the view that the ultimate issue posed by s 82 of the TPA and its equivalents "is one of causation, not one of reliance, and reliance is not a substitute for the fundamental question of causation" (at [42]). Accordingly, in his Honour's view (at [42]):

> As a matter of principle, if causation — "by conduct of" — can otherwise be established, it cannot matter that reliance is not established. Thus, the statutory cause of action does not, *per se*, include reliance as a necessary material fact (although that

> is not to say that it will not be one, as a matter of fact, in the context of many, if not most, individual cases).

1596 This view was said to be supported by *Janssen-Cilag*, *Stockland*, *Hampic* and *Australian Breeders Co-Operative Society Ltd v Jones* (1997) 150 ALR 488. The effect of these cases, according to his Honour, was to have established that "proof of reliance on the contravening conduct is not an essential element of a cause of action for damages under s 82 of the TPA" because a "sufficient causal connection can be established in ways that do not involve the applicant directly relying on the contravening conduct" (at [50]). And in his Honour's opinion, nothing in *Digi-Tech* or *Ingot Capital* militated against that conclusion (at [71]).

1597 His Honour explained away *Arrowcrest* on the basis that it only required proof of reliance at some stage in the chain of causation. His Honour stated (at [56]):

> What [*Arrowcrest*] establishes is not that the applicant must necessarily prove that *it* relied on the contravening conduct, but that the applicant must establish that *somewhere* in the chain of causation, *someone* relied on the contravening conduct — in other words, that someone was misled or deceived, and that such deception brought about prejudice to the applicant. Unless *someone* in the chain of causation is deceived, it cannot be said that the ultimate loss to the applicant is "by conduct of" the respondent, because the conduct would be immaterial to the ultimate loss unless it impacted somehow on the causative process.
>
> (Original emphasis.)

1598 *Digi-Tech* and *Ingot Capital*, on the other hand, were said not to "deny recoverability in a case such as the present on the basis of indirect market causation" (at [71]). Rather, there was not in *Ingot Capital* "any suggestion that the investors actually knew or were indifferent to the true position — although avoiding the potential for investors in such a position to recover was an important influence in" *Ingot Capital* and *Digi-Tech* (at [71]). Each case had to be read in their context according to his Honour. Thus, it was said to be relevant that (at [71]):

> neither involved "market-based causation"; both were concerned with a scenario in which the alternatives were transaction or no transaction, in which the sole causative role of the contravening conduct was in the barest 'but-for' sense to contribute to the creation of the opportunity for the relevant transaction to take place; neither were concerned with a case in which the alternatives were not transaction or no transaction, but transaction at a lower or higher price, in which the contravening conduct had the necessary consequence that the higher price would obtain.

1599 His Honour found it important that *HIH Insurance* was "not a case in which, on the relevant hypotheses, no-one was misled: while the contravening conduct did not directly mislead the plaintiffs, it deceived the market (constituted by investors, informed by analysts and advisors) in which the shares traded and in which the plaintiffs acquired their shares" (at [73]). His Honour opined that the acquisition of shares on the share market at market price carries with it an inducement to shareholders to enter the transaction on the terms on which they do by the state of the market. In so doing, investors "may reasonably assume that the market reflects an informed appreciation of a company's position and prospects, based on proper disclosure" (at [73]). Thus, it was the case that if "the contravening conduct deceived the market to produce a market price which reflected a misapprehension of HIH's financial position (which is a factual question to be resolved in conjunction with the quantification of damages), then it had the effect of setting the market at a higher level — and the price the plaintiffs paid greater — than would otherwise have been the case" (at [74]). Plaintiffs in this position were said by his Honour to be inevitably exposed to loss.

1600 It was by reference to this analysis that his Honour held that the chain of causation had been established, that chain being identified by his Honour in the following terms (at [75]):

> The chain of causation was (1) HIH released overstated financial results to the market, (2) the market was deceived into a misapprehension that HIH was trading more profitably than it really was and had greater net assets than it really had, (3) HIH shares traded on the market at an inflated price, and (4) investors paid that inflated price to acquire their shares, and thereby suffered loss. Thus, the contravening conduct materially contributed to that outcome.

1601 In these circumstances, his Honour could not see "how the absence of direct reliance by the plaintiffs on the overstated accounts denies that the publication of those accounts caused them loss, if they purchased shares at a price set by a market which was inflated by the contravening conduct: the contravening conduct caused the market on which the shares traded to be distorted, which in turn caused loss to investors who acquired the shares in that market at the distorted price" (at [77]). His Honour concluded, therefore, that "'indirect causation' is available and direct reliance need not be established" (at [77]).

1602 Now Myer submits that there are four reasons why the approach taken, and conclusions reached, by his Honour were in error and should not be followed by me.

1603 First, Myer says that his Honour erred in treating *Digi-Tech*, *Ingot Capital* and *Arrowcrest* as though they did not deny recoverability in cases where it is alleged that a misrepresentation induced entry into a transaction, that is, where it is alleged by a plaintiff that it has suffered loss by acquiring something in consequence of another party's contravention, but there has been no proof of reliance direct or otherwise. According to Myer, these cases required proof of reliance in cases of that kind. Myer says that the bases on which his Honour sought to distinguish these cases, namely, that they did not involve market-based causation and were concerned with a scenario in which the alternatives were transaction or no transaction (at [71]), are difficult to follow. Myer says that there is nothing in the reasoning of *Digi-Tech* or *Ingot Capital* that suggests that these features were relevant to, or had any effect upon, the reasoning and conclusions expressed in either case. Rather, it was made plain in *Digi-Tech* and *Ingot Capital* that proof of reliance is a necessary part of a causal chain in a case where the plaintiff alleges that it suffered loss by reason of its own acts or omissions coupled with misleading conduct by the defendant. According to Myer, the reasoning in *Digi-Tech* or *Ingot Capital* admits of no qualifications or exceptions in the principles applicable to a case of that kind, and it was an error for his Honour to proceed otherwise. Further, although his Honour sought to explain away *Arrowcrest*, his Honour's reasons never explain how his conclusion is consistent with the requirement in *Arrowcrest* that there must be proof of reliance by *someone* in the relevant chain of causation.

1604 Now let me say that even if there is merit in some of these points, it hardly avails Myer for reasons which I have already explained. These cases do not deal with causation in the context that I am considering dealing with continuous disclosure. Moreover, even if these cases did ultimately turn on some form of reliance, these cases did not purport to circumscribe the universe of possibilities even for misleading or deceptive conduct.

1605 Moreover, Myer says that his Honour's attempt to justify his conclusion on the basis that the case before him was analogous to the first class of case identified by McHugh J in *Henville v Walker* does not assist. McHugh J stated (at [100] to [101] and [103]):

> In some situations, the legal framework may require a finding that, despite a causal connection in a physical sense between the breach and damage, no causal connection exists for legal purposes. In other situations, the legal framework may require a finding that a causal connection exists even though no more appears than that the damage followed after breach of a legal norm.
>
> In the first class of case, some act of the defendant may have set in train, or some omission of the defendant may have failed to set in train, a series of physical events that resulted in or could have avoided damage to another person or property. In this situation, the damage occurred because, given the act or omission, the laws of nature dictated the result. The physical connection between the defendant's act or omission and the damage suffered, and the materiality of the connection is usually apparent, although often enough it will require expert evidence to demonstrate the connection. In this situation, questions of causation usually present no difficulty, although questions of remoteness of damage may do so. Exceptionally, however, the policy or rationale of the legal norm that has been breached will require the court to disregard the physical connection and to make a finding of no causal connection …
>
> In the second class of case, the damage will not have occurred because of the laws of nature but because a person has acted to his or her detriment by reason of or following some conduct of the defendant. The conduct may be an act, an omission, a statement or a suggestion. But it will not be regarded as causally connected with the detriment if

> it provides no more than the reason why the person acted to his or her detriment. If the defendant intended the person suffering a detriment to act in the general way that he or she did, the common law will invariably hold that a causal connection existed between the conduct and the detriment. But if the conduct merely provides the reason why the person acted, it will not be sufficient to establish a causal connection unless the purpose of the legal norm that the defendant has breached is to prevent persons suffering detriment in circumstances of the kind that occurred. If a broker negligently advises a client to retain shares because they are a good investment, the broker will be liable for the loss sustained in retaining those shares. But if, having received that advice, the client decides to buy more shares, the broker will not be liable for the further losses unless the terms of the original retainer imposed a duty on the broker to advise in respect of further purchases.

1606 His Honour reasoned that a case of market-based causation fell within the first category of case identified by McHugh J because "the laws of the market" dictated the inevitable consequence of the contravening conduct, and that "the laws of the market" were analogous to the "laws of nature" (at [74]).

1607 But Myer says that this analogy is flawed. The distinction articulated by McHugh J in *Henville v Walker* was between occurrences brought about by the laws of nature, that is, physical events, following some act or omission of the defendant (a first category case) and occurrences brought about because a person has acted to his or her detriment by reason of or following some conduct of the defendant (a second category case). Properly characterised, *HIH Insurance* was a second category case. Accordingly, so Myer says, the statements by McHugh J in *Henville v Walker*, applicable to the first category of case, do not assist.

1608 I would say here that I disagree. McHugh J's first category case is not a bad analogy to the context I am considering. But in any event McHugh J was not purporting to be exhaustive of the possibilities. So even if the analogy was bad, so to conclude does not avail Myer.

1609 Second, Myer says that his Honour erred in construing *Janssen-Cilag*, *Stockland*, *Hampic* and *Australian Breeders* as establishing the proposition that "proof of reliance on the contravening conduct is not an essential element of a cause of action for damages under s 82 of the TPA" because a "sufficient causal connection can be established in ways that do not involve the applicant directly relying on the contravening conduct" (at [50]). But Myer says that none of the cases cited by his Honour support that proposition, which is far wider than what was in fact determined in *Janssen-Cilag* and its progeny. The effect of the *Janssen-Cilag* line of cases is not to render the concept of reliance irrelevant to the causal requirements applicable to a claim of misleading or deceptive conduct. Rather, the effect of the *Janssen-Cilag* line of cases is merely to expand the concept of reliance so as to permit a plaintiff to establish the relevant causal chain by proving that some other person relied on the misleading or deceptive conduct in a way that caused the plaintiff's loss. They do not stand for the proposition that proof of reliance is no longer an essential element. Indeed, according to Myer, the true exceptionalism of *HIH Insurance* becomes apparent when it is observed that in each of *Janssen-Cilag*, *Stockland*, *Hampic* and *Australian Breeders* (as well as *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 and *ABN AMRO*) there was in fact proof of reliance, albeit by someone other than the plaintiff, and this proof was sufficient to establish the relevant causal chain. According to Myer, the conclusion in *HIH Insurance* rested on an entirely different and foreign proposition, namely, that proof of reliance is unnecessary as a matter of causation. In this respect, so it was indelicately described, *HIH Insurance* is an outlier.

1610 Let me say that I agree with his Honour's conclusion in *HIH Insurance* whether or not the foundation may be said to be flawed.

1611 Third, Myer says that it is apparent that his Honour purported to derive support for his conclusion from the statement in *Campbell* that reliance is not a substitute for the essential question of causation (at [143]). But Myer says that this statement needs to be considered in its context. Once it is considered in its context, it is apparent that the statement emphasises, rather than undermines, the importance of inducement to the question of causation. It does not provide a sufficient basis for discarding the concept of reliance.

1612 Let me discuss *Campbell* in a little more detail.

1613 *Campbell* concerned a claim by the plaintiffs that they had been induced to enter into a share sale agreement by misrepresentations made by the defendants with regard to the relevant company's financial position. The trial judge found that the principal of Backoffice, Mr Weeks, in entering into the sales agreement did not rely on an asserted representation as to projected sales revenue for December 2004. On appeal Giles JA disagreed with the trial judge's finding on this point (*Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359 at [41]). Having referred to the statement of Wilson J in *Gould v Vaggelas* (at 236) to the effect that "if a material misrepresentation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract, there arises a fair inference of fact that the person was induced to do so by the representation", his Honour held that the representation as to revenue projections induced the plaintiffs' entry into the share sale agreement, saying (at [48]):

> On the evidence as a whole, in my opinion the representations remained causally operative. Backoffice was paying for a share in the company, not for a cause of action against Mr Campbell for breach of warranty. The non-recurring expenses went to profitability, and the revenue and EBIT figures were directly important to Mr Weeks' calculations of the value of the company. *The representations were calculated, in the sense used by Wilson J, to induce Mr Weeks to purchase the share*. Respectfully differing from the trial judge, I do not think that the inference thus arising was displaced, and I consider that the representations played a material part in Backoffice's purchase of the share.
>
> (Original emphasis.)

1614 In reversing the trial judge on this point, Giles JA expressly relied on the availability of inferences of the kind referred to by Wilson J in *Gould v Vaggelas*.

1615 Thus, according to Myer, the statement of the plurality in the High Court (at [143]) was made in the context of and in response to Giles JA's use of a presumptive inference displacing the factual finding by the trial judge. This is apparent from the wider context in which the statement appears ([142] to [143]):

> The appellants nevertheless submitted that Giles JA was wrong to hold, as he did, that Mr Weeks relied on the accuracy of the estimates of future sales revenue and the estimates of future profitability derived from those estimates of revenue. The conclusion which Giles JA reached was founded upon the premise that '[i]f a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation'.
>
> Three points may be made about this proposition. First, it is a proposition expressed in relation to the law of deceit, *not* the operation of statutory provisions for the award of damages suffered by contravention of consumer protection provisions proscribing misleading or deceptive conduct. Secondly, the proposition carries within it a number of subsidiary questions, such as what is a 'material' representation, and when is a material representation 'calculated' to induce entry into a contract. Thirdly, because the proposition is directed to the drawing of inferences, consideration of its application must always attend closely to all of the evidence that is adduced that bears upon the question being examined. With considerations of these kinds in mind, Giles JA was right to point out that reliance is *not* a substitute in the context of the *Fair Trading Act* for the essential question of causation. Moreover, it is also right to observe, as Giles JA said, that '[i]t may be artificial to speak of reliance in determining what action or inaction would have occurred if the true position had been known'.
>
> (Original emphasis.)

1616 So, the plurality's remarks were directed to the correctness of deploying a presumptive inference as to inducement to displace factual findings. Viewed in context, according to Myer there is nothing in the remarks of their Honours that would undermine the proposition that, in order to establish compensable loss, the plaintiffs were required to show they relied on or were induced by the defendants' conduct. Indeed, the effect of the High Court's judgment was to restore the trial judge's holding that causation could not be established because reliance had not been proven. The plurality held that (at [147]):

> it was not open for to the Court of Appeal to infer, from its own assessment of the materiality of the representation and its own assessment of whether the representation was calculated to induce entry into a contract, that Mr Weeks would not have proceeded with the share purchase.

1617 And (at [150]):

> As for the claims concerning the estimate of sales revenue for December 2004, Backoffice and Mr Weeks established at trial that Mr Campbell had in this respect engaged in conduct that was misleading or deceptive or likely to mislead or deceive. But Backoffice and Mr Weeks did not prove that, had they known the truth, they would not have proceeded with the purchase. Because it was not shown that Backoffice and Mr Weeks would not have proceeded with the purchase, their claims that they would not have outlaid $850,000 for a share that turned out to be worthless do not arise.

1618 French CJ adopted the same approach, holding that (at [55]):

> it was not open to Giles JA … to depart, as he did, from the primary judge's finding as to reliance so far as the December 2004 estimates were concerned… There was, as counsel for Mr Campbell submitted, no exploration at trial of whether Mr Weeks would have withdrawn from the transaction had he known only of the shortfall in sales revenue figures. His caution about the figures with which he was provided would indicate that something more than a somewhat speculative inference was necessary to establish the reliance that would forge the link between the misleading or deceptive conduct in relation to the December 2004 estimates and the loss which he claimed.

1619 Accordingly, viewed in its context, Myer submits that *Campbell* confirms rather than undermines the necessity of establishing that the defendant's wrongful conduct induced the action or inaction which occasioned loss. Therefore, so Myer submits, it was an error for *HIH Insurance* to treat it as though it supported the wider proposition that proof of reliance was irrelevant to the causal inquiry. This proposition is contradicted by, and sits inconsistently with, the outcome in *Campbell*.

1620 I think the straight-forward take-out from *Campbell* is rather that it is not saying that reliance whether by the applicant or a third party is a necessary condition in all cases. Indeed, both the plurality and French CJ were clear about not saying that.

1621 Fourth, Myer says that his Honour in *HIH Insurance* appeared to invoke considerations based on the efficient capital market hypothesis in support of his reasoning. But Myer says that the relevance of an efficient market to questions of causation have been largely unexplored in this jurisdiction. It has, however, been at the centre of the "fraud on the market" jurisprudence that has developed in the United States. But it is said that that jurisprudence does not, however, support the proposition that reliance (or inducement) is irrelevant to causation. That jurisprudence in fact affirms the importance of reliance. It provides no support for the reasoning in *HIH Insurance*.

1622 Let me say something about *Basic Inc*.

1623 In the US the concept of reliance forms a constituent element of an actionable disclosure. In *Basic Inc*, the US Supreme Court accepted a presumption based on the fraud on the market theory (at 243) to facilitate proof of reliance as required by the relevant s 10(b) and rule 10b-5 that I have identified earlier. In so doing, Blackmun J who delivered the opinion of the Court stated:

> We agree that reliance is an element of a Rule 10b-5 cause of action. Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury. There is, however, more than one way to demonstrate the causal connection. Indeed, we previously have dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached, concluding that the necessary nexus between the plaintiffs' injury and the defendant's wrongful conduct had been established. Similarly, we did not require proof that material omissions or misstatements in a proxy statement decisively affected voting, because the proxy solicitation itself, rather than the defect in the solicitation materials, served as an essential link in the transaction.

1624 In *Basic Inc* terms, the "fraud on the market" theory rests on the idea that share prices are a function of all material information about the company and its business. The relevant presumption was said to be necessary to encompass the difference between the features of the stock market and the early fraud cases (at 244):

> the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus, the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, *informing him that given all the information available to it, the value of the stock is worth the market price* …
>
> [i]n an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and *purchasers generally rely on the price of the stock as a reflection of value*.
>
> (Citations omitted.)

1625 The content of the *Basic Inc* presumption was explained by Roberts CJ in *Halliburton Co v Erica P John Fund Inc* 573 US 258 (2014) at 279 in the following terms:

> What is called the *Basic* presumption actually incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second,

> if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock *in reliance on the defendant's representation*.
>
> (Emphasis added.)

1626 This explanation of the content of the *Basic Inc* presumption is significant. It clarifies that the effect of *Basic Inc* is to permit the making of a rebuttable evidentiary presumption that a buyer of shares relied on publicly available information in the market where the market has in fact been proven to be efficient. But it remains an element of the cause of action that the plaintiff and each member of the class establish actual reliance on the information in the market. The presumption merely shortcuts this proof. This is made clear by the explanation given by the Court in *Halliburton*.

1627 It is not in doubt that the efficient capital market hypothesis underpinned the analysis in *Basic Inc*. But as the arguments canvassed in *Halliburton* reveal, in the years since *Basic Inc* the efficient capital market hypothesis has been questioned (see *Halliburton* at 289 per Thomas J).

1628 Now Myer says that it is clear that the efficient capital market hypothesis cannot be taken to provide a safe foundation for the adoption into Australian jurisprudence of the *Basic Inc* presumption. I agree entirely. But I do not know where any of this takes Myer. Market-based causation is not the same thing as the US "fraud on the market" rebuttable presumption mechanism. And even if *Basic Inc* had never existed, that would not deny the force of market-based causation under the relevant Australian statutory provisions.

1629 Further, one should not confuse concepts. The efficient capital market hypothesis is relevant to market-based causation *forensically*. So, if it is not a good assumption in a particular case involving a particular class of securities, *factually* market-based causation and the "inflation-based measure" of loss in *that* case may fail. But I am here dealing with the availability of market-based causation as a matter of *law*. It is just misconceived to take doubts about the use of a securities specific forensic economic tool, let alone doubts expressed by foreign judges, to deny or query the availability as a matter of law of a test for market-based causation in Australia.

1630 Let me be clear. In invoking market-based causation in the present context, I do not need to adopt any part of the legal reasoning in *Basic Inc*. Further, whatever misconceived views have been expressed elsewhere denying the robustness of the efficient capital market hypothesis, they hardly matter to the *availability*, as distinct from proof in an individual case, of market-based causation under Australian law.

1631 Now in summary, Myer submits that I should decline to follow *HIH Insurance*.

1632 Let me say several things about *HIH Insurance.* First, it says nothing about causation concerning breaches of the continuous disclosure provisions. I am free to go my own way, of course proceeding cautiously. Second, as to causation concerning misleading or deceptive conduct, I do not consider that I am bound by appellate authority to reject market-based causation. And in that respect I agree with Brereton J's overall conclusions in that respect, albeit that my underlying reasoning differs in some respects.

1633 I should now state my own principal reasons for accepting market-based causation leveraging off my 2011 analysis.

Principal conclusions

1634 Myer's submissions on market-based causation essentially reduce to three main propositions.

1635 First, in order to be actionable, conduct said to be misleading or deceptive must relevantly have been relied on or constituted an inducement to the action or inaction which has caused the asserted loss.

1636 Second, causation may be established when someone other than the applicant relies upon or is induced by the respondent's conduct, so long as that reliance or inducement results in the action or inaction which causes the applicant's loss.

1637 Third, whether via direct reliance of the kind described in the first proposition, or reliance by a third party or intermediary as described in the second proposition, in any misleading or deceptive conduct case one of those kinds of reliance is necessary in order to establish causation.

1638 Now it is not in doubt that reliance of the kind described in the first and second propositions is sufficient to establish causation in misleading or deceptive conduct cases. But neither is a necessary condition in all cases.

1639 Further, and even more relevantly to the present context, neither of these mechanisms are necessary to establish causation in continuous disclosure cases.

1640 Let me focus on ss 674, 1317HA and 1325 for the moment. After all any analysis starts and finishes with the statutory text, albeit to be considered in context and in the light of its purpose.

1641 First, it is wrong to construe any language of causation in ss 1317HA ("damage resulted from") and 1325 ("because of conduct of") as if this was some free-standing intellectual exercise. Such language must be constructed as part of their respective phrases. So for s 1317HA, the phrase is "damage resulted from the contravention", and for s 1325, the phrase is "because of conduct of another person that was engaged in in contravention". In other words, in considering any notion of normative causation, that is, in terms of what the statute requires to impose legal responsibility for loss and damage, the type of *contravention* in question is highly relevant. You can say all you like about normative causation concerning misleading or deceptive conduct and whether reliance is required. But it is a category mistake to think that such analysis could or should drive the analysis for normative causation concerning a breach of the continuous disclosure provisions. So the real question is: what is the normative causation test involved in the combination of s 674 with s 1317HA or the combination of s 674 with s 1325?

1642 Second, as soon as you pose the correct test, the answer reveals itself in various positive and negative dimensions. I am using "positive" here in the sense of what the text actually says and promotes. I am using "negative" here in the sense of what the text does not say and does not require.

1643 Let me dispose of the negative dimension first. The statutory text makes no reference to reliance or inducement. Moreover, it would have been conceptually incoherent to have done so. After all, one is dealing with the non-disclosure of material information. Philosophers might ponder about the concept of relying upon or being induced by nothing. No doubt this could make sense for a half truth. But where the entirety of the contravening conduct is a nothing in one sense, that is, a pure failure to disclose, common sense ends and philosophising begins by trying to link with a *pure* omission the idea of reliance or inducement. Neither the text nor conceptual coherence requires an investor to show that he relied upon or was induced by a failure to disclose material information. But could you necessarily imply such a restriction? How could you? And indeed why would you?

1644 Let me turn to the positive dimension.

1645 For this purpose, let me begin by repeating what was said in *Grant-Taylor* by Allsop CJ, Gilmour and Beach JJ ([92] and [93]):

> The statutory purposes for the continuous disclosure regime were foreshadowed in the 1991 Australian Companies and Securities Advisory Committee Report and in a

> Second Reading Speech to the *Corporate Law Reform Bill 1992* (Cth) (although the 1992 Bill was superseded by the 1993 Bill). The main purpose is to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information (see *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [353]-[355]; *Re Chemeq Ltd* (2006) 234 ALR 511 at [42]-[46] per French J (as he then was)). Further, one of the justifications for introducing the continuous disclosure regime, as referred to by that Committee, was to "minimize the opportunities for perpetrating insider trading" thereby providing an explicit link between the purposes of the continuous disclosure regime and the insider trading regime.
>
> It is also to be noted that ss 674 to 677 are remedial or protective legislation. They should be construed beneficially to the investing public and in a manner which gives the "fullest relief" which the fair meaning of their language allows (*James Hardie v ASIC* at [356]).

1646 If you appreciate the dimensions of that description you will understand why notions of reliance and inducement, except possibly in a way which I will describe later as active indirect causation, have little to do with the matter.

1647 Let me take this in steps.

1648 The first step is to note that the whole purpose of s 674 is to produce a well-informed market leading to greater investor confidence.

1649 The second step is to recognise that a well-informed market in a particular company's securities is one which is trading upon, inter-alia, material information of which the company is aware absent justifying exceptions.

1650 The third step now explains the reason for the statutory duty to disclose in s 674(2). Not to do so would not be conducive to a well-informed market. Not to do so may entail the vice of the market trading in the company's securities on the basis of material information not known to the market but known to the company. That could result in share price inflation where there has been a failure to disclose material adverse information. That could result in share price deflation where there has been a failure to disclose material favourable information; this is a more exotic possibility where insiders have kept to themselves favourable information, allowed the share price to stay depressed, and soaked up shares for a song from unwitting sellers.

1651 The fourth step can now explain causation. The statute is concerned to impose legal responsibility on the non-disclosing company for the consequences of its failure to disclose. What are the consequences? The first consequence is that the market might not be trading on a fully informed basis. The second and following consequence is that the market price might be different from what it would have been in a fully informed market. The related consequence is that investors may be consummating trades at prices different to the market price that would have prevailed.

1652 The fifth step can stop here. If such an investor has so consummated a trade and has suffered loss, both the text and purpose of the relevant statutory provisions are consistent with imposing legal responsibility for the loss on the company. The text does not deny it and the purpose so requires it. "But for" causation is demonstrable. And the legislature's choice to impose legal responsibility for the loss on the company is palpable. Now I suppose you can talk about notions of investors relying upon the integrity of the market and investors relying upon a company meeting its disclosure obligations. But none of this is strictly necessary, and indeed is a little artificial as many investors do not turn their minds to such things. And indeed in the new millennium of algorithmic machine trades, even such nebulous notions of reliance become wholly unrealistic.

1653 What is Myer's answer to any of this? Frankly, not much. Most of its analysis has discussed cases that had nothing to do with s 674. And of those cases, none of them purported to set the boundaries and content of the universe of possibilities as Myer would have it. Further, Myer endeavoured to slay the perceived heterodoxy of *HIH Insurance*. But even if that perception matched reality and that aim had succeeded, that would have availed it nought in determining the availability of market-based causation for s 674 contraventions.

1654 Now Myer raised various possibilities that it suggested would deny market-based causation. What about the investor who knew the non-disclosed information it said? What about the investor who did not know, but even if they had known would have purchased anyway and at the same price that they did pay? Interesting possibilities. But none of them negate generally the availability of market-based causation. They may, however, negate an individual claim. I will return to this shortly.

1655 Further to the above analysis, there are other ways to look at the matter, whether in terms of s 674 or indeed in the misleading or deceptive conduct context.

1656 On a proper analysis of the authorities cited by Myer, there could be considered to be three well-established mechanisms for causation in misleading or deceptive conduct cases, not just two.

1657 The first category is direct causation. This is the scenario where absent a power in the respondent to direct or compel the applicant to take a course of action, the mechanism by which misleading acts or omissions by the respondent might directly cause loss to the applicant is almost invariably by inducing the applicant to some course of action. This inducing requires proof that the applicant relied upon some impression created by the respondent's misleading act or omission. This is Myer's first reliance scenario described earlier.

1658 The second category is indirect or intermediary causation. But this category has two subcategories.

1659 The first subcategory is active indirect causation. This is the scenario where a respondent's misleading conduct induces some reaction in X, and the applicant would have acted differently but for that reaction by X. There is no additional requirement that the applicant was aware of or relied on the respondent's conduct. It is enough that X relied, and that the applicant would have acted differently but for that reliance by X. Or in other words, it is enough that the applicant relied on X. Thus in *Hampic* the injured cleaner succeeded because the supervisor had relied on a misleading label which the cleaner herself never saw. So, the investors in *Digi-Tech* failed, not because active indirect causation is untenable in law, but because their evidence at trial had failed to show that the advisor on whom they relied had himself relied on the defendant's misleading valuations. And the plaintiffs in *Ingot Capital* failed on a similar evidentiary basis. Not only were they not themselves misled, but they also failed to show that the board of the company had been misled.

1660 The second subcategory is passive indirect causation. This is the scenario where the respondent's misleading conduct induces some reaction in X, and that reaction by X itself causes loss to the applicant without any requirement for a reaction by the applicant. This is the *Janssen-Cilag* type of case. Significantly, *Arrowcrest* is not a *Janssen-Cilag* passive indirect reliance case. Ford was the customer, not the thwarted competitor, and its claim was of direct causation in terms of reliance on the representations of Tristar, a subsidiary of Arrowcrest. In the *Janssen-Cilag* type case the defendant's misleading representations to the plaintiff's customers caused their customers to shift their custom to the defendant's business. Provided that the plaintiff established, by direct proof or proper inference, that the customers relied upon the defendant's misleading conduct, there was no second requirement of 'reliance' by the plaintiff, either on the defendant or on the reactions of the customers. The plaintiff was relevantly passive, but there was still causation of loss and it was still recoverable.

1661 Myer's case thesis as to the necessary form of reliance recognises direct causation and *Janssen-Cilag* passive indirect causation, but appears to ignore active indirect or intermediary causation, which is relevant to the present case.

1662 It should be clear by now that the applicant's case before me is that:

(a) Myer's disclosure failures caused the actions of intermediaries, namely, the buyers and sellers in the market, to inflate the trading price of MYR ED securities above the price which a properly-informed market would have set;

(b) the applicant acquired its securities, that is, it was active not passive in that inflated market; and

(c) the applicant would not have acquired those securities, at that price, but for the market's reaction to Myer's misleading or deceptive conduct and disclosure failures.

1663 So, this may be seen as active indirect causation. In my view it is enough, in terms of causation, that the applicant unknowingly acted by acquiring its MYR ED securities at the prevailing market price during the period of inflation, assuming that to be so for the sake of the argument at this point.

1664 Further, on the authorities cited to me I should note two other points.

1665 First, as concerns McHugh J's analysis of causation in *Henville v Walker*, that analysis does not purport to provide universal categories which apply across all causes of action. This is plain from the statement that "[m]ore than once in recent years, judges have pointed out that the issue of causation cannot be divorced from the legal framework that gives rise to the cause of action" (at [98]). Further, as was noted in *HIH Insurance*, the scenario that the "inevitable consequence of the contravening conduct would be that share purchasers would pay an inflated price" is analogous to the physical connection described by McHugh J (at [101]). This may be seen as active indirect causation. On the other hand, the circumstance described by McHugh J of a client suffering loss after being negligently advised by a stockbroker would be an example of direct causation but for the client breaking the causal nexus by the client's own actions (at [103]).

1666 Second, in relation to the plurality's judgment in *Campbell* at [143], two points should be made. The plurality agreed with Giles JA that "reliance is *not* a substitute in the context of the *Fair Trading Act* for the essential question of causation" (original emphasis) and expressly approved

Giles JA's statement that "[i]t may be artificial to speak of reliance in determining what action or inaction would have occurred if the true position had been known". Further, the plurality and French CJ took a different view of whether an inference could be drawn by an intermediate appellate court which departed from the primary judge's finding of fact. *Campbell* does not provide comfort to Myer's case thesis.

1667 Let me conclude this part of my reasons by making some final observations.

1668 Dr Michael Duffy has recently written an incisive article referring to the implications of an acceptance of the market-based causation theory (Duffy M, "Causation in Australian Securities Class Actions: Searching for an Efficient but Balanced Approach" (2019) 93 ALJ 833-854). He suggests what I would identify as four possible ways to disprove such causation. First, he suggests that a defendant could endeavour to show that the assumption of the efficient capital market hypothesis applying to the relevant securities was not made good. Myer did not demonstrate that here. Second, he suggests that a defendant could show that the relevant non-disclosure did not affect the market price. Myer appears to have demonstrated that here. But of course so to demonstrate may only be a complete answer where the applicant's and group members' loss theory is one only invoking the "inflation-based measure" of loss as I have described earlier. Third, he suggests that a defendant could show that the individual applicant or group member would have still purchased the security at the same price had he known of the information disclosed, a possibility I touched on in 2011. On the assumption that "but for" factual causation is a necessary but not sufficient condition for causation on an individual claim, to rebut "but for" causation may negate causation for that individual claim. Of course, I have begged the question as to the precise "but for" scenario that I am considering. Fourth, he suggests that a defendant could show that the individual applicant or group member actually knew the information that was not disclosed. But there are issues with this last possibility. What does "know" mean? I might believe in something about a company's finances as an external investor but what may be more significant is that, say, the CEO knew it based upon the company's business, finances and records. The CEO's and therefore the company's own opinion and knowledge would be far weightier. And if knowledge is *justified* true belief, a CEO's justification and therefore knowledge would be far weightier. The CEO knowing something which is material is of a different character to an external investor's belief. Of course, there may be no difference between the two perspectives if it is, say, knowledge of definite information of the existence of a contract between the company and the Chinese investor. Further, there is another problem. Assume I know something and wrongly believe that *everyone* else knows, so that I assume that the knowledge is factored into the market price. But if that latter belief is wrong, I have then purchased at an *inflated* price, of which I was unaware, on the wrong belief that everyone else knew. And indeed some of these possibilities may be able to be brought into the category of negating yet another permutation of "but for" causation on an individual claim.

1669 Related to some of the issues that Dr Duffy has raised, let me say something about causation at two levels.

1670 The first level is general. Was there share price inflation caused by the s 674 contravention?

1671 The second level is particular. In respect of an individual claim, did the investor purchase shares when the share price was inflated? Did the investor continue to hold or sell those shares *after* the inflation was backed out of the share price by the corrective disclosure? If so, any loss may prima facie be recoverable under the market-based causation theory. But on one view an investor may still need to give evidence that but for the contravention he would not have purchased the shares or not at the price he paid. The individual claimant may still have this onus, but it would hardly be onerous or challenged in the vast majority of cases; and it could be discharged by a simple statutory declaration or ticking boxes in a verified questionnaire post judgment on the common issues. That is one solution to get around the reverse onus problem involved in the control mechanism of a *novus actus interveniens* solution of the type discussed in *HIH Insurance*. And it cures the perceived problem in market-based causation referred to by Foster J in *Masters* at [392]. Further, a statement "I would not have purchased at the price I did / I would not have purchased at all" cannot be directly equated to positive reliance but could be seen as one part of an individual causal proof. Further, the statement may have to be said in any case to distinguish the "inflation-based measure" of loss group members from the "no transaction measure" of loss group members. I do not propose to meditate further on these possibilities. Moreover, I cannot see how any of these questions justifies the negation of the market-based causation theory in any general sense. Further, it is not beyond judges to imply and impose additional control mechanisms in this area once one has proceeded beyond the common issues and into s 33R country.

1672 Anyway, these are matters for another day. Moreover, in my case they may not need to be dealt with given the problems in Mr Houston's analysis concerning share price inflation, which is the principal difficulty for the applicant.

1673 Let me now turn to some other issues.

(b) Market expectations and Bloomberg consensus

1674 I need to first say something about market expectations and the proxy Mr Houston used as a foundation for his share price inflation analysis.

1675 As I have already said, the market valuation of a company reflects expectations in relation to the present discounted value of the future cash flows expected to be generated by it. This principle of financial economics, in combination with the semi-strong form of the efficient markets hypothesis, implies that share prices adjust in response to changes in the market's expectations of future cash flows and/or the associated risks of those cash flows.

1676 In keeping with most listed entities, Myer's earnings guidance was expressed in terms of its expected NPAT rather than its future cash flows. Market participants therefore had regard to Myer's FY15 NPAT guidance to form their expectations of its future cash flows. Consistently with this, Mr Houston drew on the market's expectations of NPAT as a proxy for expectations of Myer's cash flows.

1677 Now Mr Houston obtained information in relation to the prevailing market expectations of Myer's FY15 NPAT over the September 2014 to March 2015 period and the corresponding market valuation of Myer (i.e., its share price) that reflected those expectations. He adopted Bloomberg's estimate ("BEst") of the average equity analyst forecast of net income in FY15 as a proxy for market expectations as to FY15 NPAT over the relevant period.

1678 BEst for "Net Income, Adj+" is defined by Bloomberg L.P. as "…the profit after all expenses have been deducted. It might include or exclude the effects of all one-time, non-recurring, and extraordinary gains, losses, or charges" and is calculated as a simple average of analyst forecasts at a given point in time. The BEst excludes analyst forecasts if they were formed before relevant guidance was provided to the market.

1679 Now at this stage I need to pause and say something further about Bloomberg consensus data.

1680 During the trial the parties referred to Bloomberg consensus or Bloomberg BEst data. I sought to clarify aspects of Bloomberg consensus data, requesting further clarification as to:

(a) what the Bloomberg consensus was (i.e. what it was at various points in time);

(b) how it was calculated, including in terms of the analysts; and

(c) how the Bloomberg consensus figures matched up or not (as the case may be) against the figures used in Myer's documents.

1681 During the running, Myer filed a further affidavit of Dr Prowse addressing some of these matters.

1682 In terms of specific evidence as to what Bloomberg consensus was at various points in time, there was evidence before me from Mr Houston that:

(a) Bloomberg consensus was $96.85m on 11 September 2014;

(b) Bloomberg consensus fell on 12 November 2014 from $94.89m to $92.72m;

(c) Bloomberg consensus was $88.7m on 18 March 2015; and

(d) Bloomberg consensus was $78.65m on 19 March 2015 after Myer's announcement.

1683 Dr Prowse provided greater detail as to the Bloomberg consensus figures on specific dates. He informed me, which I accept, that Bloomberg published both a mean and a median consensus figure.

1684 Now there were discrepancies between Bloomberg consensus figures and those reported on by Myer.

1685 The following table sets out the consensus figures published by Bloomberg and those set out in internal Myer documents which were tendered during trial during the relevant period from 11 September 2014:

Date	**Bloomberg Consensus ($m) as contained in Myer internal documents**	**Bloomberg Consensus / BEst ($m) MEAN**	**Bloomberg Consensus / BEst ($m) MEDIAN**
3 October 2014	97	94.915	92.9
7 November 2014	97	94.915	92.9
27 November 2014	91	91.308	90.7
22 December 2014	90	91.023	89.2
5 January 2015	90	89.525	88.85
21 January 2015	90	88.442	87.8
4 February 2015	90	89.175	88.2
9 March 2015	89	88.718	88.5

1686 What this table demonstrates is that there were some differences between the actual Bloomberg consensus (mean) figures and the figures recorded in internal Myer documents on several dates. And these differences were not explained by Dr Prowse.

1687 Myer submits that the BEst figures to which Mr Houston referred are the same measure that Myer's directors used for market expectations. But Myer did not refer to any direct evidence in support of that proposition and there is no specific evidence to that effect.

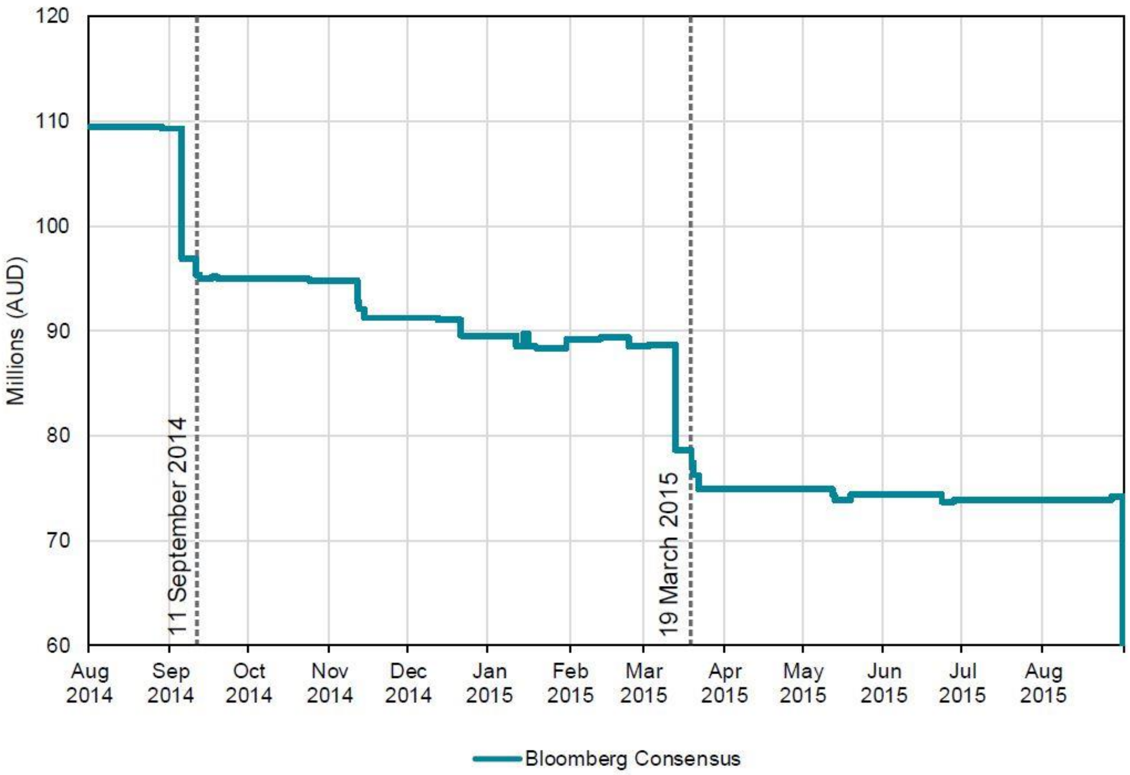
1688 As is apparent from the above table, there are material discrepancies between the figures which were quoted by the Myer Investor Relations Department in a number of its reports to the board of Myer and the Bloomberg figures themselves. As I say, it is unclear from where the Myer Investor Relations Department obtained its Bloomberg consensus figures. Myer chose not to lead any direct evidence on that question.

1689 Now in terms of how Bloomberg calculated its figures, the applicant has objected to Dr Prowse's further affidavit on relevance and hearsay grounds. But clearly the material is relevant. And as to hearsay, in relation to some of the material all that Dr Prowse is doing is setting out the published figures of Bloomberg. The published material is merely being used to show the fact that Bloomberg published those figures. In any event the screenshot(s) and fact sheet are "business records" within the meaning of s 69(1) of the *Evidence Act*. The requirements of s 69(1) are relevantly met if the document forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business and contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business. Both the fact sheet and screenshot(s) are documents which form part of the records kept by Bloomberg in the course of, or for the purposes of, a business.

1690 This material clarified, to some extent, how consensus was calculated. First, the screenshots from Bloomberg listed various analysts. From this it can be inferred that those were analysts to which Bloomberg had regard in calculating consensus, noting the qualification in Mr Houston's report that Bloomberg would usually exclude analyst forecasts that were not up to date. Second, it can be demonstrated from this that there is not a precise correlation between the mean and median of analyst forecasts calculated by Myer in its internal investor relations reports and the Bloomberg consensus figures. They each used a pool of analysts that in some respects differed.

1691 Now in terms of data using Bloomberg consensus figures, market expectations of FY15 NPAT appear to have been declining over the relevant period, as the following graph demonstrates.

Prevailing market expectations as to Myer's NPAT in FY15



Source: Bloomberg LP

1692 Immediately following Myer's 19 March 2015 announcement that it was reducing its FY15 NPAT guidance for anticipated profit growth from its previous year's result of $98.5 million NPAT to a range of $75 million to $80 million (excluding one-off costs), market analysts updated their expectations of Myer's FY15 NPAT. Prior to the disclosure of Myer's revised guidance on 19 March 2015, the market's average expectation was for Myer's FY15 NPAT to be $88.7 million. Immediately following Myer's announcement on 19 March 2015, the market reduced its expectations in relation to FY15 NPAT to $78.65 million. This represented a reduction in the market's average expectations of $10.05 million or 11.3 per cent expressed in relative terms.

1693 The Myer share price fell by $0.16 per share (after rounding), or 10 per cent, over the course of trading on 19 March 2015. Mr Houston estimated that the fall in Myer's share price on 19 March 2015 equated to an $0.17 or 11.0 per cent abnormal return that was attributable to the announcement of Myer's revised forecast FY15 NPAT (excluding one-off costs) on that day. In other words, an 11.3 per cent change in the market's FY15 NPAT expectations resulted in an 11.0 per cent abnormal return to Myer shares.

1694 The abnormal return reflected an approximate $98.6 million reduction in the market valuation of Myer, calculated equal to the abnormal return of $0.17 (without rounding) multiplied by the number of shares on issue, that is, 585.69 million, which significantly exceeded the dollar value of the reduction in Myer's forecast FY15 NPAT disclosed on that day.

(c) The counterfactual

1695 Mr Houston considered one specific counterfactual in content. I have set this out earlier in my reasons in the section, "Share Price Inflation". His assumed counterfactual disclosure bears some superficial similarities to the disclosure made in the 19 March 2015 announcement, in that it contains a number ($77m) which is said to be Myer's expectation and which is similar to the number in the 19 March 2015 announcement. However, despite some superficial similarities, there is a significant qualitative difference between his assumed counterfactual disclosure and the 19 March 2015 announcement. Importantly, the 19 March 2015 announcement concerned a statement of Myer's expected NPAT a significant way through the year. It is obvious that there was at this later time far greater certainty as to the likely FY15 NPAT position given that Myer's key trading period had been completed.

1696 Let me say some other things concerning Mr Houston's assumed counterfactual disclosure.

1697 First, Mr Houston's evidence deals only with his assumed counterfactual disclosure, which is specific as to its content but does not correspond with either any disclosure which it is pleaded that Myer should have made or any disclosure which on the evidence should have been made.

1698 Second, Mr Houston's evidence is principally premised on his assumed counterfactual disclosure being made at a specific time, being immediately after 11 September 2014.

1699 Third, his assumed counterfactual disclosure is not what I have found should have been made.

1700 Fourth, there are other problems. Mr Houston's instructions were to consider the no reasonable basis information and the relevant contradictory information. But even the relevant contradictory information which Mr Houston was directed to but did not consider was itself different from the pleaded information. Further, Mr Houston addressed share price inflation as a result of his assumed counterfactual disclosure, but did not purport to analyse in any way share price inflation as a result of the pleaded information or of course what I have found. Now it would seem that Mr Houston took the pleaded information (e.g. the no reasonable grounds information and the NPAT information) to be synonymous with his assumed counterfactual disclosure. So, he agreed that he did no analysis that would indicate what would have happened if just the no reasonable grounds information or the relevant contradictory information, as set out in the pleading, had been disclosed. In short, Mr Houston's estimates of share price inflation in his report were not directed to a failure to disclose the no reasonable grounds information or the relevant contradictory information, but rather were based on a failure to make the assumed counterfactual disclosure shortly after 11 September 2014. Although let me say now that I have taken Mr Houston's assumed counterfactual disclosure and assumed that the applicant is running a broader case that such a disclosure should have been made not just immediately after 11 September 2014 but at any time up to 19 March 2015. But even making that assumption in the applicant's favour does not assist. It does not fully accord with the pleading. And even more significantly it does not accord with what I have found in terms of the counterfactual disclosure that should have been made.

1701 Where to from here?

1702 No doubt the applicant would say that it should be given a chance to re-assess its share price inflation theory on the basis of the counterfactual disclosure that I have found.

1703 But there is a deeper problem for the applicant as I will now explain, and it all goes back to the Bloomberg consensus question.

(d) There is no share price inflation on Mr Houston's evidence

1704 On the basis of Mr Houston's evidence but assuming the correct counterfactual disclosure as I have found, no share price inflation would appear to have been demonstrated and therefore no compensable loss would appear to have been demonstrated given that only an inflation-based measure of loss has been used for all causes of action.

1705 First, it is not in doubt that Mr Houston's analysis uses and is based on Bloomberg consensus as a proxy for market expectations.

1706 Second, Mr Houston's analysis is based on an assumed relationship of 0.97 between changes in market expectations with the proxy used being Bloomberg consensus, and changes in the price for MYR ED securities. Using this relationship, the share price decreases by 0.97% for every 1% decrease in Bloomberg consensus.

1707 Third, given this assumed relationship, Mr Houston agreed that on his analysis and methodology, share price inflation would only be demonstrated and measurable if any counterfactual disclosure by Myer would have resulted in Bloomberg consensus moving downward in accordance with the ratio of 0.97 to 1.

1708 Fourth, Mr Houston's evidence was that the announcement on 2 March 2015 to the effect that Myer was in line with consensus did not cause consensus to move. At that stage the consensus was $90 million which was below FY14 NPAT. He further agreed that on 19 March 2015, when Myer announced that its FY15 NPAT would be between $75 to $80 million, the new information that caused consensus to move down must have been the announcement of a forecast *below consensus*. So it was this news that the market was reacting to on 19 March 2015, rather than that the FY15 NPAT would be below FY14 NPAT. By 2 March 2015 this had already been factored into consensus. Mr Houston's evidence was that these events show, at least in the context of this case, that in order for Bloomberg consensus to move downward, and on his methodology for assessing share price inflation for there to be a corresponding decline in the share price, Myer needed to make an announcement of NPAT of less than consensus.

1709 Now Myer measured its disclosure obligations as against consensus which, as I have said elsewhere, was an incorrect thing to do at least to the extent that Myer says that this was the principal if not sole measure it was justified in using. In the present context, Myer ought to have measured its disclosure obligations against the 11 September 2014 representation.

1710 Now on the hypothesis upon which Mr Houston's methodology is based, Myer says that it has not been established that at any time between 11 September 2014 and 18 March 2015, Myer expected to achieve an NPAT less than Bloomberg consensus and that it should have made an announcement to that effect prior to 19 March 2015. I agree.

1711 In my view, as I have said elsewhere, Myer's counterfactual disclosure in light of the 11 September 2014 representation should have been the following. In the context of and given the fact that the 11 September 2014 representation had been made, Myer should have disclosed to the market:

(a) by no later than 21 November 2014 that its likely NPAT for FY15 was not likely to be materially above the FY14 NPAT;

(b) by no later than 9 December 2014 that its likely NPAT for FY15 was around $92 million;

(c) by no later than 22 December 2014 that its likely NPAT for FY15 was in the range of $89 to $90 million;

(d) by no later than 5 January 2015 that its likely NPAT for FY15 was around $90 million;

(e) by no later than 21 January 2015 that its likely NPAT for FY15 was in the vicinity of $90 million;

(f) by no later than 9 February 2015 that its likely NPAT for FY15 was in the vicinity of $90 million; and

(g) by no later than 27 February 2015 that its likely NPAT for FY15 was in the range of $87 to $91 million, depending upon the costs of the strategic review.

1712 But none of this avails the applicant concerning share price inflation. This is because the Bloomberg consensus figures were tracking these levels in any event. So, if such disclosure had been made, and assuming Mr Houston's methodology including his chosen proxy for market expectations being Bloomberg consensus, the market price would not likely have altered from what it in fact was if these disclosures had been made; as I say, this is making Mr Houston's assumption that Bloomberg consensus is an appropriate proxy, a questionable assumption as I have indicated elsewhere.

1713 Now I accept that Myer actually disclosing or confirming these figures from time to time may have been qualitatively important and different. The consensus figures were third party estimates. And Myer's confirmation would have been far weightier. Consensus estimates were third party estimates factoring in and no doubt averaging the upsides and downsides. So an NPAT estimate figure of a particular analyst of say $90m may be his average of an upside of $95m and a downside of $85m. If you told that analyst that Myer in fact estimated $90m, he might have re-calibrated a new lower estimate with a new range. And all analysts may have done this, such that the Bloomberg consensus may have moved lower. If Myer confirmed a consensus figure, the upside may be perceived to be removed. So it is possible that Myer actually confirming a consensus estimate on a particular day and saying that it was accurate could move the market, although as I say this did not occur on 2 March 2015.

1714 But for the moment, I am just taking and applying Mr Houston's methodology. And on Mr Houston's own evidence no share price inflation is or can be demonstrated. Mr Houston's evidence establishes that his inflation figures would only represent loss if the case against Myer was that it was under an obligation to disclose, earlier than it did, that it expected its FY15 NPAT to be *below consensus*. But such a case has not been established.

1715 Of course I am not here saying anything about *statutory* materiality as I have previously discussed.

1716 Accordingly, as to the extent of any share price inflation caused by the alleged contraventions of either ss 674 or 1041H, there appears to be no evidence which proves that any share price inflation was caused. No findings can be made as to any share price inflation on the evidence which the applicant has adduced and on the correct counterfactual disclosure that I have found.

1717 I should note that I have already dealt with other methodological issues, mostly in favour of Mr Houston, concerning the relevant event studies in another part of my reasons and do not propose to repeat what I have said.

1718 I will hear further from the parties as to the precise consequences of such a finding in terms of causation, share price inflation (if any) and damages.

CONCLUSION

1719 Even though the applicant has established contraventions of ss 674 and 1041H, there is no evidence which establishes that those contraventions caused any loss or damage to the applicant or group members.

1720 On the approach for assessing share price inflation adopted by Mr Houston, one can conclude that there was no share price inflation as Myer's expectation as to its NPAT at all relevant times was either above or not materially different from the Bloomberg consensus figure for NPAT. As I have said, Mr Houston's methodology for calculating share price inflation was premised on a relationship between Bloomberg consensus and the price of MYR ED securities, such that share price inflation would only have been demonstrated and measurable if any counterfactual disclosure by Myer would have resulted in Bloomberg consensus moving downward. But in order for Bloomberg consensus to move downward, on Mr Houston's evidence Myer needed to make an announcement of NPAT of less than consensus. But this is not the counterfactual disclosure that I have found should have been made. The applicant's evidence in relation to share price inflation was based upon the wrong counterfactual. The counterfactual disclosure which formed the basis for Mr Houston's evidence as to share price inflation was not established by the evidence as an accurate or appropriate disclosure required to have been made.

1721 I will hear further from the parties as to the course they propose to take in light of my reasons.

I certify that the preceding one thousand, seven hundred and twenty-one (1721) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 24 October 2019

ANNEXURE – HOUSTON'S INFLATION FIGURES

		True price			Share price inflation		
Date	Trading price	Lower bound	Mid-point	Upper bound	Lower bound	Mid-point	Upper bound
11/09/2014	2.15	1.72	1.88	2.02	0.43	0.27	0.13
12/09/2014	2.02	1.64	1.79	1.92	0.38	0.23	0.10
15/09/2014	2.00	1.63	1.77	1.90	0.37	0.23	0.10
16/09/2014	2.01	1.63	1.78	1.91	0.38	0.23	0.10
17/09/2014	2.01	1.64	1.79	1.92	0.37	0.22	0.09
18/09/2014	2.03	1.66	1.80	1.93	0.37	0.23	0.10
19/09/2014	2.03	1.66	1.80	1.93	0.37	0.23	0.10
22/09/2014	2.02	1.65	1.79	1.92	0.37	0.23	0.10
23/09/2014	2.02	1.65	1.79	1.92	0.37	0.23	0.10
24/09/2014	2.01	1.64	1.78	1.90	0.37	0.23	0.11
25/09/2014	1.94	1.58	1.72	1.84	0.36	0.22	0.10
26/09/2014	1.95	1.59	1.73	1.85	0.36	0.22	0.10
29/09/2014	1.94	1.58	1.72	1.84	0.36	0.22	0.10
30/09/2014	1.96	1.60	1.73	1.85	0.36	0.23	0.11
1/10/2014	1.95	1.59	1.72	1.84	0.36	0.23	0.11
2/10/2014	1.94	1.58	1.71	1.82	0.35	0.23	0.11
3/10/2014	1.90	1.55	1.68	1.79	0.35	0.22	0.11
6/10/2014	1.91	1.56	1.68	1.79	0.35	0.22	0.11
7/10/2014	1.89	1.54	1.67	1.78	0.35	0.22	0.11
8/10/2014	1.88	1.54	1.66	1.77	0.34	0.22	0.11
9/10/2014	1.88	1.53	1.65	1.76	0.34	0.22	0.12
10/10/2014	1.85	1.51	1.63	1.73	0.34	0.22	0.12
13/10/2014	1.82	1.49	1.60	1.70	0.33	0.22	0.12
14/10/2014	1.87	1.53	1.65	1.75	0.34	0.22	0.12
15/10/2014	1.86	1.52	1.64	1.74	0.34	0.22	0.12
16/10/2014	1.84	1.50	1.61	1.71	0.34	0.22	0.12
17/10/2014	1.77	1.45	1.56	1.65	0.32	0.21	0.12

20/10/2014	1.80	1.47	1.58	1.68	0.33	0.22	0.12
21/10/2014	1.79	1.46	1.57	1.66	0.33	0.22	0.13
22/10/2014	1.84	1.50	1.61	1.71	0.34	0.23	0.13
23/10/2014	1.82	1.49	1.59	1.69	0.33	0.23	0.13
24/10/2014	1.79	1.46	1.57	1.66	0.33	0.22	0.13
27/10/2014	1.82	1.48	1.59	1.68	0.33	0.23	0.13
28/10/2014	1.87	1.52	1.63	1.72	0.34	0.23	0.14
29/10/2014	1.90	1.55	1.66	1.75	0.35	0.24	0.15
30/10/2014	1.92	1.56	1.67	1.77	0.35	0.24	0.15
31/10/2014	1.94	1.58	1.69	1.79	0.36	0.25	0.15
3/11/2014	1.88	1.53	1.64	1.73	0.34	0.24	0.15
4/11/2014	1.91	1.56	1.67	1.76	0.35	0.24	0.15
5/11/2014	1.86	1.52	1.62	1.71	0.34	0.24	0.15
6/11/2014	1.87	1.52	1.62	1.71	0.34	0.24	0.15
7/11/2014	1.89	1.54	1.64	1.73	0.35	0.25	0.16
10/11/2014	1.88	1.54	1.64	1.72	0.34	0.24	0.16
11/11/2014	1.90	1.55	1.65	1.74	0.35	0.25	0.16
12/11/2014	1.76	1.47	1.56	1.64	0.29	0.20	0.12
13/11/2014	1.79	1.50	1.60	1.68	0.28	0.19	0.11
14/11/2014	1.79	1.50	1.59	1.67	0.28	0.19	0.11
17/11/2014	1.77	1.48	1.58	1.65	0.28	0.19	0.11
18/11/2014	1.74	1.46	1.55	1.62	0.28	0.19	0.11
19/11/2014	1.69	1.42	1.50	1.58	0.27	0.18	0.11
20/11/2014	1.69	1.43	1.52	1.59	0.26	0.17	0.10
21/11/2014	1.69	1.43	1.52	1.59	0.26	0.17	0.10
24/11/2014	1.71	1.45	1.54	1.61	0.26	0.17	0.10
25/11/2014	1.64	1.39	1.47	1.54	0.25	0.17	0.10
26/11/2014	1.68	1.42	1.50	1.57	0.25	0.17	0.10
27/11/2014	1.64	1.39	1.47	1.54	0.25	0.17	0.10
28/11/2014	1.62	1.37	1.45	1.52	0.25	0.17	0.10
1/12/2014	1.59	1.34	1.42	1.48	0.24	0.16	0.10
2/12/2014	1.61	1.36	1.44	1.50	0.24	0.17	0.11
3/12/2014	1.67	1.41	1.49	1.55	0.25	0.18	0.11
4/12/2014	1.62	1.37	1.44	1.51	0.25	0.17	0.11
5/12/2014	1.57	1.33	1.40	1.46	0.24	0.17	0.11

8/12/2014	1.54	1.30	1.37	1.43	0.23	0.16	0.11
9/12/2014	1.46	1.23	1.30	1.35	0.22	0.15	0.10
10/12/2014	1.46	1.23	1.30	1.35	0.22	0.16	0.10
11/12/2014	1.43	1.21	1.27	1.32	0.22	0.15	0.10
12/12/2014	1.43	1.21	1.27	1.32	0.22	0.15	0.10
15/12/2014	1.35	1.14	1.20	1.25	0.21	0.15	0.10
16/12/2014	1.31	1.11	1.16	1.21	0.20	0.14	0.10
17/12/2014	1.37	1.16	1.22	1.26	0.21	0.15	0.10
18/12/2014	1.38	1.17	1.23	1.27	0.21	0.15	0.10
19/12/2014	1.38	1.17	1.23	1.27	0.21	0.15	0.10
22/12/2014	1.41	1.20	1.26	1.30	0.21	0.15	0.11
23/12/2014	1.38	1.17	1.23	1.27	0.21	0.15	0.11
24/12/2014	1.37	1.16	1.22	1.26	0.20	0.15	0.11
29/12/2014	1.48	1.25	1.31	1.36	0.22	0.16	0.12
30/12/2014	1.42	1.21	1.26	1.30	0.21	0.16	0.12
31/12/2014	1.40	1.21	1.26	1.31	0.19	0.14	0.09
2/01/2015	1.43	1.23	1.29	1.33	0.19	0.14	0.10
5/01/2015	1.42	1.22	1.28	1.32	0.19	0.14	0.10
6/01/2015	1.38	1.19	1.24	1.28	0.19	0.13	0.10
7/01/2015	1.37	1.18	1.23	1.27	0.19	0.13	0.10
8/01/2015	1.38	1.19	1.24	1.27	0.19	0.14	0.10
9/01/2015	1.43	1.23	1.28	1.32	0.19	0.14	0.11
12/01/2015	1.44	1.25	1.30	1.34	0.18	0.13	0.09
13/01/2015	1.41	1.23	1.28	1.32	0.18	0.13	0.09
14/01/2015	1.40	1.22	1.27	1.30	0.18	0.13	0.09
15/01/2015	1.41	1.21	1.26	1.29	0.19	0.15	0.11
16/01/2015	1.45	1.25	1.29	1.33	0.20	0.15	0.12
19/01/2015	1.49	1.30	1.35	1.38	0.19	0.14	0.11
20/01/2015	1.48	1.29	1.34	1.37	0.19	0.14	0.11
21/01/2015	1.50	1.31	1.36	1.39	0.19	0.14	0.11
22/01/2015	1.55	1.36	1.40	1.43	0.19	0.15	0.12
23/01/2015	1.51	1.32	1.37	1.40	0.19	0.14	0.11
27/01/2015	1.50	1.31	1.35	1.38	0.19	0.14	0.11
28/01/2015	1.51	1.32	1.37	1.39	0.19	0.14	0.12
29/01/2015	1.54	1.35	1.39	1.42	0.19	0.15	0.12

30/01/2015	1.56	1.36	1.40	1.43	0.19	0.15	0.12
2/02/2015	1.56	1.36	1.40	1.43	0.19	0.15	0.12
3/02/2015	1.63	1.43	1.47	1.50	0.20	0.16	0.13
4/02/2015	1.69	1.47	1.51	1.54	0.22	0.18	0.15
5/02/2015	1.79	1.55	1.59	1.62	0.24	0.19	0.17
6/02/2015	1.82	1.57	1.62	1.64	0.24	0.20	0.17
9/02/2015	1.81	1.57	1.61	1.63	0.24	0.20	0.17
10/02/2015	1.80	1.56	1.60	1.62	0.24	0.20	0.17
11/02/2015	1.84	1.60	1.64	1.66	0.24	0.20	0.18
12/02/2015	1.82	1.57	1.61	1.64	0.24	0.20	0.18
13/02/2015	1.86	1.61	1.65	1.67	0.25	0.21	0.19
16/02/2015	1.90	1.64	1.68	1.70	0.25	0.22	0.19
17/02/2015	1.86	1.61	1.65	1.67	0.25	0.21	0.19
18/02/2015	1.88	1.63	1.66	1.68	0.25	0.22	0.20
19/02/2015	1.89	1.64	1.67	1.69	0.25	0.22	0.20
20/02/2015	1.90	1.64	1.68	1.69	0.25	0.22	0.20
23/02/2015	1.89	1.63	1.67	1.68	0.25	0.22	0.20
24/02/2015	1.88	1.63	1.66	1.68	0.25	0.22	0.20
25/02/2015	1.89	1.64	1.67	1.68	0.25	0.22	0.21
26/02/2015	1.90	1.64	1.67	1.69	0.25	0.22	0.21
27/02/2015	1.86	1.61	1.63	1.65	0.25	0.22	0.21
2/03/2015	1.66	1.45	1.47	1.48	0.21	0.18	0.17
3/03/2015	1.63	1.42	1.44	1.45	0.21	0.18	0.17
4/03/2015	1.61	1.40	1.43	1.43	0.20	0.18	0.17
5/03/2015	1.67	1.46	1.48	1.49	0.21	0.19	0.18
6/03/2015	1.70	1.49	1.51	1.51	0.21	0.19	0.19
9/03/2015	1.68	1.47	1.49	1.50	0.21	0.19	0.18
10/03/2015	1.69	1.47	1.49	1.50	0.22	0.20	0.19
11/03/2015	1.63	1.42	1.44	1.44	0.21	0.19	0.19
12/03/2015	1.60	1.39	1.41	1.41	0.20	0.19	0.18
13/03/2015	1.57	1.37	1.39	1.39	0.20	0.18	0.18
16/03/2015	1.59	1.39	1.40	1.40	0.20	0.19	0.19
17/03/2015	1.57	1.36	1.38	1.38	0.20	0.19	0.18
18/03/2015	1.53	1.33	1.35	1.35	0.20	0.18	0.18