

SUPREME COURT OF QUEENSLAND

CITATION: *Borg & Ors v Northern Rivers Finance Pty Ltd & Ors* [2003]
QSC 112

PARTIES: **ANDREW JAMES BORG**
(first plaintiff)
JASON MARK BYRNE
(second plaintiff)
ROBERT STUART CHRISTENSEN
(third plaintiff)
GLEN ANGELLO COPPO
(fourth plaintiff)
LAURENCE ROY DIXON
(fifth plaintiff)
IAN ANTHONY GLAZEBROOK
(sixth plaintiff)
MICHAEL CHARLES GOTTKE
(seventh plaintiff)
BRIAN KENNETH HINCHEY
(eighth plaintiff)
ROBERT MICHAEL McCLOY
(ninth plaintiff)
NANCY MARY MONTGOMERY
(tenth plaintiff)
HENRY ALEXANDER MONTGOMERY
(eleventh plaintiff)
GORDON EDWARD PARISH
(twelfth plaintiff)
GORDON JOHN REID
(thirteenth plaintiff)
JAMES MICHAEL ROACH
(fourteenth plaintiff)
GLEN ALAN SCOTT
(fifteenth plaintiff)
GASPAR SICH
(sixteenth plaintiff)
NEIL GREGORY CAMERON
(seventeenth plaintiff)
COLIN SCOTT PURDIE
(eighteenth plaintiff)
GEOFFREY DAVID RAPSON
(nineteenth plaintiff)
DREW KINGSLEY WOODMAN
(twentieth plaintiff)
NIKO JOZINOVIC
(twenty-first plaintiff)
v
NORTHERN RIVERS FINANCE PTY LTD

(first defendant)
INVESTMENT LICENCING PTY LTD
(second defendant)
NORTHERN RIVERS PLANTATION MANAGEMENT LTD
(third defendant)
DARREN PAWSKI and RALPH MARCEL NUNIS trading as "SecurInvest Accounting Services"
(fourth defendant)
DREW GRAHAM FRANCIS
(fifth defendant)
BASE METALS EXPLORATION NL
(sixth defendant)
EXPLORERS AND PROSPECTORS FINANCE LIMITED
(seventh defendant)
DARREN CHARLES HORNER
(eighth defendant)
JOHN MEARES
(ninth defendant)
BANALASTA OIL PLANTATION
(tenth defendant)
SAFEINVEST PTY LTD
(eleventh defendant)
KAREN EVANS
(twelfth defendant)
PLANTATION EQUITY PTY LTD
(thirteenth defendant)

FILE NO: SC No 191 of 2000
DIVISION: Trial Division
PROCEEDING: Civil Trial
ORIGINATING COURT: Supreme Court at Mackay
DELIVERED ON: 9 May 2003
DELIVERED AT: Brisbane
HEARING DATE: 11 February 2002; 12 February 2002; 13 February 2002; 14 February 2002; 15 February 2002; 18 February 2002; 19 February 2002; 20 February 2002; 21 February 2002; 22 February 2002; 5 April 2002
JUDGE: Mackenzie J
ORDER: **Findings of fact and liability of fourth, eighth, tenth and thirteenth defendants delivered.**
Consideration of thirteenth defendant's counterclaim, quantum, final orders and costs adjourned to a date to be fixed.

CATCHWORDS: TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – REPRESENTATIONS – IN GENERAL – where three tax minimization schemes – where plaintiffs’ claims allowed by ATO in 1997 and 1998 – where notices of reassessment issued in 2000 on basis that schemes disallowed – where deductions disallowed in third scheme – where investment schemes did not provide lawful tax deductions and were not approved by ATO – whether salesmen engaged in misleading or deceptive conduct or conduct likely to mislead or deceive – whether plaintiffs induced by deceptive and misleading conduct to enter investment scheme/s – whether representations made as to existing facts

TRADE AND COMMERCE – SECURITIES INDUSTRY – DEALING IN SECURITIES – GENERALLY – where salesmen made recommendations to invest – whether a securities recommendation – whether salesmen defendants were securities advisors – whether breach of s 851 *Corporations Law* – whether recommendations reasonable and appropriate in the circumstances – whether no reasonable basis for making securities recommendations – whether plaintiffs acted in reliance – whether reasonable for them to do so – whether loss or damages was suffered as a result

TRADE AND COMMERCE – SECURITIES INDUSTRY – DEALING IN SECURITIES – GENERALLY – whether breach of s 849 *Corporations Law* – whether failure to disclose commission and brokerages payable

EVIDENCE – ADMISSIBILITY AND RELEVANCE – IN GENERAL – OTHER CASES – where no representative or class action pleaded – where no application to amend pleadings – where counsel sought to introduce evidence of representations made to plaintiffs generally – where sought to show plaintiffs were a class – where sought to bring evidence outside the case technically pleaded – where evidence not clearly identified or pleaded – whether evidence admissible – whether case presented went beyond a mere variation, modification or development of pleadings to amount to a new, separate, distinct or radical departure from case pleaded

EVIDENCE – ADMISSIBILITY AND RELEVANCE – SIMILAR FACTS – IN GENERAL – RELEVANT PRINCIPLES – whether evidence that similar representations made to plaintiffs admissible as similar fact evidence

CONTRACT – PARTICULAR PARTIES – PRINCIPAL AND AGENT – RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS – WHAT ACTS OF AGENT BIND

THE PRINCIPAL – IN GENERAL – where agency admitted by fourth defendant in respect of provision of investment advice by fifth and eighth defendants – whether fourth defendant liable as principal for actions of fifth and eighth defendants – whether fourth defendant liable for actions of Mr Nunis as partner of company – whether tenth and thirteenth defendants liable as principals for fourth and eighth defendants

Corporations Law (Cth), s 9, s 77, s 765, s 819, s 849, s 851, s 852, s 995, s 995A

Fair Trading Act 1989 (Qld), s 52

Trade Practices Act 1974 (Cth), s 51AF, s 51A, s 82, s 87

Uniform Civil Procedure Rules, r 65, r 75

D.F. Lyons Pty Ltd v Commonwealth Bank of Australia (1991) 28 FCR 597, cited

Gates v City Mutual Life Society Ltd (1982) 43 ALR 313, cited

Howland-Rose v Commissioner of Taxation [2002] FCA 246; (2002) 118 FCR 61, explained

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 192 ALR 1, considered

Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, cited

NMFM Property Pty Ltd & Ors v Citibank Ltd (2000) 107 FCR 270, considered

Sheldon v Sun Alliance Australia Ltd (1988) 50 SASR 236, cited

Sykes v Reserve Bank of Australia (1998) 158 ALR 710, applied

Waghorn v George Wimpey & Co Ltd (1970) 1 All ER 474, cited

COUNSEL: P E Hack SC, with Dr R C Schulte, for the plaintiffs
J S Douglas QC, with I A Erskine, for the fourth and eighth defendants

C Wilson for the tenth and thirteenth defendants

SOLICITORS: Macrossan & Amiet for the plaintiffs
Gateway Lawyers for the fourth and eighth defendants
Mullins and Mullins for the tenth and thirteenth defendants

INDEX

Part 1 – General Issues

Background to the Actions.....	6
Credibility- Salesmen.....	8
Credibility of Plaintiffs - Overview.....	13
Structure of Plaintiff’s Cases.....	13
(a) Recommendations Case.....	15

(b) Representations Case.....	24
Miscellaneous Matters	
(a) Pleadings.....	26
(b) Material Departure from Case Plead.....	26
(c) Similar Fact Evidence.....	29
(d) Taxation Advice.....	29
The Case Against the Fourth and Thirteenth Defendants.....	30
The Case Against the Tenth and Thirteenth Defendants.....	31
(a) Representations Case.....	31
(b) Recommendations Case.....	32
Part 2 – Analysis of individual cases	
Mr Borg.....	34
Mr Byrne.....	42
Mr Coppo.....	47
Mr Dixon.....	50
Mr Glazebrook.....	55
Mr Gottke.....	57
Mr Hinchey.....	60
Mrs Montgomery.....	62
Mr Montgomery.....	67
Mr Parish.....	68
Mr Reid.....	71
Mr Roach.....	74
Mr Scott.....	77
Mr Sich.....	80
Mr Cameron.....	82
Mr Purdie.....	85
Mr Rapson.....	87
Mr Jozinovic.....	89
Part 3 – Liability of Fourth and Eighth Defendants.....	91
Part 4 – Liability of Tenth and Thirteenth Defendants.....	91
Part 5 – Summary of Findings.....	91
Case law	
<i>D.F. Lyons Pty Ltd v Commonwealth Bank of Australia</i> (1991) 28 FCR 597.....	29
<i>Gates v City Mutual Life Society Ltd</i> (1982) 43 ALR 313.....	29
<i>Howland-Rose v Commissioner of Taxation</i> [2002] FCA 246; (2002) 118 FCR 1...7	
<i>I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd</i> (2002) 192 ALR 1... 25	
<i>Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd</i> (1981) 36 ALR 23.....	29
<i>NMFM Property Pty Ltd & Ors v Citibank Ltd</i> (2000) 107 FCR 270.....	21
<i>Sheldon v Sun Alliance Australia Ltd</i> (1988) 50 SASR 236.....	29
<i>Sykes v Reserve Bank of Australia</i> (1998) 158 ALR 710.....	32
<i>Waghorn v George Wimpey & Co Ltd</i> (1970) 1 All ER 474.....	28

PART 1 – GENERAL ISSUES

Background to the Actions

- [1] These actions had their origins in three tax minimisation schemes marketed in the coalfields of Central Queensland and the Mackay area where a number of employees in the coal mining industry resided. The trial concerned the cases of the first and second, fourth to eighth, tenth to nineteenth and the twenty-first plaintiffs against the fourth and eighth defendants, the sellers of two of the schemes and the tenth and thirteenth defendants which were respectively the manager and financier of the project underlying the third scheme.
- [2] Not all plaintiffs were involved in all schemes. The first scheme, marketed in respect of the financial year ending 30 June 1997, concerned the Northern Rivers Tea Tree Project (“Northern Rivers”). The second in the year ending 30 June 1998, concerned the Base Metals Exploration and Prospecting Project (“Base Metals”). The third, in the year ending 30 June 1999, concerned the Banalasta Oil Plantation (“Banalasta”). The Northern Rivers Scheme was to produce tea tree oil; the Base Metals Scheme was to engage in mineral exploration; and the Banalasta Scheme was to produce eucalyptus oil and related products.
- [3] The salesman who actually dealt with the respective plaintiffs was, in respect of the Northern Rivers Scheme, Drew Francis, the fifth defendant, against whom judgment by default had been entered by the time of trial. He was called under subpoena to give evidence in the case for the fourth and eighth defendants. He had been employed as a consultant by the fourth defendant in connection with selling the scheme. In respect of the Base Metals Scheme, Mr Nunis, one of the partners in the partnership which is the fourth defendant, or Mr Horner, the eighth defendant, were the salesmen. In respect of Banalasta it was Mr Horner. Mr Horner was also employed by the fourth defendant in connection with selling the schemes with which he was involved.
- [4] The problem which led to the proceedings was that the plaintiffs had claimed, in respect of schemes in which they were involved, taxation deductions for expenditures to which they had committed themselves under the schemes. These deductions were claimed under the self-assessment taxation regime. Notices of assessment on the basis that the deductions were allowable were initially issued and refunds paid accordingly in respect of the Northern Rivers and Base Metals Scheme. Notices of reassessment were issued, mostly in early 2000, on the basis that those deductions were disallowed. Notices of assessment based on disallowance of the deductions in respect of Banalasta were issued in the first instance. In some cases individual plaintiffs received independent advice that there was a risk that the deductions would be disallowed and lodged amended returns.
- [5] A general description of the case of each of the plaintiffs is that each of them was persuaded by the salesman to become a party to what became known as a “mass marketed tax scheme” on the basis of recommendations and representations made by the salesman. The pleadings allege that in the case of each plaintiff representations that investments in each of the schemes were lawfully tax deductible and that each of the schemes was approved by the Australian Taxation Office (“ATO”) had been made. It was also alleged in the pleadings that, in truth and in fact, investments in each of the schemes did not provide lawful tax deductions and

that each of the schemes was not approved by the ATO. The plaintiffs had suffered loss and damage because the recommendations were neither genuine nor made in accordance with the law and the representations were misleading and deceptive.

- [6] The schemes operated on the concept that a substantial amount of the moneys refunded by the ATO on the basis that the expenditure was lawfully tax deductible was paid into the schemes once the refund had been received. The effect of the schemes was that the plaintiffs who were earning in the vicinity of \$70,000 upwards were able to reduce their taxable incomes to varying sums in the vicinity of \$20,000. Some plaintiffs gave evidence that they were told that at that level of income they would be entitled to benefits from the social security system which they would not otherwise be eligible for. Some said that they had not taken advantage of this opportunity because they thought it would be immoral.
- [7] It is apparent from the evidence that the existence of schemes of this kind was a common topic of conversation at the mines. Many of the plaintiffs were persuaded by this talk to inquire about the schemes, with the result that they either invited the salesmen to discuss the schemes with them or attended presentations by the salesmen. The result was that there was usually a conjunction of eager sellers and eager purchasers. In many cases the documents were signed on the spot without any further inquiry, without reading any of the documentation. In some cases the plaintiffs who ultimately purchased were more wary.
- [8] The Taxation Commissioner's decision to reassess the tax liability of participants in the first two schemes and to disallow deductions in respect of the third scheme led to the present litigation, as has already been noted. The decision of Conti J in *Howland-Rose v Commissioner of Taxation* (2002) 118 FCR 61; [2002] FCA 246 which was delivered, after the evidence had been heard, on 18 March 2002 is an example of a scheme in respect of which the Commissioner's approach was vindicated. The costly and time consuming task of the matter coming to trial had reached the fourth day of the trial when the Taxation Commissioner announced a settlement offer for mass marketed scheme investors. The Taxation Commissioner's offer will have an impact on the level of damages recoverable in any cases where liability is established.
- [9] Analysis of the legal framework of the plaintiffs' cases can be put aside for the time being. One underlying proposition is that conduct that was misleading or deceptive or likely to mislead or deceive was engaged in by the salesmen of the schemes. It is desirable at this point to refer to a broad formulation of the case for the plaintiffs. In paraphrase the submission on behalf of the plaintiffs was that the case should be treated as one where everyone was taken advantage of by unscrupulous and predatory salesman. Coal industry workers who earned high incomes but were financially unsophisticated were targeted by salesmen who came the long distance from Western Australia to lure them, by use of aggressive marketing techniques and disseminating incorrect advice concerning ATO approval of schemes, into schemes that were supposed to be tax effective but were actually fraudulent. It was submitted that the salesmen were able to create a "tax effective schemes culture" and that the proper approach is to look at the plaintiffs as a class who were systematically targeted by the salesmen defendants and were susceptible to the apparently considerable benefits of each of the schemes.

- [10] This approach involves a degree of overstatement. Firstly, it attempts to minimise differences between individuals and the evidence in individual instances. Secondly, it seeks to avoid, by generalisation, the need to form a conclusion in individual cases as to issues such as what was actually said, how what was said is to be categorised for the purpose of legal analysis and the degree of reliance by individuals upon what is found to have been said. Related submissions to the effect that the “broad brush” approach implicit in these submissions is wrong in principle will be returned to later. Further, whether one describes the formation of the decision to invest in some instances as being due to trust and understanding induced by slick salesmanship, or a reckless desire, no matter what was said, not to miss out on what others in the mines were describing to anyone who cared to listen as a way to beat the taxation system and benefit under the Social Security System as well, may vary according to the perspective from which one views it. Such a dichotomy also creates the risk of obscuring subtleties in individual sets of circumstances.

Credibility - Salesmen

- [11] One thing may be stated with clarity. Although the three salesmen involved in the relevant schemes describe themselves as financial planners, they did not perform financial planning in any real sense. Their function and purpose was to sell the scheme with which they were currently involved, without regard to the overall financial situation or needs of the client. The only analysis of a financial nature engaged in was to obtain an estimate of the plaintiffs’ income for the current taxation year, work out what investment was necessary to achieve the optimum taxation outcome and to illustrate the contemplated kinds of deductions and tax savings to the client.
- [12] Since there is a gulf between what the plaintiffs in most cases say they were told and what the salesmen say they told the plaintiffs it is necessary to resolve issues of credibility and reliability of evidence. The two issues are important since an adverse finding as to credibility may not necessarily mean that the contrary version will be acceptable since there are also issues of reliability of that account as well.
- [13] One specific aspect of credibility concerns the eighth defendant Horner. Exhibit 116 is a letter dated 4 February 2002 under the hand of Mr Leach, instructing solicitor for the fourth and eighth defendants. Relevantly it says the following:

“Further to our earlier communications with you, our clients have instructed that settlement may be able to be reached in accordance with the terms of the **enclosed** draft Deed, provided the terms of settlement are agreed promptly, and are substantially in accordance with the enclosed draft.

Further, the terms of settlement will most likely need to be resolved today, otherwise circumstances will then dictate that the issue will not be able to be resolved by settlement between our respective clients.

Kindly advise by **urgent** return as to your response in relation to the proposed terms of settlement.”

- [14] The draft deed referred to in the letter shows the releasees as the fourth defendants and the eighth defendant. The critical part for present purposes is that part of the consideration for settlement of the action referred to in cl 2.1(b) was that Mr Horner would sign an affidavit in the form annexed to the deed. The effect of the affidavit was that, in respect of the cases of each of the plaintiffs with whom Mr Horner dealt, he admitted that he had, with the actual authority of the fourth defendants made the representations alleged, undertaken and performed the conduct alleged and made the agreements alleged by each plaintiff. The effect of swearing the affidavit would have been that his evidence in court that he used essentially a standard presentation not including the representations alleged against him, for the most part, would have been diametrically the opposite of what was in the affidavit.
- [15] This led to an exploration of the circumstances surrounding the giving of the instructions implicit in the letter. In the cross-examination of Mr Horner, the following appears:

“... I’ll ask, did you give instructions on that date to your solicitors that you would be prepared to swear an affidavit confirming the fact that you made the representations alleged in the statement of claim?-- I’m not too sure what letter we’re talking abate (*sic*).

Look at this document please? And I want you to read that to yourself please?-- Where’s my signature?

Shall I repeat the question?-- Yes, please do.

On or about that date, did you give instructions to your solicitors that you would be prepared to swear an affidavit confirming the fact that you made the representations alleged in the statement of claim?-- No, I can’t remember saying that.

Remember giving instructions that you were prepared to swear an affidavit?-- At that stage, no I wasn’t.

I didn’t ask you whether you were. Do you recall giving instructions to a solicitor that you were prepared to swear an affidavit? It was the week before the commencement of this trial?-- Mmm. I’m trying to think. To my - did I say to my solicitor?

Yes?-- No, I wouldn’t have done.

I’m sorry?-- I wouldn’t have done.

You wouldn’t have done?-- No, ‘cause I didn’t talk to my solicitor.

Did you talk to Mr Nunis and he talked to Mr Leach?-- No, not Mr Nunis.

Mr Pawski?-- I had a conversation with Mr Pawski about what they were offering.

Well don't want to go into that. What I want to know is whether you gave instructions directly or indirectly to your solicitors that you were prepared to swear an affidavit?-- No, I didn't say that to Mr Pawski.

I'll repeat the question. Did you instruct your solicitors directly or indirectly that you were prepared to swear an affidavit?-- Based on these terms here, is it?

Just forget those terms for the moment. Did you tell your solicitor directly or indirectly that you were prepared to swear an affidavit? We'll come to the terms of it in a moment. Did you say that?

...

WITNESS: No, I didn't.

...

MR HACK: Either by speaking to him directly or by communicating with him through another person?-- No.

...

Is it not the case at about the 4th of February you were prepared to swear an affidavit saying that you did say to the various plaintiffs in this case the things that they allege?-- No."

Reading this passage of evidence in the form of transcript does not fully convey the length of time involved and the extent of deliberation on the part of Mr Horner when giving the evidence.

- [16] Mr Leach swore an affidavit exhibiting some correspondence preceding and subsequent to Exhibit 116. On 8 January 2002 Macrossan & Amiet for the plaintiffs sent a letter to Gateway Lawyers referring to an earlier letter which is not exhibited. Macrossan & Amiet's letter stated that their clients were keen to progress settlement negotiations on the basis outlined in the earlier letter. A proposal was put by Macrossan & Amiet that either Gateway's clients would be available to give evidence for the plaintiffs confirming that the representations alleged in the statement of claim were in fact made, or alternatively, that they provide an affidavit confirming that the representations as alleged in the statement of claim for each relevant plaintiff were in fact made. It was stated that the purpose of this was to assist to resolve the matter with what would be the remaining outstanding parties, the tenth and thirteenth defendants.
- [17] On 16 January 2002 Macrossan & Amiet replied to further correspondence from Gateway (which is not exhibited to Mr Leach's affidavit). In it was discussion of a proposed affidavit, the purpose for which it was intended to be used and the tactical advantages to be taken of it if the tenth and thirteenth defendants went to trial. The letter also urged the fourth and eighth defendants to have regard to the advantages of settlement as a result of the affidavit being given.
- [18] On 4 February 2002 Exhibit 116 was forwarded to Macrossan & Amiet but on 7 February 2002 Macrossan & Amiet were advised as follows:
- "Further to our earlier without prejudice discussions, it seems that Mr Horner has received independent advice to not swear the affidavit in any form as proposed by you.

As you may appreciate, this will then probably result in the end of our settlement negotiations, given that the form of the affidavit was a central requirement to your clients' position."

[19] In his affidavit Mr Leach explained Exhibit 116 as follows:

"When I used the words 'settlement may be able to be reached in accordance with the terms of the enclosed draft Deed' in exhibit 116 I was not acting on direct instructions from Mr Horner but as a result of a conversation with another of my clients."

[20] In cross-examination on his affidavit he gave the following evidence:

"... you say that 'At no stage had Mr Horner or any of my clients given me instructions that Mr Horner was willing to swear the affidavit'. Did you have instructions that Mr Horner may be willing to swear the affidavit?-- No. Not maybe willing. What I was told that he was reluctant to swear the affidavit.

Well you were told though that he was considering swearing the affidavit?-- He was certainly considering it, yes."

In re-examination he said that Darren Pawski had informed him of that. Mr Pawski was not called by any party.

[21] Mr Hack invited me to conclude that Mr Leach's evidence that he had been told by Mr Pawski that Mr Horner was prepared to consider signing the affidavit established that Horner was disposed to swear falsely either in his evidence or in the affidavit. He submitted that his credit was damaged because of this to such an extent that his evidence should be disregarded where it conflicted with that of the plaintiffs and their witnesses. I am not persuaded in the absence of any more extensive account of how the notion of Mr Horner swearing the affidavit in the terms proposed was conceived that I should draw the conclusion suggested by Mr Hack. As the evidence stands Mr Leach's proposal seems to have been based on information from Mr Pawski as to Mr Horner's possible acquiescence in the proposal. Even allowing for an inference that may be drawn from the absence of evidence from Mr Pawski that any such evidence would not have helped the fourth and eighth defendants' case, Mr Horner's manner of denial in the witness-box and Mr Leach's evidence lead to the conclusion that I should base my weighing of Mr Horner's evidence on other factors rather than this.

[22] It is apparent from the evidence that Mr Horner was regarded by many of those with whom he dealt as a likeable person. No doubt this predisposed them to treat him as sincere and trustworthy. The results he achieved show that he was a very effective salesman. He also had the advantage, in many cases, of selling to people who had in previous years received the predicted benefits from other schemes and were therefore conditioned to accept that history would repeat itself in connection with the scheme he was then selling.

[23] His presentation in the witness-box was superior to that of the other salesman. His explanation of how he went about his business was more detailed and precise than

theirs, although Mr Nunis also gave an example of his standard presentation as well. His credibility presents the greatest problem of any of the salesmen for those reasons. He gave evidence that each of his presentations followed a set form and that he did not make representations in a form that was deceptive or misleading. A description of the content of his standard presentation was given in cross-examination. He said that it was subject to amplification by explanations given in answer to questions from the client but that such explanations did not include deceptive or misleading statements. Subject to what follows, the issue of his credibility needs to be addressed in conjunction with the question of reliability of individual plaintiffs.

- [24] As will appear from the analysis of individual cases, some of the plaintiffs were for various reasons more compliant than others and needed little persuasion to enter into the particular scheme. Others were inclined to try to understand the scheme in more detail. There are sufficient indications in the evidence that Mr Horner used well tried sales techniques to persuade plaintiffs to join. I am prepared to accept his evidence that he used a fairly standard form of presentation. The accounts of it given by Mr Purdie and Mr Rapson, which are among the most detailed, support this. I am also satisfied that he was astute enough to be cognisant of the limits which should be observed in informing the plaintiffs about the nature of the scheme.
- [25] However I am also satisfied that he was capable of moulding his presentation to suit the exigencies of the particular case. The conclusion upon which I have acted in assessing the individual cases is that where he was preaching to the converted who approached the transaction uncritically it was sufficient to substantially follow the standard format to make a sale. Where on the other hand the person was cautious, indecisive, or, in the worst case situation, wavering between signing or not, Mr Horner was prepared to say what was necessary to clinch a sale.
- [26] With regard to the issue whether he sufficiently informed plaintiffs concerning his right to commission, to comply with s 849 of the *Corporations Law* (Cth), I am satisfied on the balance of probabilities that it was part of his presentation to tell clients that he would get a commission or brokerage at a particular percentage rate. It is, however to be noted that when tested as to what sum the percentage was based on, he had difficulty articulating his understanding. When dealing with cases of individual plaintiffs later, if there is no specific reference to Mr Horner's evidence in the section relating to "conclusion" it may be assumed that I have acted in that instance in line with the view expressed in this paragraph.
- [27] It can also be said at this point that neither Mr Francis nor Mr Nunis was an impressive witness. Their evidence was generally lacking in detail and unconvincing. Their evidence must be subjected to severe scrutiny for those reasons while recognising that there is also a need to consider the reliability of competing evidence in forming ultimate conclusions as to whether individual plaintiffs have established their cases. Overall, I would be less prepared to accept Mr Francis' evidence than Mr Nunis', as will appear later.
- [28] It is convenient to note at this point that that Mr Francis and SecurInvest parted company at a time between the selling of the first and second schemes in circumstances resulting in an uncomplimentary letter about him being sent to clients. Some plaintiffs gave evidence that they were told about it as well when the Base Metals scheme was being introduced to them. Mr Francis, who had set

himself up as SafeInvest, responded to the allegations in a letter he distributed similarly. It is also convenient to note, in the context of the allegation that Mr Francis said that the Northern Rivers scheme was ATO approved when selling it to clients, that a letter (which Mr Francis said was sent without his authority) containing the following was sent to Mr Borg, the first plaintiff, on 14 July 1997:

“At present we are looking at new projects for the 1997/98 financial year, but of course we can’t introduce these products until they have the appropriate licence and approvals from the Australian Securities Commission and Australian Tax Office, as soon as these are in place we will be in contact.”

Credibility of Plaintiffs - Overview

- [29] With regard to the plaintiffs and their witnesses, one of the real difficulties as to reliability of any version from them is that, on any view of it, the evidence given must represent what is an impressionistic and condensed view of what the witness believed was said in a presentation, in some cases interrupted by questions and answers, extending over a much longer period than the version given in evidence extended. In most cases the format was that the particular salesman spoke to the potential client and was asked questions of various descriptions by the client. In the course of the meeting the salesmen filled out the tax management worksheet and explained it and also, at least in some cases, took the person’s personal particulars for incorporation into the documentation. It is also fair to say that the degree of interaction and questioning by potential clients varied from client to client. In short, it would be beyond argument that by the time the documents were signed the client believed that he or she would obtain the deductions referred to in the tax management work sheets. Otherwise the transaction would not have made economic sense. However, issues remain, firstly, about the extent to which there were misleading or deceptive statements which led the plaintiffs to enter into the transactions, given that a number of them were plainly predisposed from what others had told them or from previous experience to enter into the transactions and, secondly, about the extent to which individual plaintiffs relied on what they were told by the salesmen.

Structure of Plaintiff’s Cases

- [30] It now is necessary to examine in more detail the structure of the case presented on behalf of the plaintiffs before individual cases are examined. The statement of claim alleged that a number of matters were common to each plaintiff. It was said that there were “common representations” that:

- (a) investments in each of the schemes were lawfully tax deductible; and
- (b) that each of the schemes was approved by the Australian Taxation Office.

It was also alleged that there were “common truths” that:

- (a) investments in each of the schemes did not provide lawful tax deductions; and
- (b) that each of the schemes was not approved by the ATO.

- [31] It was also alleged that there was “common conduct” consisting of:

- (a) completion of a tax management worksheet;
- (b) requiring only details of gross income;

- (c) requiring no other financial information (including information concerning investment objectives, financial situation and particular needs); and
- (d) not considering a recommendation to invest in the scheme made with the benefit of that financial information.

[32] In respect of each plaintiff the case as pleaded followed a general pattern. Typically the structure was as follows:

- a description of the occasion when the plaintiff and the salesman discussed the scheme;
- a description of the representations “expressly and orally” made;
- reference to undertaking the common conduct and to other things the salesman did or did not do;
- reference to an alleged tax planning agreement and a duty of care in relation thereto;
- an allegation of knowledge that the plaintiff would rely on the representations;
- facts pleaded as evidence of reliance on the representations when the agreement was entered into;
- the common truths concerning the scheme and allegations of other false representations;
- alleged breaches of the *Corporations Law*;
- alleged breaches of the *Fair Trading Act 1989 (Qld)*;
- alleged breaches of the *Trade Practices Act 1974 (Cth)*;
- breach of contract and negligence;
- damages.

[33] As the matter was finally presented the focus was on whether there had been misleading or deceptive conduct, or specific contraventions of the *Corporations Law* with regard to disclosure and investment advice. No submissions were made concerning the causes of action pleaded in breach of contract and negligence. It was accepted that the concept of misleading or deceptive conduct was common to the *Corporations Law*, the *Trade Practices Act* and the *Fair Trading Act*.

[34] As the case crystallised, it was said to rest on two bases, the “recommendations case” and the “representations case”. The former was alleged to rely on breaches of ss 849 and 851 of the *Corporations Law* and s 852 which provides a remedy in certain circumstances. The “representations case” was based on the proposition that the relevant defendants had engaged in conduct that was misleading or deceptive or likely to mislead or deceive (which for convenience will be referred to generically

as misleading or deceptive conduct). The combination of the presentation by the salesmen and the nature of the schemes was said to have represented to the plaintiffs expressly or impliedly and orally or in writing that the schemes were tax office approved and/or provided lawful deductions.

(a) Recommendations case

- [35] The basis of the allegation relating to s 849 was an alleged failure to disclose commission or brokerage payable. The contravention of s 851 was based on an alleged failure to have a reasonable basis for making a securities representation. It was submitted that the fourth defendant was an investment adviser as defined by the *Corporations Law*, that the fifth defendant and the eighth defendant were securities representatives of the fourth defendant and that each of the fourth defendant (through Mr Nunis), Mr Francis and Mr Horner was a securities adviser. It was submitted that there was in each instance the making of a securities recommendation defined by s 9 of the *Corporations Law*, namely a recommendation with respect to securities or a class of securities, made expressly or by implication.
- [36] Section 849 is concerned with a situation where a securities adviser makes a securities recommendation to a client who may reasonably be expected to rely on it. There is no doubt that each plaintiff might reasonably be expected to rely on the recommendation. I do not accept that the failure of the plaintiffs to take steps to familiarise themselves with the documents if given to them by the salesmen, made it unreasonable to expect that they would rely on the recommendation. In most instances, the way in which the transaction occurred was not designed to encourage reading or enquiry. In respect of that category of person a securities adviser is required to disclose particulars of any commission or fee that the security adviser or an associate will or may receive in connection with the making of the recommendation or a dealing by the client in securities as a result of the recommendation. If the recommendation is made orally the information about a commission or fee must be disclosed orally. If the recommendation is made in writing it must be disclosed in writing.
- [37] As will appear in more detail later when dealing with individual cases, there is evidence in many instances that plaintiffs signed Disclosure Statements setting out in various ways the fact that commission was payable to the salesman. ASIC Policy Statement 122 with reference to s 849 and s 851 was tendered. It is not determinative of whether there has been a contravention of either section, but is useful as an indication of aspects of the requirements that need to be considered by persons making recommendations. At [PS 122.77], it is stated that a blanket or generic disclosure, examples of which are given, does not comply with the obligation of s 849. [PS 122.78] says that disclosure should be made in a manner that is clear and easy for the client to understand. The level of sophistication of the client is a factor to be taken into account when deciding on an appropriate level of detail and suitable format. [PS122.79] says that if the client is unlikely to be familiar with the concept of percentage, it is advisable to disclose the information in dollar terms. The point that is obvious from the document is that there is no rigid requirement; there is flexibility on a case by case basis.
- [38] What has just been said is of some relevance because in the case of the Banalasta scheme, it was submitted that there was a breach of s 849 because the disclosure

statement refers to a “rate of commission of 5%” to be received by Mr Horner. It was submitted that this amount, since Mr Horner was not sure of the basis of calculation, was not capable of calculation and was uncertain. It was submitted that there was a breach of s 849(2).

- [39] Section 852 of the *Corporations Law* provides a remedy if four matters coincide. Section 852 also relates to breaches of s 851 to which reference will be made later. The four matters are:
- (a) the security adviser contravenes the relevant provision in relation to a security recommendation to a client;
 - (b) the client, in reliance on the recommendation, does or omits to do, a particular act;
 - (c) it was reasonable for the client to do, or omit to do, the act in reliance on the recommendation; and
 - (d) the client suffers loss or damage as a result of the act or omission.

If those four matters coincide, a securities adviser is liable to pay damages in respect of the loss or damage, subject to s 852(3), in the case of s 849 and s 852(4) in the case of s 851.

- [40] With respect to (b), (c) and (d), subject to s 852(3), provided it is established that a client relied on a recommendation to invest in a scheme, and it was reasonable in all of the circumstances for the client to act on the recommendation, upon proof of loss or damage as a result of acting on the recommendation (i.e. as a result of entering into the scheme) the security adviser would be liable to pay damages in respect of the loss and damage.
- [41] In the case of s 849, there must be reliance on the recommendation as a result of which loss is caused. The fact that the recommendation to enter into the scheme was made must be proved to be a motivating factor for the particular client entering into the scheme. That is the first causal link required. The next question posed by s 852(3) is whether loss resulted from entering into the scheme. The final question is whether, in any instance where s 849 was not complied with, it is proved a reasonable person in the client’s circumstances, even if told in appropriate terms that the salesman was entitled to the commission, would have entered into the scheme. This involves an objective element. It is not a question whether it is proved that the particular client could be expected to enter into the scheme but whether a hypothetical reasonable person in the client’s circumstances could be expected to have done so. On the view I take of the facts, except where otherwise indicated, a reasonable person having been told that commission at the rate of 5% would be due to the salesman could be expected to have gone ahead anyhow with the scheme.
- [42] A submission was made on behalf of the fourth and eighth defendants to the effect that this basis of liability had not been established because there was no causal link established between the failure to inform the plaintiff of the right to commission and the loss and damage suffered. In its abstract form I do not accept this argument. The structure of s 852 does not require the loss to be causally connected to the failure to inform. The required causal connection is between the act or omission done in reliance on the recommendation made by a person who has not made disclosure of his commission and the loss and damage. That is to say the causal

connection must be between entering into the scheme and suffering loss and damage.

[43] Section 851 applies where a securities adviser makes a securities recommendation to a person who may reasonably be expected to rely on it and the securities adviser does not have a reasonable basis for making it. The concept of not having a reasonable basis for making a recommendation is defined, for the purposes of the section, as involving the following: the securities adviser does not have a reasonable basis unless;

- (a) he or she has given such consideration to and conducted such investigations of the subject matter of the recommendation as is reasonable in the circumstances, in order to ascertain that the recommendation is appropriate having regard to the information the securities adviser has about the person's investment objectives, financial situation and particular needs; and
- (b) the recommendation is based on that consideration and the investigation.

It was submitted that the salesmen had not given reasonable consideration to or conducted reasonable investigations of the subject matter of the recommendation, that is to say, the underlying investment.

[44] Each of Mr Francis, Mr Nunis and Mr Horner saw themselves as salesmen whose authority was limited to advising as to the particular product currently being marketed. They did not consider themselves as financial advisers in any wider sense. I am satisfied that many of the plaintiffs were principally interested in reducing their taxable income, had heard of the particular scheme from others and knew anecdotally of the benefits of schemes of this kind or the scheme itself before they met the salesman. They formed a cohort of the willing when it came to entering into the scheme. A few plaintiffs were more cautious, having heard about the scheme but wanting to know more about it before committing themselves.

[45] I am satisfied that each plaintiff was a person who might reasonably be expected to rely on the recommendation inherent in the way the sales pitches were conducted. In respect of such a person s 851(2) required:

- (a) that the matters in (b), (c) and (d) be set in the context of the information the securities adviser has about the person's investment objectives, financial situation and particular needs;
- (b) such consideration of the subject matter of the recommendation by the securities adviser as was reasonable in the circumstances;
- (c) such investigation of the subject matter of the recommendation by the securities adviser as was reasonable in the circumstances; and
- (d) that the consideration and investigation be carried out purposively; it was to be done in order to ascertain that the recommendation was appropriate in the required context.

There was little evidence that some of the plaintiffs had any particular objective in mind except reducing their taxable income and increasing their refund. Some, in their evidence at least, expressed purposes related to retirement and future family expenditure from income from the scheme.

- [46] The evidence does not suggest persuasively that any of the salesmen conducted any inquiry at the time the project was being discussed about the particular plaintiff's investment objectives beyond a desire to reduce taxation by involvement in the scheme nor as to their particular needs. Indeed in some cases, such as Mrs Montgomery's and Mr Reid's, the fact that their financial circumstances would be considerably worse in the subsequent year did not cause any cautionary comment, in the case of Mr Reid, or according to Mr Horner, any comment other than if Mrs Montgomery got into difficulties a proposition would be put to the scheme to restructure her commitments. Some other plaintiffs who expressed concern that their financial position may deteriorate because of volatility in the industry were not cautioned concerning participation. They were told much the same as Mrs Montgomery.
- [47] It was submitted that a critical omission was that each salesmen had failed to ascertain each person's individual objectives, financial situation and particular needs. There is a degree of subjectivity in s 851(2)(a). Literally it focuses on information that the "securities adviser has" about the person's investment objectives financial situation and particular needs. The drafting of the provision is not apt to cast a direct obligation on the investment adviser not to make a recommendation unless he has complete information about such matters. For example if a person sought advice from an investment adviser on a specific subject and chose not to reveal any other information, the investment adviser would not be in breach of s 851 merely because he had not ascertained that information. It may, however, be imprudent for an investment adviser not to, at least, seek such information. As [PS 122.102] says, "Section 851 does not expressly require reasonable inquiries to be made of the client's needs and circumstances. However ASIC considers that this is implicit in the underlying purpose of the s851 obligation and the general law obligations of the securities adviser as a fiduciary". [PS 122.106] and [PS 122.107] deal with the case of a client who wishes not to fully disclose personal information. But, in the end, it would not constitute an offence if the recommendation was appropriate on the basis of such information as he had, provided he had conducted such consideration and investigation of the subject matter of the recommendation as were reasonable in all of the circumstances and the recommendation was based on that consideration and investigation.
- [48] Further, s 852(4) provides that in a case of contravention of s 851, the securities adviser is not liable to pay damages in respect of loss suffered by reason of entering into the scheme if it is proved that the recommendation was reasonable in the circumstances having regard to the information the securities adviser had about the client's investment objectives, financial situation and particular needs. The provision focuses on the state of knowledge of those things at the time the recommendation was made.
- [49] Each of the salesmen gave evidence bearing on the extent of their consideration and investigation of the subject matter of the recommendation. This is simply put on record to show that little if any independent research into the schemes was done by them. Given the level they occupied, the fact that they essentially gave a set presentation, supplemented if necessary in the case of a particular client, is not surprising. Mr Francis gave no evidence concerning the state of his knowledge of the Northern Rivers scheme other than that he had referred to the prospectus during the course of his presentation.

[50] Mr Nunis said that he was introduced to the Base Metals scheme by Mr Hooker a director of the manager and financier. He also spoke to other directors although what was said in these conversations is unspecified. He spoke to a geologist involved with the project and said he relied on his opinion concerning the prospects discussed. He said that he had gone to New Caledonia (in company with a friend who was a geologist) where he saw drilling sites. There was also a journey to a place near Tamworth to view a site but this proved abortive because the person who was to show them could not come for a couple of days. He said that he had read the prospectus, and referred to its contents during the presentation. He had not personally done any search of or read any ASIC documents concerning relevant companies. He did not realise that the tax opinion in the prospectus was given by the company's auditors. He did not make any inquiry of the Stock Exchange about the companies which held the tenements upon which the prospecting was to be done.

[51] Mr Horner said that he had visited the Banalasta scheme land on at least two occasions, one of which may have been after the relevant period. One purpose was to check the feasibility of the project with reference to the existence of trees and infrastructure and to find out about marketing prospects for the products. He did not investigate the financial structure or circumstances of relevant companies.

[52] A passage of cross-examination of Mr Horner was directed at the proposition that there had been analysis of the personal financial situation of plaintiffs, as asserted in a document given to them after they joined the scheme. He admitted that he did no analysis of their personal financial situation. He believed his function was to take clients' personal details and to find out their financial situation, put it in the computer and calculate how many units they should purchase. He said that he had sold schemes to about 300 people and only two people were advised not to enter into them. Notwithstanding a description on his business card as "financial planner" the scheme he was selling was the only scheme he was authorised to recommend. A passage of the cross-examination illustrates, in summary, what he saw his position to be:

"You said, 'The Base Metals scheme, or the Banalasta scheme, which as the case may be, this is the scheme for you', is that correct?-- It's the only scheme I could recommend.

Is that what you said to them?-- Yes, that's true.

'This is the scheme for you'. You see, you did have an option. You could say, 'This is not your scheme. You should go and see a real financial planner', that was an option, wasn't it?-- I was there to sell the product. I wasn't there on the financial planning capacity as looking at shares and all that. I wasn't licensed in any other areas to be able to comment on it."

[53] He was questioned about Mrs Montgomery's case. He admitted that he did not advise her that the scheme was not suitable for her. He maintained he was acting in her interests notwithstanding that her capacity to meet payments in the second year of the scheme was contingent on her finding another office job paying of the order of \$50,000 per annum. He maintained that he was acting in her interests by selling her the scheme and telling her that they would "look at" doing something by way of

readjusting the costings of her investment in respect of the second year if she did not get a job.

[54] In cross-examination of Mr Francis in connection with his dealing with Mr Borg in respect of the Northern Rivers scheme he admitted that the only financial information he obtained from Mr Borg was his taxable income. He said that he did not find out what his financial objectives were but qualified it by saying that it was under Mr Borg's instructions. He elaborated on this in re-examination, saying that he asked Mr Borg if he wanted him to do any more financially and whether Mr Borg wanted to give him any more of his financial situation but Mr Borg declined. Mr Francis agreed that he had found out nothing about Mr Borg's particular needs. He denied that he had recommended the scheme or that he persuaded plaintiffs to enter the scheme but admitted that he was a salesman and that it was his job to sell the scheme.

[55] In cross-examination Mr Nunis agreed that prior to meeting Mr Borg in connection with the Base Metals scheme, all he knew was that he was a married miner. In the course of the meeting he asked for his taxable income. He did not ascertain his investment objectives nor his financial situation beyond his taxable income. He accepted that he was there purely to sell him an investment in the Base Metals scheme which was the only scheme he was authorized to sell. He believed that being in three speculative tax minimization schemes was a form of risk diversification. In a general way his method is summarized in the following passage:

“When you arrived to have a presentation with one of your clients, or potential clients, you were not there to give them financial planning advice, were you?-- No, I was there to show them the product.

You were there to sell them the scheme, weren't you? -- The Base Metals project, yes.

And the scheme operated on the basis of your telling them that these payments would be allowable deductions, that they would get a refund and out of that refund the money would pay for the participation; is that correct?-- Yes.

You were not interested in giving them a recommendation that suited their particular needs, their particular finances, were you?-- They were products specific. They actually wanted to speak to us about that particular product.

You were not interested in selling them something that was geared to their needs or their circumstances, were you?-- I didn't have the capacity to do so.

Shall I ask the question again? -- No.

Well would you answer it, please?-- No. The answer is no.

You were there to sell your tax scheme?-- The Base Metals exploration project.”

- [56] It is probably futile to attempt to define comprehensively the minimum level sufficient to comply with s 851 or to establish that a person is within the exemption from liability in s 852(4). Each case will depend on its own facts. There are two issues. One is whether there has been a contravention of s 851. The second is whether notwithstanding any such contravention it is proved that the recommendation was appropriate in any event.
- [57] There is little authority on s 851. However, in *NMFM Property Pty Ltd & Ors v Citibank Ltd* (2000) 107 FCR 270, Lindgren J was primarily concerned with an allegation of negligent advice in recommending to clients that they refinance to borrow to purchase units in an investment product. The inquiries concerning the individual plaintiffs' financial position and aspirations were more detailed than in the present case. At 361, he said:

“After speaking with the Investors, usually at some length and more than once, and at least purporting to listen to them and to take cognisance of their individual circumstances, the Advisers recommended a radical restructuring of their financial affairs that involved substantial borrowings on the security of their homes and of the units purchased. The borrowings gave rise to heavy interest commitments, which, in many cases, consumed most if not all of the Investors' income from their employment. The increased interest liability was supposedly to be met by the returns from the units and the tax savings arising from the ‘negative gearing’ aspect of the investment. The Package was far more complicated and risky than a simple investment in units in the Trust.”

He also said at 360:

“The Package involved the Investors in substantially increasing their indebtedness as part of an arrangement which, for them, was unfamiliar and extraordinary. They were entitled to expect that an unqualified recommendation to invest in accordance with the Package would not be made if there were associated risks that were not made clear to them, or if their income was or might well prove insufficient to service their borrowings, or if the Package was or was likely to be unsuitable for them.”

- [58] There was also a claim of contravention of s 851 of the *Corporations Law*, which he presumed proved in the circumstances. Because of this, it can only be inferred that Lindgren J would have considered that the procedure followed by the advisers in that case was insufficient compliance with the requirements of s 851. In my assessment of the two cases, the conduct of the salesmen in the present case falls short of that in *NMFM*.
- [59] In the case of the Northern Rivers scheme the Letter of Instruction commences substantively with the sentence “I advise that I am interested in receiving advice in relation to the class of products generally known as **TAX EFFECTIVE** products”. It will be noted that the interest is in advice in relation to the class of products, not necessarily an individual product. Then there are paragraphs expressed as alternatives. The first instructs the second defendant to provide the client with recommendations and to collect such information as is necessary to provide an

appropriate recommendation. The second states that the client does not wish to provide any personal information and merely requires the second defendant to advise on the feature of whatever tax effective products the second defendant has available. It also instructs that the client will make his own decision and purports to exclude liability of the second defendant or its agents, officers or employees as to the appropriateness of the selected product for the client's circumstances.

- [60] Despite the fact that the two instructions are different and expressed as alternatives and the form says "delete whichever paragraph is not applicable", neither of the alternatives was crossed out.
- [61] The features of the disclaimer referred to above are substantially the same with regard to the Base Metals scheme, with the exception that the instruction to cross out whichever alternative is not applicable is not included. The fact that they are alternatives is clear but one of them is not crossed out on any of the disclaimers except in one case where there appears to have been a crossing out at some time after the document was completed. Later there is a reference to the words of s 851 and a statement that the Securities Recommendation Report was based on personal information provided by the plaintiff. There was also an invitation to the client to bring any misinterpretation of the information or some other personal details, needs or objectives that have been overlooked to the attention of the second defendant before placing the investment.
- [62] In my view scant regard is paid in these documents to the obligations under s 851 despite the fact that the Base Metals document refers to s 851. In cases where there is no feature peculiar to the case of individual plaintiffs, I am satisfied that the minimum requirements of s 851 have not been satisfied by the salesmen in respect of these two schemes. Even allowing for the subjective content of s 851 there was generally no satisfactory evidence of a meaningful attempt to offer a considered opinion of the scheme's suitability for the client which reflected even the limited knowledge they had of the plaintiffs' investment objectives, financial situation and particular needs as opposed to seeking to reduce the plaintiff's taxable income. The process of considering what to recommend consisted in practice of no more than finding out how many units in the investment could be funded from the taxation benefit expected from entering into the scheme.
- [63] By referring to a considered opinion of the scheme's suitability, it should not be taken to mean that reliance by an investment adviser on analysis by others including information in the prospectus will not be sufficient in any circumstances. In many cases it will. However, the evidence in the present case does not suggest that there was anything of the nature of a frank explanation of the schemes by the salesmen, nor a presentation in a form that allowed clients to understand the schemes' capacity to remain viable and any risks associated with them. They presented what they were schooled to say as their own basis for recommending the scheme. There may have been passing reference to the fact that the investment was speculative, but the nature of the oral presentation was calculated to minimise any concerns that a plaintiff may have had. Even in that regard the focus was generally on allaying concerns about "legality" rather than the risk that either the underlying venture or the taxation aspect may fail.
- [64] It should be mentioned that the procedure varied to some extent as to when the plaintiffs had the opportunity to read the prospectus and other documents. On the

view I take of the obligations under s 851, the opportunity to peruse the documents provided is both concerned with reliance and issues involved in that section. The manner in which the presentation was made may allow inferences to be drawn about the degree of attention to matters comprehended by s 851. In many instances, if plaintiffs did not ask for the opportunity to take the documents away with them before signing up for the scheme, at best they could peruse them after they had signed. Often the presentation was hurried and no opportunity was given to refer to the documents as it proceeded. However, it should be recorded that in some cases, it is questionable whether plaintiffs would have been interested in reading documents provided in detail, and if given the opportunity, whether they had the financial sophistication to properly interpret them. In other cases, plaintiffs took documents with them and had the opportunity to read them or seek advice about them. The evidence in this regard will be referred to in individual cases if significant.

[65] When dealing with the cases of individual plaintiffs an indication that there has been a contravention of s 851 is an abbreviated way of incorporating the conclusions reached in the preceding paragraphs. Whether the recommendation to enter these two schemes was in fact appropriate requires consideration in the context of particular plaintiffs. But in respect of none of them was information ascertained that would have suggested to a person giving financial advice that their financial situation was such that risk of failure of a speculative scheme was an event they could absorb without a significant detriment.

[66] With respect to the Banalasta Scheme, the disclaimer refers to s 851. It contains, in bold type, the following:

“The Security Dealer’s Licence held by Banalasta ... enables its authorised representatives to deal only in the prescribed interests of those projects specifically mentioned on this licence. Accordingly, securities recommendations provided by the Company’s authorised representatives are on a limited advice basis and contained to these specific projects.”

[67] The Letter of Instruction is in the following terms:

“I/We advise that I/We are interested in receiving information in relation to that class of products generally known as Securities Products. I/We acknowledge that the securities recommendations provided by the Company’s authorized representatives are limited and contained to those specific projects as stated on the Securities Dealer’s Licence held by Banalasta.

I/We hereby advise that I/We wish to provide Banalasta or its authorized representative _____ with very limited/no *(delete whichever is not appropriate)* personal financial information. I merely require them to advise me on the features of whatever security products they have available.

Accordingly, I/We will make my own decision and acknowledge that Banalasta, its agents, officers and employees have no liability

whatsoever as to appropriateness of the selected product for my circumstances. ...”

It is perhaps symptomatic of the superficial approach to presenting information that later in the document there is a reference to an independent tax opinion “received by Earnest Young”, not the independent tax opinion received from Ernst & Young.

- [68] Much more limited advice is envisaged in respect of this scheme than in the case of the previous two schemes. It is more appropriate in the case of this scheme to deal with the plaintiffs on an individual basis in determining whether there has been a contravention of s 851 or proof of exemption under s 852(4).

(b) Representations case

- [69] The plaintiffs relied principally upon two representations:
- (a) that the amounts invested were tax deductible; and
 - (b) that the schemes were approved by the Australian Taxation Office.

It was submitted that those representations were representations of existing fact. It was submitted that the representation that the amounts were tax deductible was not one to the effect that when, after the end of the financial year in which the representation was made, the investor prepared and lodged a tax return the amounts invested would be treated as a claimable deduction. The plaintiffs’ case was put on the footing that what was represented was as to a then existing fact, that the amounts set out in the tax management worksheet under the description “Deductible Business Expenses” were lawful deductions in accordance with the law as it then stood. It was submitted that the existing fact of lawful tax deductibility was an inherent part of the scheme, for without lawful deductibility the scheme would not be viable for the plaintiffs because no funding from the tax refund would be available.

- [70] It was submitted that it was important to the plaintiffs to view the case in that way since if the representations were as to the future, the salesmen might plead and prove that they had a reasonable basis for making that representation. It was also submitted that the plaintiffs did not suggest that the words as pleaded were used on every occasion. Rather, the case was that the deductibility representation and the approval representation were conveyed by a combination of what was said, both orally and in print, and what was not said (This formulation of the argument was attacked by those of the defendants who defended, on the basis that it departed significantly from what had been pleaded; more will be said of this later).
- [71] It was submitted that whether the basis of the case was s 52 of the *Trade Practices Act* or s 995 of the *Corporations Law* it was well settled that whether conduct was misleading or deceptive was to be gauged in the light of all relevant circumstances constituted by acts, omissions, statements or silence. It was submitted that in considering the conduct in this way it needed to be borne in mind that the schemes worked on the assumption that a claim would be made to deduct a large amount of fees and other expenses and that the major portion of the consequential tax refund would be paid to the scheme promoters.
- [72] It was submitted that the schemes were based on two notions, firstly that receipt of a refund cheque demonstrated acceptance by the Commissioner of Taxation that the

deductions claimed were lawful deductions, and secondly, that the amounts under the heading “Deductible Business Expenditure” were in fact lawful deductions. The failure to explain the concept of self-assessment constituted misleading and deceptive conduct especially where it was coupled with positive assertions oral and in writing, that the amounts claimed were deductible business expenditures.

- [73] While discussing these kinds of issues it is convenient to mention that since the case was argued the High Court has explained the operation of ss 82 and 87 of the *Trade Practices Act* in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 192 ALR 1. Insofar as there was a good deal of evidence in this case that some, but not all, of the plaintiffs took little care to protect their interests by ensuring that they read and understood as far as possible the documents relating to the transaction before binding themselves to the schemes it is necessary to repeat the succinct passage from the judgment of Gaudron, Gummow and Hayne JJ at [50]. It is as follows:

“...Section 82 provides a cause of action to those who have suffered loss or damage by conduct contravening a relevant provision of the Act. It does not merely provide a remedy which may be granted or withheld according to the exercise of discretion. As Gummow J pointed out in *Marks v GIO Australia Holdings Ltd* [(1998) 196 CLR 494 at 526-7]:

‘Section 82 has at least five discrete elements. First, it identifies the legal norms for contravention of which the action under the section is given. Secondly, it identifies those by and against whom that action lies. Thirdly, the section specifies the injury for which the action lies as the suffering of loss or damage. Fourthly, it stipulates a causal requirement that the plaintiff’s injury must be sustained ‘by’ the contravention. Finally, the measure of compensation is ‘the amount of’ the loss or damage sustained.’

Of these elements, it is the fourth and fifth that are of principal relevance to the present question. If the causal link between injury and contravention is established, the measure of the compensation for which the section provides, and to which the person bringing the action is entitled, is the amount of the loss or damage sustained, not some lesser amount. In particular, it follows from the decision in *Henville v Walker* [(2001) 206 CLR 459] that there is nothing in s 82(1), in other provisions of the Act, or in the policy of the Act, to suggest that a claimant’s carelessness may be taken into account to reduce the amount of the loss or damage which the claimant is entitled to recover under s 82(1).”

- [74] Later in the judgment at [57] in the course of discussing the need for identification of a causal connection between loss and damage and contravention it was observed that it may be possible to identify several features of the history of events as having contributed to the person suffering loss and damage. Two such features referred to in elaborating on the issue were foolishness and the failure to take reasonable care to protect the person’s own interests. Nevertheless it was reinforced that it was well established that the question is not what was the sole cause of loss or damage. It is

enough to demonstrate the contravention of a relevant provision of the Act was *a* cause of loss or damage sustained.

Miscellaneous matters

(a) Pleadings

- [75] In a trial of this magnitude, the task of producing a pleading that is wholly complete and internally consistent is a challenge. The trial was beset in its early stages by complaints, which were justifiable, about what was in issue on them. Principally, these concerned the defence, which had encountered difficulties in preparation. As the record shows, it seemed to me that it was necessary to amend to litigate properly the issues between the parties but that it would be counter-productive, pending an appropriate amendment being drafted, not to hear the evidence, principally relating to reliance, which was the main deficiency in the pleadings. The pleading was eventually amended in that respect, albeit somewhat belatedly. There was also an amendment during the trial to enable the ATO proposal to alleviate the position of persons who had entered into mass-marketed schemes to be taken into account with regard to damages.
- [76] In a trial which evolved to some extent as it went on, I have acted on the basis that it should be decided on the issues as they stood at the end of the trial, without pedantic attention to whether the pleadings are precise with regard to them. There is nothing to suggest that any material prejudice will occur to any party by adopting this approach. However, as appears in the next section, the issue of how elastic this approach should be is an important one.
- [77] One other pleading issue arose at the commencement of the last day of evidence. Mr Hack presented a variety of proposed amendments marked A to F. Paragraphs A to D were concerned with allegations relating to contraventions of s 851 by the fourth and/or eighth defendants. Paragraph E was concerned with alleging that the eighth defendant had recommended that plaintiffs invest in the Banalasta Scheme. None of these were objected to. After asking for time for consideration, Mr Wilson, to whose client paragraph F related, indicated that he would not oppose it. However, more will be said about this when discussing liability of the thirteenth defendant particularly in Part 4 of these reasons.

(b) Material departure from case pleaded?

- [78] One of the points in contention between the plaintiffs and the fourth, eighth, tenth and thirteenth defendants concerns the plaintiffs' submission as to how it may prove its case, encapsulated in the following passages from the plaintiffs' written submissions:

“6. In respect of the representations case, the plaintiffs seek relief under one or other of the *Corporations Law*, the *Trade Practices Act* 1974 and the *Fair Trading Act* 1989. The primary bases for the representations case are s.995 of the *Corporations Law*, s.52 of the *Trade Practices Act* and s.38 of the *Fair Trading Act*. Each of those sections proscribes conduct ‘that is misleading or deceptive or is likely to mislead or deceive’. When looked at as a whole, the evidence supports the general proposition that through the

combination of the salesmen's spiel, the tax management work sheets and the very nature of the schemes themselves it was represented to the plaintiffs either expressly or impliedly, orally or in writing that the schemes were 'tax office approved' and/or provided lawful deductions.

7. Contrary to the pedantry and legalism of the defendants' submissions, the task of the Court is to look at the plaintiffs as a class of people who were systematically targeted by the defendants as the primary means of floating the various schemes. The demand the defendants make of the plaintiffs requiring specific words to be used belies the fact that the notion of misleading and deceptive conduct is not capable of precise definition. The question is whether in light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct that was, or was likely to be, misleading or deceptive: *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32, 41. In all the circumstances there need only be a real (not remote) chance that the conduct is 'likely to mislead' (*Global Sportsman Pty Ltd v. Mirror News Papers Ltd* (1984) 2 FCR 82 at 87...."

Later, in the context of the "representations case" it was said:

"52. It needs to be stressed that the plaintiffs do not suggest that the words as pleaded were used on every occasion. Rather, their case is that the deductibility representation and the approval representation were conveyed by a combination of what was said, both orally and in print, and what was not said.

53. The concept of misleading or deceptive conduct underlies the plaintiffs' cases to the extent that they rely upon s.52 of the *Trade Practices Act* and s.995 of the *Corporations Law*. It may now be regarded as well-settled that whether conduct was misleading or deceptive is to be gauged in the light of all relevant circumstances constituted by acts, omissions, statements or silence (See eg., *Demagogue Pty Ltd v. Ramensky* (1992) 39 FCR 31, 32, 40-41). In considering the conduct in this way it needs to be borne in mind that the schemes worked upon the assumption that a claim would be made to deduct a large amount of fees etc and that the major portion of the tax refund that followed would be paid over to the scheme promoters.

54. The schemes were based upon two notions, first that receipt of a refund cheque demonstrated acceptance by the Commissioner of Taxation that the deductions claimed were lawful deductions and second that the amounts under the heading 'Deductible Business Expenditure' were, in fact, lawful deductions.

55. Viewing the matter narrowly, the failure to explain the concept of self-assessment constituted misleading and deceptive conduct, *a fortiori*, where it was coupled with positive assertions, oral and in

writing, that the amounts claimed were deductible business expenditures.”

- [79] The tenth and thirteenth defendants take issue with this approach, pointing out that in relation to every plaintiff, it was pleaded that representations were made “expressly and orally”. It was submitted that it was not pleaded that the representations were made impliedly or other than orally. It was submitted that the evidence in chief and cross-examination of crucial witnesses focussed on the words supposedly used. The tenth and thirteenth defendants took issue with the description of the submissions made in reliance on the state of the plaintiffs’ pleadings and evidence led in support of them as “pedantry and legalism” in a case of this magnitude. It was submitted that in the context of this case, the conduct of the fourth and eighth defendants could only constitute misleading and deceptive conduct if by such conduct representations were conveyed.
- [80] The fourth and eighth defendants accepted that, while the pleadings determine what is relevant at the trial and some latitude is ordinarily allowed, as a rule the judgment must be based on the evidence. If the case presented and proved is a variation, modification or development of what is contained in the pleadings, judgment can be given on the case proved by the evidence. However, where the case proved or attempted to be proved is new, separate and distinct and constitutes a radical departure from the pleaded case, the case cannot succeed. *Waghorn v George Wimpey & Co Ltd* (1970) 1 All ER 474 was referred to as an example of this approach.
- [81] It was submitted that an invitation to the court to consider the case as relying on omissions and silence (which were not clearly identified nor pleaded) fell into the latter category and should not succeed. It was pointed out that no application had been made to amend the pleadings. The case had been put and fought on the basis of individual and discrete factual allegations relating to each plaintiff. Therefore the merits of each plaintiff’s case should be determined by reference to the evidence and facts pleaded concerning each plaintiff. The plaintiffs’ attempt to obscure this by a “broad brush” approach was impermissible. It was submitted that the notion of the plaintiffs constituting a class was also not in accordance with the way the action was constituted. It was not a representative action under *UCPR* 75; it was presumably constituted under *UCPR* 65.
- [82] In my view the attempt to broaden the scope of the plaintiff’s cases in the way contended for in paragraph [78] goes beyond what is permissible. The pleadings are not framed in that way; nor was the conduct of the case focussed in that way. To consider the case of each of the plaintiffs on the basis contended for would go beyond proper bounds. Had an allegation of failure to explain the self-assessment taxation system been intended to be a material omission or silence, it should have been pleaded. It is significantly different in character from express and oral representations.
- [83] At times, it even seemed to be suggested that the cases of individual plaintiffs should be resolved by reference to an even more nebulous notion that, in every case, there was a “spiel”, consisting of more than the pleaded express and oral representations, the common conduct and the allegation concerning failure to explain the self-assessment taxation system. The manner of presentation of the “spiel” as a whole, it seemed, misled the plaintiffs into failing to appreciate that the

theory upon which the scheme was based would be falsified if, contrary to the encouraging opinions in the prospectuses and the Ernst & Young reports, the ATO disallowed the deductions. The cases of individual plaintiffs will therefore be decided in accordance with whether or not the allegations in the pleadings, albeit given the kind of latitude referred to in paragraph [76] above, are made out.

(c) “Similar fact” evidence

- [84] It was common ground that in a civil matter evidence that similar representations were made to others is admissible (see *Mister Figgins Pty Ltd v Centrepont Freeholds Pty Ltd* (1981) 36 ALR 23, 30-31; *Gates v City Mutual Life Society Ltd* (1982) 43 ALR 313, 327; *D.F. Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597, 603-7). It was accepted that such evidence was relevant as having a bearing on the issue of whether the probability that particular representations were made to a particular plaintiff was increased and, ultimately, whether they were proved to a satisfactory level.
- [85] However, it was submitted by the fourth and eighth defendants that different plaintiffs had significantly different recollections of what was said to them and there was therefore a risk that using evidence of what was said to others to buttress the credibility of individual plaintiffs may too readily lead to an erroneous conclusion (c.f. *Sheldon v Sun Alliance Australia Ltd* (1988) 50 SASR 236). While that risk is accepted, such concern is not a reason for excluding such evidence in a civil trial by judge alone. It is correct that automatic extrapolation of evidence from one witness into another’s case does not pay due regard to other individual credibility issues arising from the plaintiff’s evidence in the case then under consideration.
- [86] It may be observed, too, that evidence of this kind may not only be useful in favour of a plaintiff. In this kind of case, it may suggest that the particular plaintiff misconstrued a particular document or event if there is a considerable body of evidence from other plaintiffs placing a different construction on it or describing it differently. However, that issue has in each case to be considered in conjunction with other aspects of credibility of the particular plaintiff, and the circumstances of the particular transaction.

(d) Taxation advice

- [87] In respect of the Northern Rivers Scheme there is an opinion from accountants in the prospectus. A person of reasonable comprehension reading the document would draw the conclusion that the effect of the opinion was that the way the scheme operated, growers were carrying on business, with the consequence that management fees, interest, administration fees and the like would be legitimately deductible if claimed. There was also an Ernst & Young report prepared in May 1996 relating to the Northern Rivers Scheme to the effect that taxation benefits envisaged were realistic.
- [88] With respect to the Base Metals Scheme there is a tax opinion from different accountants to the effect that provided each participant was carrying on business and intended to participate for the full term of the project, exploration and prospecting expenses and interest on moneys expended in Australia on exploration and prospecting should *prima facie* be deductible in the current tax year. With respect to Banalasta Oil there was a report by the same accountant as for the Base Metals Scheme, the effect of which was that research and development fees,

management fees, interest and the indemnity fee should be deductible. There was an Ernst and Young opinion to similar effect.

- [89] Generally promises, predictions and opinions involve a state of mind of the maker at the time the statement is made. The character of the representations said to be false or misleading must be tested at the date of making the statement, not with the benefit of hindsight. A statement of this kind ordinarily conveys expressly or by implication the meaning that the maker had the state of mind and a basis for it. If the meaning in or conveyed by the statement is false the making of the statement will have contravened the relevant provision. On the other hand if an expression of opinion can be identified as no more than such, it conveys only that the opinion is held and perhaps that there is a basis for it. It is a question of fact whether a particular formulation is an opinion or a statement of fact.
- [90] The proper view of these reports is that they were opinions as to what the Commissioner of Taxation's attitude would be to claims made in taxation returns for expenditures in respect of the various schemes. More directly relevantly, a person selling the scheme who was familiar with the taxation opinions might legitimately represent on the basis of the reports that the items referred to in the reports would be accepted as legitimate deductions when the taxation return was lodged. That comment is subject to the reservation that in any case where there was a positive representation that the particular scheme had been approved by the ATO the person entering the scheme would be relying upon that misleading or deceptive representation. The quality of the salesman's initial belief would not be relevant in such cases.
- [91] The evidence of the salesmen was to the effect that they were aware of the taxation advices and relied on them in making their presentations as to the deductibility of the particular items. On the face of the documents and their proper interpretation there were reasonable grounds for making the representations that the various payments would be tax deductible. There is no evidence that there was any recklessness in forming that view or in advising that the payments would be tax deductible. There is no reason in the evidence to find that the salesmen knew or ought reasonably to have known that the Taxation Commissioner would, upon further investigation and litigation, which obviously took some time to bring to completion, take the view that they were not allowable as deductions. There is no evidence of any substance that there were any specific reasons to be concerned that payments would not be allowed by the Taxation Commissioner at the time when the representations were made. If there were any such indications of what ultimately occurred, there was no evidence given of them. Insofar as the plaintiffs' submissions assert that the projects upon which the schemes were based were inherently fraudulent themselves, no attempt was made to establish that proposition by calling evidence at trial. It may also be noted that nothing in the taxation opinions shed any light on the intrinsic financial prospects of the schemes; they were concerned only with taxation.

The case against the fourth and eighth defendants

- [92] Mr Horner, the eighth defendant, is alleged to have contravened provisions prohibiting misleading or deceptive conduct and of the *Corporations Law* in relation to investment advice. With regard to the fourth defendant, typically the pleading alleges that it employed, engaged or retained Mr Francis and Mr Horner to

provide accounting, investment and taxation advice, that Mr Francis was its servant or agent and that Mr Horner was its servant. It is alleged that it is liable for their actions. Agency in respect of providing investment advice only was admitted in respect of Mr Francis and Mr Horner. It was also alleged that in the course of carrying on business itself, the fourth defendant provided accounting, investment and taxation advice. Mr Nunis was a partner in the fourth defendant at relevant times. It is alleged that it is liable for his actions.

The case against tenth and thirteenth defendants

(a) Representations Case

- [93] It was pleaded that Mr Horner was agent of tenth and thirteenth defendants. It was admitted by them that that was so at all relevant dates in the pleadings. It was accepted that at the relevant time, in respect of the Banalasta scheme, the operative legislative provision was s 995 of the *Corporations Law*, by virtue of the exclusion of “financial services” from the *Trade Practices Act* (s 51AF *Trade Practices Act*) and from the *Fair Trading Act* (s 995A *Corporations Law*). In any event it was accepted that the prohibition of misleading or deceptive conduct was common to each piece of legislation.
- [94] The plaintiffs’ case was that because of the making of the common representations and other representations peculiar to individual plaintiffs and the falsity of the common representations, misleading or deceptive conduct had been engaged in by Mr Horner. Reliance on the representations was evidenced by the plaintiffs claiming tax deductions and entering into a loan agreement with the thirteenth defendant. In the circumstances, it was alleged the tenth and thirteenth defendants were liable for the conduct of Mr Horner.
- [95] It was accepted by the tenth and thirteenth defendants that if the plaintiffs came up to proof in respect of the representations or conduct, reliance, falsity of the representations and loss in relation to the common representations, liability would be established. It was accepted that representations were made to each plaintiff to the effect that the investments in the scheme were lawfully tax deductible. While Mr Horner’s evidence was that he did not expressly state those words, the form of the standard presentation and the completion of the various tax management worksheets and associated documents would be a representation to the effect pleaded.
- [96] A point of difference between the plaintiffs and the tenth to thirteenth defendants was whether the representations were of present fact or a statement involving a prediction or opinion. The tenth and thirteenth defendants submitted that the representation as to tax deductibility was an opinion of Mr Horner as to the manner in which the proposed deduction would be treated by ATO when claimed. Reliance was placed in the submissions on the tax opinion in the prospectus and the Ernst & Young letter dated 24 March 1999 concerning the scheme in which the tax opinion in the prospectus was reviewed.
- [97] It should be mentioned, since it appears in one of the written submissions, that the onus lies on a person making a representation with respect to any future matter to adduce evidence establishing positively that the person had reasonable grounds for making the representation. In the absence of such evidence the person is deemed not to have had reasonable grounds for making the representation. In this respect

the *Corporations Law* (s 765(2)) is to the same effect as s 51A of the *Trade Practices Act*.

[98] In discussing s 51A of the *Trade Practices Act* Heerey J said in *Sykes v Reserve Bank of Australia* (1998) 158 ALR 710, 712 that if there was a representation as to a future matter the onus was on the representor to show:

- some facts or circumstances;
- existing at the time of the representation;
- on which the representor in fact relied;
- which are objectively reasonable; and
- which support the representation made.

[99] It was submitted on behalf of the plaintiffs that both of the common representations were representations of existing fact. On behalf of the tenth and thirteenth defendants it was maintained that they were representations as to a future event on the basis that to categorize a representation that certain expenditure is tax deductible as a representation of present fact places an unreasonable strain on the meaning of the words, which had an element of futurity. On the basis previously discussed, the matter will be resolved in individual cases as follows. In cases where there is no finding that an express statement to the effect that the ATO had given its approval was made, the representations as to what is deductible will be treated as an opinion relating to a future event. The effect is that when a tax return is filed, having regard to the opinions given as to compliance with the tax laws, the itemised deductions will be allowed. Because of the content of the opinions, the existence of reasonable grounds for making the representation has been established. In cases where it is found that a statement to the effect that the scheme was ATO approved was made, that is itself a misleading or deceptive representation. While there is an element of futurity involved in the expectation that the sums itemised would be lawfully claimable when the tax return was filed, the representation would be taken by the client to be a statement of fact, not opinion.

(b) Recommendations Case

[100] With regard to the recommendations case the plaintiffs' final submission took the form that the "primary basis was breach of s 851 and s 852 of the *Corporations Law*". Each of the fourth defendant (through Mr Nunis), the fifth defendant and the eighth defendant was a "securities advisor" as defined in the *Corporations Law*. Each salesman had contravened s 851 and had failed to establish the exemption from liability under s 852. The plaintiffs' written submissions continue as follows:

"...It having been admitted, without limitation, that SecurInvest and Horner were agents and authorised representatives of Banalasta Oil and Plantation Equity, Banalasta Oil and Plantation Equity ought to be found liable for the conduct of their agents either under the general law or under section 819 *Corporations Law*."

- [101] That the eighth defendant, Mr Horner, was agent for, inter alia the tenth and thirteenth defendants was pleaded in the statement of claim. In response to a notice to admit facts the tenth and thirteenth defendants admitted that the fourth and eighth defendants were “authorised representatives” within the meaning of the *Corporations Law* “at all relevant dates detailed in the amended statement of claim”. It was accepted that that meant at dates variously pleaded in relation to the Banalasta scheme. It was also admitted that the fourth and eight defendants were agents of the tenth and thirteenth defendants at all relevant dates.
- [102] In reply to the plaintiffs’ submission quoted above Mr Wilson made the following observations:
- “...[In] the plaintiffs’ submissions it is contended that the tenth and thirteenth defendants have admitted “without limitation” that the fourth and eight (sic) defendants were their agents and authorised representatives. Examination of the Notice to Admit Facts (exhibit 2) reveals that the admission is limited to the fact of those agencies on the relevant dates in the amended statement of claim....There is no pleading that the fourth or eight (sic) defendants acted as agents for the tenth or thirteenth defendants in respect of any contravention of section 851 of the *Corporations Law*. There is no pleading of liability of the tenth and thirteenth defendants pursuant to section 819 of the *Corporations Law*...”
- [103] The subject was then taken up in Mr Wilson’s oral submissions. He submitted, correctly, that the issue of agency of the tenth and thirteenth defendants so far as it extended to contraventions of s 851 had not been explored during the evidence. He expressed being surprised, having regard to the form of the pleadings, that the plaintiffs were not only relying on the representations case against his clients (which was pleaded and what he had expected to meet) but also the recommendations case (which he had not). It is necessary to pay some attention to the form of the pleadings having regard to this argument.
- [104] Typically in relation to the Banalasta scheme, the pleadings allege that Mr Horner recommended that the plaintiff invest in it. It is then alleged that “Horner or in the alternative SecurInvest Accounting” did not have a reasonable basis for making the recommendation. Then it is pleaded that, in those premises, “Horner or in the alternative SecurInvest Accounting” contravened s 851(1) of the *Corporations Law*. This was contrasted with the pleading in respect of the “representations case” where there was an express pleading that Mr Horner, SecurInvest, Banalasta and Plantation Equity all engaged in conduct that was misleading or deceptive.
- [105] Further, in a typical pleading, prior to the late amendment referred to in paragraph [77], the only relief sought against the thirteenth defendant was an order declaring the loan agreement void for contravention of the prohibition against misleading or deceptive conduct. When that amendment was made, it was made only to a paragraph the natural reading of which was that it related to damages based on the same conduct. The question whether it is at this point open to the plaintiffs to claim derivative relief against the tenth and thirteenth defendants becomes of importance.
- [106] In my view what has happened leaves a somewhat unfortunate gulf between the parties but even applying a liberal approach to the relationship between the

pleadings and the case conducted I am driven to the conclusion that there is substance in Mr Wilson's submissions and as the case has been conducted it is not open to now allege that the tenth and thirteenth defendants are liable for contraventions by the fourth and eighth defendants of s 851.

PART 2 - ANALYSIS OF INDIVIDUAL CASES

Borg

[107] Mr Borg left school at 15 in Year 10. He had only furthered his education to the extent of obtaining trade certificates after that. His only other investment at the beginning was an investment in a Gold Coast duplex. He was in all three schemes.

(a) Northern Rivers scheme

[108] There are allegations that Mr Francis made certain representations expressly and orally. The allegation in paragraph 28 of the second amended statement of claim that Mr Francis made the common representations is not admitted on the basis of a denial that Mr Francis was authorized to do so and that the facts which were solely within the knowledge of Mr Francis and Mr Borg could not be ascertained. It was not admitted that various representations concerning the advantages of the scheme were made. Allegations in paragraph 32 that at a later meeting representations were made concerning the reduction of taxable income and eligibility for family allowance were not admitted on the same basis. It was also alleged that the representation that the scheme had been approved by the ATO was repeated, but not admitted. It was admitted that Mr Francis recommended that Mr Borg should invest in the scheme.

[109] Mr Borg's mother-in-law had been discussing the scheme with Mr Francis prior to organising a meeting which Mr Borg and his wife, along with other people, attended to hear a presentation from Mr Francis. Mr Borg's mother-in-law had obtained legal and accounting advice about the scheme prior to this. The meeting was held at her home and the initial presentation lasted for about 40 minutes. After the presentation had finished, Mr Borg and his wife were left by themselves to discuss whether they would enter into the scheme. It is not easy to ascertain from the evidence precisely what was said at the first meeting and what was said during the second meeting. However, it is clear that Mr Borg says that he expressed scepticism about the scheme and was told by Mr Francis that there was an Ernst & Young opinion and that it had been approved by the tax department. Mr Borg had been shown a prospectus which Mr Francis had. He said that he flicked through it but found it difficult to understand.

[110] When Mr Francis came to speak to them on the second occasion, he asked them what they thought about the scheme. Mr Borg said that Mr Francis put pressure on them to make a decision saying that time was running out and he had other clients to see. He said that he had asked again about tax deductibility because he found it hard to believe. Mr Francis told him it was tax department approved and said "there's the papers there in front of you". He said that Mr Francis said that people who had participated in other schemes the previous year had got their tax refund. He said "This is on the same type of lines as it; what are you worried about?" The

documents were signed on that day although he did not read them at the time of signing them.

- [111] Mrs Borg gave evidence that the first thing they asked was whether the scheme was legitimate and allowed by the ATO and Mr Francis said that it was. He showed them an Ernst & Young document in support. She said that after the presentation had finished Mr Francis left them alone while he spoke to other people. They read the prospectus in a cursory manner. The documents were signed on the same day.
- [112] Mr Francis gave evidence that he had a standard presentation which involved reference to the prospectus. If the prospective purchaser interrupted to ask questions they were dealt with. Then the presentation resumed. He said that he had referred to the Ernst & Young opinion but did not refer to the experience of people in previous years in similar schemes receiving refunds. His recollection was that there were two separate meetings with Mr and Mrs Borg some days apart. His recollection was that they had asked for time to consider the investment and that he had applied no pressure to them to sign. He agreed, however, that his role was essentially that of a salesman of the scheme.
- [113] To meet a late amendment concerning reliance the parents-in-law of Mr Borg, Mr and Mrs Shepphard gave evidence. Mr Shepphard gave evidence that a meeting of a number of people including Mr and Mrs Borg had been organised when it was suggested by Mr Francis, who was having difficulty keeping appointments to speak to individual prospective clients. He said that he had not spoken to Mr Borg about the project before the meeting. Mrs Shepphard also gave evidence to like effect. Neither of them had given any assurances to him about the project.
- [114] Mr Shepphard gave evidence that after he got his tax refund in respect of the Northern Rivers Project, and perhaps about 6 weeks or 2 months later, he got a questionnaire from the ATO about the project which he answered with the assistance of information obtained from Mr Francis. The audit was conducted by mail, not face to face. Mr Shepphard said he interpreted the reply from the ATO as meaning that if he entered into a similar scheme he would have no problems. He believed that he would have spoken to Mr Borg after he received the letter and told him about it. He also said it became common knowledge that he had been audited in this way and expressed the opinion that the fact that he had been audited without any problems probably influenced people who knew about it and made subsequent schemes easier to sell.
- [115] Mr Borg was also recalled. He reiterated that Mr Francis had said that the scheme was taxation department approved. He denied that Mr Francis had explained to him that if he went into the scheme as a long term investment payments into it might be tax deductible. The Ernst & Young report was not explained in this way, but linked to the assertion that the payments scheme had ATO approval.

- **Conclusion**

- (i) **Representations Case**

- [116] Mr Douglas submitted that Mr Borg's evidence suffered from improbabilities and inconsistencies, characterised, inter alia, by his attempt to safeguard his position by suggesting that he had not read cautionary parts of the documents given to him. It was also submitted that I should find that he had not relied on Mr Francis in light of

the evidence of his conversations with Mr Francis and, subsequently, with his accountant.

- [117] I accept Mr Borg's evidence that he was told by Mr Francis that the scheme had the approval of the Tax Department. I reject Mr Francis' evidence to the contrary and do not accept that in the context of the conversations he was making a representation as to a future matter. I accept that Mr Borg relied on what he was told by Mr Francis about the approval by the Tax Department in making his decision to invest. I find that misleading or deceptive conduct was engaged in by Mr Francis in these respects. I also accept that there was discussion of reduction of taxable income to a level where Social Security benefits would be available. However, evidence as to reliance which induced him to enter the scheme because of the information is lacking.

(ii) Recommendations case

- [118] There was no evidence from Mr Borg that he was not told that Mr Francis was entitled to commission. He could not recall reading the disclosure statement which stated that Mr Francis received brokerage. The onus of establishing that there was a contravention of s 849 has not been discharged.
- [119] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

(b) Base Metals scheme

- [120] It is alleged in paragraph 64 that Mr Nunis expressly and orally represented a number of matters including the common representations. All but those relating to Mr Nunis representing the fourth defendant and making recommendations with respect to investing were denied. They included representations concerning the assets of the company, the risk to Mr Borg if he invested, the effect on taxable income and eligibility for family payments and whether Ernst & Young advised that payments were tax deductible and deductible according to the ATO
- [121] Mr Borg's evidence with regard to this is sparse. Essentially, he said that he had been given a prospectus in relation to this scheme. He said that Mr Nunis, the salesman, had explained that it was a minerals exploration scheme and that payments were tax deductible. "The scheme was perfectly all right". He also said that Mr Nunis had said "Well, you got last year's tax return didn't you? What are you worried about this year?" He denied in cross-examination that he had not been told that the scheme was ATO approved.
- [122] Mrs Borg said that Mr Nunis took them through parts of the prospectus. They were told that it was ATO approved. She said that her husband had kept persisting to ask him about it because he wanted to make sure that it was ATO approved. She said that she was not present for the whole presentation. She said that money was not given to Mr Nunis on that day because they wanted to discuss it and to have a look at the prospectus. The prospectus was dropped into their accountant who had one of his associates look at it. She had phoned him later to ask what he thought of it. He

said that it “actually looked ok”. She could not recall whether payment of the money occurred before or after this advice was given.

- [123] When recalled for further cross-examination, Mr Borg agreed that it was possible that, before meeting Nunis about this scheme, his father-in-law and he had spoken about the fact that Mr Shepphard had been audited by the ATO with respect to the Northern Rivers scheme without any problem arising. He accepted that he gained reassurance from this that the claims made about taxation approval were correct.
- [124] Mr Shepphard said that he did not recall having any discussions with Mr Borg about this project and made no assurances to him about the scheme. Mrs Shepphard said that she did not know anything about the scheme prior to Mr Nunis and Mr Horner coming to discuss it. She did not speak to Mr Borg about it before the meeting.
- [125] Mr Nunis agreed that SecureInvest specialised in speculative tax schemes and that his role was as a salesman of them. He said that he had a standard presentation, which he outlined at some length in his evidence. The presentation might be interrupted by questions from potential clients with resultant digression from the standard presentation. He said that he went through at least parts of the prospectus in the course of the presentation. He denied that he said the scheme was ATO approved. He said he may have mentioned the Ernst & Young taxation opinion which was separate from the prospectus. He did not draw attention to the fact that the taxation opinion in the prospectus was from Base Metals’ auditor. He said that he believed that the ATO knew of the scheme because he had heard that ATO officers had spoken to a director of the company.
- [126] He said that he had recommended that Mr Borg invest in the scheme but also said that he should get independent financial advice. He believed, from his attitude, that Mr Borg was a “sceptical person”. He did not get the cheque in payment for investment that day. The cheque was collected on a later day by Mr Horner. He said that Mr Borg had expressed disappointment that the net return was not as great as the previous year’s. He said that he did not refer to the fact that the previous taxation refund had been received. Nor did he refer to the social security position. However, it was pointed out that the disclosure statement specifically referred to obtaining advice about social security implications of the investment.

- **Conclusion**

- (i) **Representations Case**

- [127] Mr Douglas submitted that Mr Nunis’ account of what had happened was not unlikely and had not been seriously challenged in cross-examination.
- [128] While I have reservations about Mr Nunis and some latitude must be given in a case of this kind in interpreting what is properly covered by the pleadings the plaintiff bears the onus of establishing positively that the representation alleged was made and relied on. It is probable that Mr Borg got the impression from the presentation that he would obtain the anticipated tax benefits. However in this instance there was a delay in entering into the scheme. According to Mrs Borg, advice was obtained from their accountant, although the evidence is vague as to the sequence of events and there is no specific evidence that she told her husband of the advice. There is also evidence that Mr Borg was probably aware before seeing Mr Nunis

that Mr Shepphard had been audited by the ATO without any adverse consequences the year before in respect of a scheme of a related kind.

- [129] In the result I am not satisfied on the available evidence in this instance that Mr Borg relied on a representation that was deceptive or misleading made by Mr Nunis in entering into the scheme. The evidence is consistent with his forming a judgment on the basis of his own knowledge of the kind of scheme and his knowledge of the outcome of Mr Shepphard's tax audit, without any specific representation having been made. I am satisfied that eligibility for Social Security benefits was discussed, but evidence of reliance is lacking. I am not satisfied that other alleged representations are made out satisfactorily.

(ii) Recommendations Case

- [130] Mr Borg said he thought that he had paid an application fee or a recommendation fee. Mr Nunis gave evidence that when he explained that he was going to receive a payment, he may have used the terms "brokerage" and "commission" interchangeably. He said that whichever way it was described, the client knew that he was being paid. He said he invariably recited the words of the acknowledgement on the form, but then modified his evidence to "in most cases". He said he "possibly" recited the words to Mr Borg. Overall, I have come to the conclusion that, on balance, Mr Nunis referred to an entitlement to commission or brokerage during the course of his presentation. I am not satisfied a contravention of s 849 has been proved.
- [131] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

(c) Banalasta scheme

- [132] It is alleged in paragraph 97 that Mr Horner expressly and orally made representations including the common representations. The fourth and eighth defendants admitted that Mr Horner represented that the investment was tax deductible but with the qualification that that advice may change. They denied that the words allegedly used with respect to the Ernst & Young Tax Report were said although it was admitted that it was said that Ernst & Young had given an opinion on the relevant law. It was admitted that Mr Horner made a recommendation to invest. They denied the alleged representation that while there was no product ruling investigations had been made by the fourth defendant in connection with risk and suitability. The allegations were not admitted by the tenth and thirteenth defendants.
- [133] Mr Borg said that word had got around at work about a new scheme. His recollection was that his wife arranged a meeting to which Mr Horner came with a product sample. Mr Borg thought that he had been given a prospectus early in the meeting. According to Mr Borg, Mr Horner said that the project was a going concern. Mr Borg asked if the project was taxation department approved and was told it was. On querying Mr Horner about it, Mr Horner reminded him that he had got a refund from the previous projects. He said that he was also told that this was

the last kind of this scheme and that, as with the others, there was an Ernst & Young opinion about it.

[134] Mr Borg said that he asked if the scheme had a product ruling because he had heard of product rulings on the news. His evidence is a little difficult to follow in some respects but the thrust of it appears to be that he was told that there was no product ruling. However, he said he was told that there had been a product ruling the previous year and that the directors did not deem it necessary to have one for the present year. In a different part of his evidence he suggests that he was told that there would be no worries about getting one.

[135] He accepted that he knew that the ATO had not ruled on the project. The shifting or at least imprecise nature of his evidence is illustrated in the following two passages:

- “I suggest to you it was before you signed the documents that you saw the Ernst and Young advice?-- Well, I can’t recall.

And Mr Horner said to you that on the basis of that advice, SecurInvest believed that the deductions that you would claim were likely to be allowed by the ATO?-- Would be allowed by the ATO.

Sorry?-- That they would be allowed by the ATO.

That they would be allowed?-- Yep.

Although you knew that there was no prior ruling?-- That’s right.”

- “So Mr Horner, who had told you that there was no product ruling, and you having acknowledged that in writing, then said, ‘But there’s absolutely no doubt about this, you’ll get a tax deduction’, did he?-- ‘Put it, you’ll get a tax deduction. It’s all – it’s all okay. The directors of the company the year before had got a product ruling for it. There’s no reason why it won’t get one this year’.

There’s no reason why it won’t? Can you remember exactly what he said?-- That’s – that’s it.

One more time, please?-- There’s no-----

What exactly did he say-----?-- -----there’s no reason-----

-----about the deductibility?-- -----why I won’t get a product ruling for this year because it – it was issued one last year and the directors of the company don’t deem it necessary to have one for this year.

And you can’t recall him saying that there was no guarantee?-- I can’t recall that.

But he didn't say the ATO had approved it?-- Pardon?

Did he?—Pardon?

He didn't say the ATO have approved it?-- He didn't mention the ATO hadn't approved it neither. He just said it hadn't had a product ruling.

He didn't tell you that the Australian Tax Office had approved it, did he?-- He didn't say it didn't neither.

Do you understand my question, sir?-- No, I don't.

Did he say the Australia Tax Office have approved this investment as a deduction?-- Yeah.

He said that?-- It's all Tax Department approved.

So I need to be clear on this. We need to be exact – very clear on your testimony here. Now you're saying he said that the Australian Tax Office had approved this product?-- It was approved by the Tax Department. There was no product ruling because the directors of the company don't deem it necessary."

- [136] He said that when he spoke to his accountant, his accountant advised him to put his tax return in on the basis of the deductions being claimable. If the project did not get a product ruling the return could be amended. Mr Borg said that he got his refund but later put in an amended return because he had been advised that deductions in relation to the Northern Rivers and Base Metals schemes were disallowed. He said that he had not shown the prospectus to his accountant in respect of this project because he took Mr Horner's word, because the earlier schemes had resulted in a refund, and because he was happy with Mr Horner's explanation of the Banalasta scheme. He admitted the possibility that he was keen to enter the scheme because everything had turned out, at that time, satisfactorily in the previous 2 years. When Mr Borg was recalled for further cross-examination his evidence relating to his father-in-law's tax audit was equally applicable to this scheme.
- [137] Mrs Borg gave evidence of being present for at least parts of the discussion. She remembered that Mr Horner had said that the outlay for the scheme was bigger but it was going for 2 years. She said that he had said that it was ATO approved, in response to a question from Mr Borg. She said that Mr Horner had said that there was no product ruling but she gained the impression that one was being obtained. She went as far as to say that Mr Borg had said "You guarantee me that there will be a product ruling" and that Mr Horner assured him that there would be one.
- [138] Mr Horner gave evidence that he had a series of phone calls from Mr Borg and Mr Sheppard to ensure that he saw Mr Borg about the scheme when he was next in Mackay. Mr Horner gave evidence in considerable detail of the way in which he proceeded at meetings. He said that he first explained his licensing status. Then he went to the prospectus and pointed out that the investment was speculative and that independent financial advice should be obtained. He then discussed the product

after which he drew a flowchart on a piece of paper to illustrate how the investment operated. He said that Mr Borg was more interested in the bottom line than the details of the project. He said he told Mr Borg that the project was a 2 year project. He said that he explained that in future it would be necessary to get a product ruling which meant that the ATO had to be persuaded that the scheme was actually a business which complied with all the tax laws. He said that he explained that the Banalasta business had been actually set up before product rulings became necessary. For a product ruling to be obtained it would be necessary to shut the business down, reapply and start again. Because the business was already up and running with trees and infrastructure already there, it was impossible for that to be done. He explained that on the basis of the tax opinion in the prospectus and the Ernst & Young report it was believed that the project complied with ATO requirements. He said that SecurInvest used projects like the present one because they were already up and running and could show that they were a business. There was proof of this if the tax department questioned the position.

[139] He said that he would refer to the Ernst & Young report and allow the client to read it if he wished but did not give the client a copy. He then prepared the tax management worksheet. In this case, when the net return was worked out Mr Borg became upset because he believed SecurInvest was taking more of his refund each year. Mr Horner said that he told Mr Borg that this project was different because it involved running an actual business. While Mr Borg was not happy, he calmed down. Mr Horner denied saying that the project was approved by the ATO or that Ernst & Young had given an opinion that the scheme was approved by it. He said that he recommended that Mr Borg enter into the scheme and asked Mr Borg whether he would like to go ahead or whether he wanted to take it away and look at it. He said "No, I am happy. Here's the cheque." The cheque had already been signed and dated but the details not filled in. Mr Borg said that his father-in-law had already had a look at the project when Mr Horner had done a presentation with him. Mr Borg said that his father-in-law had taken the scheme to his accountant who had looked it over, and repeated that he was ready to go with it.

[140] In cross-examination Mr Horner was taken to the forecast income in the prospectus. He was cross-examined about evidence he had given to the effect that notwithstanding that the prospectus showed a specific sum, he had said that the range of outcomes was from zero to that sum. He said that he included the reference to the range, notwithstanding the figure forecast, to illustrate that there was the possibility of fluctuation and that there were no guarantees because it was an investment. He agreed it was implicit in the working out of the tax management worksheet that the deductible business expenses item was claimable as a tax deduction. He said that he did not remember saying that it was tax deductible. He maintained he said that, based on the taxation opinions in the prospectus, it was deductible. He described Mr Borg as a very eager client who wanted to get as much tax back as he could.

- **Conclusion**

- (i) **Representations Case**

[141] Mr Douglas submitted that Mr Horner's evidence should be accepted in preference to Mr Borg's. He submitted that Mr Borg had been keen to proceed with the scheme. He was aware of the prospect of having to amend his tax return because of

the risk of disallowance. He submitted that the evidence was evasive as to whether the statement that the scheme had been ATO approved had been made. He also submitted that Mr Borg had conceded that he would not invest in a scheme unless he understood it. Because of the conflicting aspects of the evidence given by Mr Borg about whether he was told that the scheme was ATO approved and variances between his evidence and that of Mrs Borg I am not prepared to find positively that Mr Borg was told that the scheme was ATO approved.

(ii) Recommendations Case

[142] Mr Borg's final position was that it was possible that he had been told that Mr Horner was to receive commission. He agreed that there was no reason to think, in light of the signed acknowledgement concerning the right to commission, that Mr Horner had not told him. I am not satisfied that a contravention of s 849 has been established.

[143] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. Insofar as Mr Horner's evidence suggests that he explained the possibility of a range of investment outcomes, I am satisfied from my overall assessment of his evidence that, on the assumption that his evidence is accurate in that regard, any such statements would have been incorporated in a way that minimised rather than emphasised the risks of the investment.

Byrne

[144] Mr Byrne was involved in all three schemes. He was a mine electrician who had left school halfway through Year 11 and whose only further educational qualification was a trade certificate. He had no experience in investing before he invested in the Northern Rivers scheme.

(a) Northern Rivers scheme

[145] It is alleged in paragraph 130 that Mr Francis made expressly and orally the common representations and representations concerning the benefits of the scheme, that Mr Francis would not be able to sell the scheme if it was not ATO approved and that Mr Francis recommended Mr Byrne should invest in the scheme. These were not admitted by the fourth and eighth defendants.

[146] Mr Byrne said that he had heard from work colleagues that there was a financial advisor in the area. He arranged to meet Mr Francis who came to his home and gave him and his wife a presentation concerning the scheme. Mr Byrne denied having heard from others that the scheme was ATO approved. Mr Byrne agreed that it seemed too good to be true. He said he was sceptical whether the ATO would allow such benefits and asked Mr Francis about it. However, he says he was told by Mr Francis that it was "all above board" and that "the tax department has approved it". He said that he had not been given a prospectus until the end of the meeting. Later he tried to read it but found that the terminology was beyond him. He denied that Mr Francis had suggested he get independent financial advice. He believed he was getting such advice from Mr Francis. He denied that he had any conclusive intent to sign up for the scheme regardless of what Mr Francis said.

[147] Mr Francis's actual recollection of the meeting with Mr and Mrs Byrne was non-existent. He explained that he had met them only for 45 minutes to an hour 4 years before. However, he would have given the same kind of presentation as that given to Mr and Mrs Borg. No representation that the scheme was ATO approved would have been made because he was "not allowed to do that". He would also have said that the accountant's opinion was that deductions would be allowed if the client was predominantly going into the project for the long term, not for an upfront tax benefit.

- **Conclusion**

- (i) Representations Case**

[148] Mr Douglas submitted in respect of this scheme that it was improbable that Mr Byrne relied on anything said by Mr Francis in the absence of an indication to Mr Francis that he was satisfied with the scheme. With reference to Mr Byrne's credit generally, he submitted that his evidence was opportunistic and tended to safeguard his position at the expense of the truth. He had recklessly determined to participate in the scheme. He did not read nor ask to read relevant documents and was not concerned with what was in them before signing them. He did not seek advice despite having an accountant. He had had discussions with work colleagues about the benefits of the schemes. It was submitted that the evidence disclosed sufficient doubt as to reliance.

[149] I accept Mr Byrne's evidence that he was told by Mr Francis that the scheme was ATO approved and that Mr Byrne relied on that representation in entering into the scheme. Mr Francis had no real recollection of the meeting. I do not place any weight on his rationalization that he would not have told Mr Byrne that the scheme was ATO approved because he was not allowed to do so. I find that Mr Francis engaged in false or misleading conduct in this respect.

- (ii) Recommendations Case**

[150] Mr Byrne agreed that Mr Francis had told him he would get commissions. He also signed a disclosure statement referring to the amount per farm. The allegation of non-compliance with s 849 is not made out.

[151] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

- (b) Base Metals scheme**

[152] It was alleged in paragraph 161 that Mr Nunis expressly and orally had made the common representations (which was denied on the basis that he did not say the words). There were qualified admissions as to representations about profitability and an admission concerning a representation about reduction in taxable income and of making a recommendation to invest. An alleged representation that moneys paid for shares issued would be recouped by the sale of equipment owned by the company was denied.

- [153] Mr Byrne heard from workmates that a new tax effective project was coming during 1998. Mr Nunis and Mr Horner met Mr Byrne and his wife at their home. Mr Nunis introduced Mr Horner as Mr Francis' replacement as the area representative. Mr Nunis went through aspects of the scheme including, after an inquiry from Mr Byrne, his liability in the event of the scheme failing. Mr Byrne asked if it was the same as last year with respect to the ATO. He was told "Yes it is all above board". He was asked if he had received his tax return for the last year. When he said that he had Mr Nunis said "It's the same as last year; you won't have any problems there".
- [154] Mr Byrne said that he was not told that the scheme was speculative and was not told to get other advice. He was not given the prospectus at the beginning of the meeting. Mr Nunis did not go through it with him. Mr Byrne was a little ambivalent about the effect of the previous refund on his decision to invest. The view I take of his evidence is that the fact that he had had his deductions allowed during the previous year reinforced his decision to sign (which he did on the day) but that had he not come to believe the scheme was acceptable to the ATO he would not have done so.
- [155] Mr Nunis said that Mr Byrne told him that he had heard of the scheme at work. His recollection was that only he, Mr Byrne and his wife were at the meeting. He gave a presentation similar to that given to Mr Borg. He said that he took Mr Byrne through the prospectus, including the part relating to investment returns and made an analogy with an investment property. He also drew a diagram to illustrate the scheme. He denied that he had told Mr Byrne that investments were lawfully tax deductible or approved by the ATO. He did not say that an investment in Base Metals was better because the deductions were larger. He said that he recommended that Mr Byrne should invest in the scheme because Mr Byrne appeared happy with the information given. He said that he explained what each document to be signed was including the disclosure statement.

- **Conclusion**

- (i) **Representations Case**

- [156] Mr Douglas' general submissions concerning Mr Byrne's credibility referred to in conversation with the Northern Rivers scheme apply equally to this scheme.
- [157] I am satisfied that by the time Mr Byrne spoke to Mr Nunis he was favourably disposed to entering into the scheme. Obtaining the refund the previous year was a factor in this. I am satisfied that Mr Byrne had been told the previous year that the Northern Rivers scheme was ATO approved and that from the inquiries made of Mr Nunis referred to in para [153] he came to the conclusion that it was ATO approved. There is no evidence that Mr Nunis knew what Mr Byrne had been told the previous year. I am not satisfied positively that a misleading or deceptive representation was made by Mr Nunis on the available evidence. There was discussion about eligibility for Social Security benefits, but evidence of reliance is lacking.

- (ii) **Recommendations Case**

- [158] Mr Byrne said that he could not recall Mr Nunis mentioning commission. However, he signed the disclosure statement showing a percentage of the money raised as payable to Mr Nunis. Mr Nunis said that when he explained that he was

going to receive a payment, he may have used the terms “brokerage” and “commission” interchangeably. He said that whichever way it was described, the client knew that he was being paid. He said he invariably recited the words of the acknowledgement on the form, but then modified it to “in most cases”. He said he “possibly” recited the words to Mr Byrne. I am not satisfied that the onus of proof there was any non-compliance with s 849 has been discharged.

- [159] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client’s investment objectives, financial situation and particular needs.

(c) Banalasta scheme

- [160] It was alleged in paragraph 194 that Mr Horner had expressly and orally made the common representations, which was denied by the fourth and eighth defendants on the basis that Mr Horner did not say the words alleged. Allegations that a product ruling was being obtained, and if the moneys were not tax deductible Mr Byrne could withdraw without liability were denied on a similar basis. The tenth and thirteenth defendants denied the allegations.

- [161] Mr Byrne said that he heard of the scheme at work. Following that, Mr Horner visited his home. While they were going through the project Mr Horner explained that the tax laws had changed and told him that the scheme was going to obtain a product ruling. Mr Byrne did not understand what a product ruling was and Mr Horner then explained that if the scheme met certain criteria it was issued with a product ruling. Mr Byrne’s evidence as to this is set out in the following passage:

“I said, ‘With this product ruling it’ll be getting it and they’ll all be tax approved?’ and he said, ‘Yeah. The scheme’s all right. It’s going to be the same as the last two’ and in my mind I sort of thought oh well the last two had – I’d got my tax return so I assumed that everything was a-okay we were running along quite well, and I asked, ‘What would actually happen if you didn’t get your tax return and you wouldn’t be able to repay the \$25000 or whatever it was to Banalasta?’ and he said, ‘Oh, that won’t happen’. He said, ‘You’ll get your money. It’s the same as every other year. It’s getting a product ruling. It’s all above board with the ATO’, and I said, ‘Oh yeah, but just sort of speculating, what if it actually did happen that you didn’t get you tax return?’ and he said, ‘Well if you didn’t get your money give me a call, I’ll tear up all the loan documents and stuff and it’s not a done deal. You won’t have to worry about it’. I said, ‘Oh that’s good, yeah’. So we proceeded to sign up with it and paid the cheque and become invested in it; the same as the other two schemes.”

- [162] He said that Mr Horner did not take him through the prospectus in detail. He did not point out the qualified nature of the taxation opinion. He did not advise him to get independent advice. It was possible that the Ernst & Young report was referred to. He maintained under cross-examination that Mr Horner did tell him that a product ruling was being obtained and that all the criteria were in place ready to get

one and that they were applying for one. He admitted that he knew that it did not have one.

[163] He denied telling Mr Horner that he was happy to proceed because he had invested in previous years and had discussed the scheme with other people. The significance of obtaining a product ruling, so far as he was concerned, was that the scheme was “above board and going to be approved by a product ruling”. He understood that was the way the ATO expressed its approval. He was pressed as to why he had a concern that he may not get a refund and sought assurances about being released from the loan if that happened. He said that he recognised that there was always a possibility that the ATO might disallow deductions but denied that it was because he knew there was no product ruling.

[164] Mr Horner gave evidence that the presentation to Mr Byrne followed much the same format as that previously described by him. He denied saying anything to the effect that a product ruling was being obtained from the ATO. He said that he did not tell Mr Byrne that he could withdraw without further liability. He could not remember any question about that subject being raised. He said that a copy of the prospectus was taken away by Mr Byrne. A tax management worksheet had been prepared and explained. Mr Horner said that Mr Byrne said that his work colleagues had already seen the prospectus and had talked about the scheme among themselves. He said he was happy with the scheme and wanted to follow it through. In cross-examination Mr Horner denied that he told Mr Byrne that Banalasta was going to get or had applied for a product ruling or that the project was going to be approved.

- **Conclusion**

- (i) **Representations Case**

[165] Mr Douglas’ general submissions concerning Mr Byrne’s credibility apply to this scheme as well. Mr Wilson pointed out that Mr Byrne was aware that the scheme had not received a product ruling and did not have ATO approval at the time he invested. He was also aware of the possibility that a deduction might not be allowed. It was submitted that his explanation for asking about that possibility was unconvincing. He pointed out that the alleged common representation concerning ATO approval was not made out in the evidence.

[166] In this instance I am satisfied that Mr Byrne was favourably disposed to entering into the scheme. He had a specific concern about the consequences of not obtaining a tax refund relating to the scheme. He was aware that the scheme did not have a product ruling. The contest between Mr Byrne and Mr Horner is as to whether it was represented that a product ruling, with the consequence of ATO approval, was being obtained. On balance, on my assessment of the witnesses, it was unlikely that he would have been told expressly that steps were being taken to obtain ATO approval. On the other hand, on balance, I accept he was told that he could withdraw from the scheme, upon which he relied. I am satisfied generally from the evidence of Mr Horner that there was no basis for withdrawal from the scheme in the way alleged. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in that respect.

(ii) Representations Case

- [167] Mr Byrne gave no evidence on the subject of commission. He signed a disclosure statement showing that Mr Horner received commission at a rate of 5%. The onus of establishing a contravention of s 849 has not been discharged.
- [168] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Coppo

- [169] At the time of the hearing Mr Coppo was a trainee manager in a firm concerned with coal mining safety. He had been a worker in coal mines for about 14 years prior to that. He left school in Year 10 and had no post-school formal education. He was only involved in Banalasta, although he had made inquiries the previous year about the Base Metals scheme. However, he did not become involved in that scheme because Mr Horner, with whom he was dealing, did not produce evidence satisfactory to him that it had been approved by the ATO. He denied that he had actually signed papers relating to the Base Metals scheme but had withdrawn after he had taken advice from someone, possibly an accountant.

(a) Banalasta scheme

- [170] It was alleged in paragraph 259 that Mr Horner had expressly and orally made the common representations, which was denied on the basis that Mr Horner did not say the words alleged. It was also alleged in paragraph 260 that Mr Horner had presented a letter purportedly from the ATO to support the common representations, which was denied by the fourth and eighth defendants. The tenth and thirteenth defendants did not admit the allegations.
- [171] Mr Coppo and his partner Caran Morgan attended a presentation by Mr Horner at a motel in Mackay. According to Mr Coppo, after they talked about the project Mr Coppo asked Mr Horner if he had an ATO letter of approval. According to Mr Coppo, Mr Horner produced a letter in a plastic A4 sleeve. The letter had the ATO logo and was coloured blue in the manner of ATO documents and referred to Banalasta Oil and had the word "approvals" on the heading. As he produced the document Mr Horner said "Oh yeah mate, it's been approved". However, Mr Horner quickly went on to the next document and Mr Coppo did not have the opportunity to read the letter in any greater detail.
- [172] He said that he asked Mr Horner for a copy of the document. Mr Horner said he did not have any facilities to make a copy but would send him one in the mail. According to Mr Coppo he rang Mr Horner several times to remind him about the document but never received one. In this connection he was questioned about a letter he wrote to Mr Horner in late August 1999, about two months later, thanking Mr Horner for his time and helping him invest in Banalasta. The letter did not raise the issue of the failure to send the ATO letter or request a copy and it was relied on by the defendants as being inconsistent with either a desire to obtain the letter or dissatisfaction with Mr Horner and, ultimately, with the existence of a letter of the

kind alleged. Mr Coppo said that by that time he had given up expecting that he would be supplied with the letter.

- [173] By the end of the presentation by Mr Horner, Mr Coppo was convinced that the scheme suited his aims. He was given a prospectus that had been on the table. However, he raised with Mr Horner whether he could take the paperwork home and digest it before signing. He also did not have the necessary cheque with him. Mr Horner said he was leaving next morning and that everything had to be done by early next morning. Mr Coppo then signed the documents and subsequently delivered the cheque.
- [174] Mr Coppo denied that he had gone to the meeting intending to enter into the scheme. He said he was going to look at it seriously but wanted to fully understand it before signing. He said that he was not told to get independent advice and that Mr Horner did not go through the prospectus with him. He denied that he had discussed reducing his income to limit the amount of maintenance he paid in respect of his former marriage. He did say that the only thing he said to Mr Horner was that he did not want the scheme to reflect on what he was paying his children. His motivation in entering into the scheme was to provide for his retirement. He said that he was not told there was no product ruling and did not realise that there was none notwithstanding statements in documentation that neither a product ruling nor a public tax ruling had been applied for.
- [175] Caran Morgan gave evidence that she was present at the meeting but not directly involved in the discussions. She said that she had the ATO letter in her hands at one stage. She described it as a paper "saying everything was legal there with whatever they were going through". She said she did not have a chance to read it fully because she was quickly handed another document.
- [176] Mr Horner said that Mr Coppo had contacted him the previous year concerning the Base Metals scheme. He got to the point of faxing the application documents to Mr Coppo who completed them and faxed them back. However, shortly afterwards Mr Coppo sent another fax saying that he did not want to follow through that year due to his accountant's advice. Mr Horner said that early next year Mr Coppo rang him and expressed some annoyance, in light of the success of his work colleagues in getting refunds in respect of the Base Metals scheme, that his accountant had advised him not to become involved. He said that Mr Coppo complained that he had to pay an extra \$7,000 maintenance because he was not in it.
- [177] Mr Horner said that when he met Mr Coppo about Banalasta, Mr Coppo was given the standard presentation, including the drawing of a diagram, and advised to get independent advice. He said that Mr Coppo observed that his accountant the previous year had steered him the wrong way. He said he wanted to get into Banalasta. Mr Horner said that he did not say it was ATO approved; there was no talk of the ATO. He said that he explained that there was no product ruling but that the scheme had pre-dated the need for one. He said that he referred to the Ernst & Young report and showed Mr Coppo the document which Mr Coppo handed back. He said that he gave a prospectus to Mr Coppo at the end of the meeting. In cross-examination he said that he thought that there was a lady present but he did not have any interaction with her. He said that he did not have an ATO letter referring to the project and did not show Mr Coppo a letter that he pretended was such a letter.

- **Conclusion**

- (i) **Representations Case**

- [178] Mr Douglas submitted that Mr Coppo's case depended on my finding that the letter purportedly from the ATO which Mr Coppo said was produced in fact existed. He pointed out that there was no pleading based on oral representations made at the time the document was produced. He submitted that it was therefore incredible for Mr Coppo to say that he relied on the letter when all he saw were the logo and references to Banalasta and 'approval'. He also submitted that the evidence concerning attempts to get a copy of the letter was unconvincing especially when the evidence suggested that he did not join the Base Metals scheme because of concerns he had relating to approval. He also submitted that Caran Morgan's description of the letter differed materially from Mr Coppo's. Mr Wilson also commented on aspects of the evidence relating to production of the letter and the subsequent attempts to get a copy of it. He submitted that Mr Horner's evidence that he had shown the Ernst & Young letter to Mr Coppo and his denial of saying that the ATO had approved the scheme should be accepted.
- [179] Although one was not canvassed by Mr Douglas, in my view two issues arise with regard to credibility. One concerns the document allegedly produced by Mr Horner and referred to in evidence by Mr Coppo and Caran Morgan. The other is the issue of maintenance. Mr Coppo conceded that the latter was discussed (but only in the context of not wanting to affect his children's rights). The most likely explanation of how the subject came to be raised is that it was raised by Mr Coppo. It was common ground at least that he had been interested in entering the Base Metals scheme but did not do so. On balance I am satisfied that there was discussion about the effect of the scheme on his maintenance.
- [180] According to Mr Coppo a product ruling was not mentioned and Caran Morgan did not give evidence that it was, either. Mr Coppo's case really focuses on the document he says gave the appearance of being an ATO letter referring to approval of the scheme and conversation at the time it was produced. He relies on this to establish that he was told that ATO approval had been given. It is noted that evidence of the same technique, purporting to read from a document (although not entirely of the same appearance) and saying that the scheme was ATO approved, was given by other witnesses in other cases. As against that, the letter written in August 1999, notwithstanding Mr Coppo's explanation, is somewhat inconsistent with his focus upon the need for proof of ATO approval.
- [181] There are competing factors for and against acceptance of the evidence that Mr Coppo was told that the scheme was ATO approved. I am satisfied that he was more interested than the evidence expressly concedes in entering the scheme. Once that is accepted it would tend to suggest that he was more amenable, having regard to his knowledge of benefits accruing to workmates to enter into the scheme this year. His evidence, and that of Caran Morgan, is that a letter with ATO on it was produced, although the argument that they gave descriptions of it which vary has some cogency. If he was sufficiently concerned the previous year not to enter the scheme because there was no evidence of ATO approval, it would be surprising, unless he was more amenable to a lower standard of satisfaction this year, that he did not ask again in the letter of August 1999 for a copy of the document. At that time he was obviously on good terms with Mr Horner.

[182] As against that, the procedure sworn to has some similarities to the evidence of others who had dealings with Mr Horner in connection with this scheme. While there is always the possibility of collusion in cases of this kind, that issue was not seriously pressed in a detailed way at trial or in submissions. However, the onus is on Mr Coppo to satisfy me positively that I should prefer his evidence on the issue. I have to factor in also my general impression of the credibility of the witnesses. Having performed that exercise, I am not persuaded that the onus has been discharged. Overall, I am not satisfied that misleading or deceptive conduct has been established.

(ii) Recommendations Case

[183] Mr Coppo admitted that Mr Horner told him he would get commission. He signed a disclosure statement showing a commission rate of 5%. I am not satisfied the allegation of non-compliance with s 849 is made out.

[184] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. While I am satisfied Mr Coppo was predisposed to enter the scheme, the absence of any appropriate level of explanation of the potential risks in the investment leads to the conclusions expressed.

Dixon

[185] At the time of the trial Mr Dixon was a shift supervisor of the underground colliery at Moranbah North. He left school at 17 and had subsequently done a certificate of mining by correspondence. He had investment experience with negatively geared rental properties and in an employer's share scheme in respect of the company for which he worked. He had not invested in schemes of the present kind previously. He was involved in the Base Metals scheme and the Banalasta scheme.

(a) Base Metals scheme

[186] It was alleged in paragraph 288 that Mr Horner had made the common representations, which was denied on the basis that he did not say the words alleged as were representations that Mr Horner had made representations concerning the minimum degree of risk involved for concerning the utility of accounting advice. It was admitted that Mr Horner had said that the scheme was a good commercial investment.

[187] Unlike many of the other plaintiffs Mr Dixon approached the investment with some caution and appropriate concern for his own interests. He had learnt of Mr Horner from a work colleague who was something of a father figure whose judgment and astuteness he respected. Mr Horner came to his home and there was a lengthy meeting. The nature of the project and the prospect of excellent returns for the amount of money invested were referred to. It was said to be a very tax effective scheme with no risk to investors.

[188] According to Mr Dixon, Mr Horner explained at some length that the people at SecurInvest had spent sometime picking the project. They had actually worked in the taxation department and knew its ins and outs. They knew that deductions for

the scheme would pass through the ATO successfully. Mr Dixon says he told Mr Horner that he would like to talk to his accountant but was told that a local accountant would be unfamiliar with the scheme. At the end of the evening Mr Dixon was not confident enough to sign the documentation so a second meeting was arranged. According to Mr Dixon the second meeting was held on the following night, although it was put to him that there was a gap of some days between the two meetings, which he denied (While the date of the second meeting seems to have been 21 June 1998, the earlier date was never precisely fixed. However, Mr Dixon's evidence that it was on a Tuesday suggests he was wrong about the gap).

- [189] Mr Dixon said that in the intervening day he tried to contact his accountant unsuccessfully. However, he did speak to his father figure work colleague, who had already invested in the scheme. On the evening of the second meeting he and Mr Horner spent another two or three hours going through the scheme again. Mr Dixon said he was unconvinced about the loan and pressured Mr Horner about the approval of and legitimacy of the taxation deductions. According to Mr Dixon, Mr Horner repeated the substance of the explanation he had given the previous night and added "You know, this is an approved scheme; there's no problems about that. You won't have any problems. It will go through". He said that he had asked about the ATO approval because it was commonsense to do so. He denied having heard work colleagues say that the scheme was ATO approved. He said that Mr Horner referred to some parts of the prospectus in the presentation. He was not advised to get independent advice. He said that the main attraction was the investment return in 5 to 6 years since he wanted to provide for his children's schooling, but the prospect of tax deductions was also a "sweetener".
- [190] Mrs Dixon gave evidence but with regard to this scheme her contribution is minimal since she was only present intermittently. The only specific matter she could recall was that her husband had asked if the scheme was approved by the tax office.
- [191] Mr Horner said that he had two meetings with Mr Dixon. The first, which lasted about 3 hours, was much longer than the standard meeting but covered the areas covered in the standard presentation. However, Mr Dixon had asked a lot of questions about the project including the investment side, the returns and ASIC involvement. Mr Horner said that during the course of the evening Mr Dixon flicked through the prospectus and asked questions. Mr Horner was asked if he had said anything about the ATO's attitude to tax deductibility. He said he told Mr Dixon that he could only go by the tax opinions in the prospectus. He did not say that the payments were tax deductible. He said that he explained that the ATO looked at any investment from the point of view of commercial reality to ensure that it was an investment, not just a means of obtaining a tax deduction. If the ATO audited them there was evidence to show why the money was invested in the project. He said that he pointed out that the investment was speculative because it was a mining exploration venture and that Mr Dixon should seek independent advice. He did a flow chart and explained the money flow.
- [192] He said that Mr Dixon had told him at the outset that he would not be signing the documents that night. He said that he wanted to get it checked out. He said that he told Mr Dixon that some of the questions asked were not ones he could answer and that he should get advice from a person who could answer them. Mr Horner said that Mr Dixon said he was going to take the documents to an accountant and perhaps to another financial adviser for a second opinion. Mr Horner said he told

him that that was fine but to make sure to take it to someone who was actually qualified to give a true and honest opinion on this kind of project.

[193] Mr Horner said the second meeting was about 1 ½ weeks later. He said that Mr Dixon told him that he wanted to get involved in the investment and that he had rung and spoken to a few people. He said that the delay in making his decision had been caused by waiting for advice from his accountant in Brisbane to whom he had posted the documentation. He said that the investment looked above board. According to Mr Horner, Mr Dixon said that a number of work colleagues were getting family allowance. He said that he had told Mr Dixon that he should speak to his accountant about that matter. He said that the projected income was from zero to \$10,000 and that the investment was speculative.

[194] In cross-examination he said that he recommended that Mr Dixon enter into the scheme. He denied that the meetings were on two consecutive days and that he had backdated the documents since the second meeting occurred on 1 July 1998. He said that he was not in the area on 30 June and 1 July 1998 and maintained that it was 1 ½ weeks or so between the two meetings. He denied that he had signed the documents as a witness at the first meeting without Mr Dixon also signing them, in the expectation that Mr Dixon would sign them for him to collect the following night. Given a specific choice between denying or not recalling that he had said to Mr Dixon that the scheme would reduce his income to a level where he could get family allowance payments he chose to say that he could not remember saying it.

- **Conclusion**

- (i) **Representations Case**

[195] Mr Douglas submitted that Mr Dixon's evidence as to the period between the meetings was unreliable. Once that was accepted, the evidence why he did not read the documents or get advice from an accountant became weak. He submitted that the evidence created a doubt whether Mr Dixon relied on what Mr Horner said. There was a lack of conviction about the legitimacy of the loan, but the fact that Mr Horner had discouraged him from getting accountancy advice did not make him suspicious. There was the evidence that he spoke to his respected co-worker and gained comfort from the knowledge that he was already in the scheme in the period between the two meetings.

[196] The period between the two meetings was not resolved by any objective evidence, but it was probably five days or so, at least. It is apparent that at the two meetings, whenever they occurred, there was a lengthy discussion of the scheme. The fact that there was such discussion on the second occasion suggests that Mr Dixon had not yet made up his mind. I am satisfied that Mr Dixon was particularly concerned about the legitimacy of the tax deductions. I prefer his version of the evidence that when he maintained his caution about the approval and the legitimacy of the tax deductions, Mr Horner went the extra step of telling him that it was an approved scheme. On balance, I accept that Mr Dixon relied on what he was told and that it was not as a result of obtaining advice from an accountant or anyone else that he entered into the scheme. It is not without significance that Mr Horner admitted telling him to ensure that he took the documents to an accountant who was familiar with the kind of project. This advice which appears to also have been given in other cases in various ways, was calculated to minimize the risk that advice would

emanate from someone who was unsympathetic to or sceptical about the scheme. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in this respect.

(ii) Recommendations Case

[197] Mr Dixon gave evidence that he had been told by Mr Horner that he was to receive commission. He signed a disclosure statement which advised that “brokerage of up to 6%” would be received by Mr Horner. The onus of establishing a contravention of s 849 is not discharged.

[198] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client’s investment objectives, financial situation and particular needs.

(b) Banalasta scheme

[199] It was alleged at paragraph 324 that Mr Horner made expressly and orally the common representations, which was denied by the fourth and eighth defendants on the basis that he did not say the words alleged. It was not admitted by the tenth and thirteenth defendants. It was also alleged in paragraph 325 that he had presented a letter purporting to be from the ATO to support the common representations. This was denied by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

[200] Mr Dixon was favourably disposed towards entering this scheme because the deductions had been allowed in respect of the Base Metals scheme. Further, when Mr Horner came to discuss it with him he said that the Base Metals scheme would give a return sooner than the 5 to 6 years projected. According to Mr Dixon, Mr Horner explained the nature of the scheme. He asked Mr Horner about the taxation eligibility of the scheme because he had seen reports in the Courier Mail about product rulings. He said that Mr Horner said that the scheme had “definitely been approved”.

[201] Mr Dixon says he asked more specifically about approval of the scheme. The following passage sets out his version of what happened:

“I said, ‘Well, you know, these schemes were in the paper and that they showed that they had been approved. Have you got something that you can show me?’ So he had a folder and he opened up the folder and got out an A4 piece of paper. On top of the piece of paper it had Australian Tax Office and it had, ‘Income Tax’ and then ‘Banalasta Scheme’, and then Darren took the piece of paper and read from the piece of paper and – to summarise what it said, it basically said that it was approved by the Tax Department. Darren also explained that the Tax Department had been actually out to see the plantation and the research station and looked at the books and the way the scheme was being marketed and the actual physical nature of the scheme, you know, there was something there and yeah, I once again asked him, you know, was the scheme approved and he said, ‘Yes, it’s definitely approved’, and I said what about for

myself, and he said, ‘Yes’, it would be approved for myself because in particular I’m a very conservative sort of a person. I didn’t want to take any gambles and basically he – yeah, I wouldn’t – there’s no way I would have signed onto the scheme if I thought there was any chance of the deductions being knocked back by the tax office, the Australian Tax office.”

- [202] In cross-examination he said that Mr Horner had told him that there was no product ruling but approval had been given by the ATO after an inspection of the company’s operations. He said that Mr Horner had read from the document which had Australian Taxation Office on it and a reference to Banalasta. He said that his wife had asked if she could copy the document by use of their fax machine. Mr Horner was agreeable but as the conversation moved on it was forgotten about until after he had left. Mr Dixon was shown an Ernst & Young letter which referred to Banalasta but denied that that was the document he had seen. He said that after the reading of the letter Mr Horner said “What this means is it’s approved by the tax office”. Mr Dixon said that on this occasion, too, he was not advised to get independent advice.
- [203] Mrs Dixon was, once again, intermittently at the meeting on this occasion. She said that she remembered Mr Horner showing them a piece of paper which “had taxation approved on it and whatever it had”. She recalled asking if she could copy it on the fax but they had forgotten about it. She also said that she had not seen the Ernst & Young opinion before. She had a recollection that she had phoned someone at SecurInvest’s office in Western Australia some time in January the following year and asked for a copy of it but it did not eventuate.
- [204] Mr Horner said that he gave his standard presentation, except that he did not prepare a flow chart because Mr Dixon was already familiar with the concepts from the previous year’s discussions. He said that he had with him the prospectus, the letter from Ernst & Young and the application forms. He denied showing a letter from the ATO, asserting it had approved the scheme, to Mr and Mrs Dixon. He said there was no such letter. He said he did give Mr Dixon the Ernst & Young letter to read. Mr Dixon asked for a copy of it but eventually no copy was taken. No request was made subsequently for a copy of it. In cross-examination, he agreed that Mr Dixon’s wife was present at times. He reiterated that the request was for a copy of the Ernst & Young report. He did not tell them that the scheme had ATO approval, nor that such approval was as good as a product ruling. He said that he had explained product rulings and why one would not be applied for in this case in the manner he usually followed in his presentation.

- **Conclusion**

- (i) **Representations Case**

- [205] Mr Douglas’ submission focussed upon the contrast between Mr Dixon’s portrayal of himself as a conservative person who did not want to take a gamble and his lack of interest in understanding the written documents or finding out independently whether the scheme was ATO approved. He also submitted that it defied belief that Mr Dixon would not have followed up the question of getting a copy of the purported ATO letter. Mr Wilson’s submissions were broadly similar in effect.
- [206] Mr Dixon was aware that there was no product ruling. His case was based on Mr Horner reading from a document and saying that notwithstanding that there was no

product ruling the scheme was “definitely approved” by the ATO. Mr Horner said that it was the Ernst & Young letter to which he was referring. Both Mr and Mrs Dixon say that it was not the document they saw. Whatever the document was, I prefer Mr Dixon’s evidence to Mr Horner’s having regard to my view of the relative credibility of the witnesses. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in this regard.

(ii) Recommendations Case

- [207] Mr Dixon’s evidence concerning whether he had been told by Mr Horner that he was to receive commission was rather vague. He said he was generally aware that Mr Horner would be entitled to payment of some kind but was not sure whether it would be by way of salary or commission.
- [208] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client’s investment objectives, financial situation and particular needs.

Glazebrook

- [209] Mr Glazebrook was a project manager in the coal mining industry. He left school at Year 10 and did post-trade courses in electronics. He was involved only in Banalasta. It was his first major investment.

(a) Banalasta scheme

- [210] It was alleged at paragraph 351 that Mr Horner expressly and orally made the common representations, which was denied by the fourth and eighth defendants on the basis that Mr Horner did not say the words alleged and not admitted by the tenth and thirteenth defendants. It was alleged at paragraph 352 that Mr Horner presented the Ernst & Young letter in support of the common representations. This was denied by the fourth and eighth defendants on the basis that Mr Horner did not do so. The allegation was not admitted by the tenth and thirteenth defendants. It was alleged in paragraph 355 that at a second meeting Mr Horner expressly and orally made the common representations. This was denied on the same basis as before by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.
- [211] Mr Glazebrook said he heard of the scheme through Mr Borg. He arranged to meet Mr Horner to find out more about the scheme. At the meeting Mr Horner discussed the product and went through financial aspects. According to Mr Glazebrook he asked Mr Horner at least 3 times if the scheme was ATO approved because one of his greatest concerns was that he had heard it was a tax minimisation scheme and believed it would need such approval. He said that Mr Horner said that it was approved.
- [212] Mr Glazebrook did not sign that evening despite Mr Horner telling him that there was a limited number of units left and that he could miss out. He said that he asked for a prospectus as he left. He agreed that he was shown, but did not have a chance to read, an Ernst & Young report which Mr Horner told him was to the effect that

the scheme had passed the requirements of the tax laws. He did not get a copy of that opinion.

[213] After about a week had passed, Mr Glazebrook decided he wished to participate and arranged a second meeting with Mr Horner at which he signed the documents. He said that prior to doing so he asked again if ATO approval had been given and was told “Yes”. He said that Mr Horner did not tell him that the scheme did not have a product ruling. He said that at that time he did not understand what a product ruling was. He was not advised to get independent advice. He denied he told Mr Horner that he would go away and get independent advice at the conclusion of the first meeting. He agreed that he had told Mr Horner that several of his work colleagues had invested in similar schemes in earlier days and that he was wishing to invest in the scheme. He said that he had said that but intended to hear all the facts first. He denied that he told Mr Horner that he had obtained advice from advisers in Rockhampton and that was the reason why he wanted to proceed.

[214] Mr Horner said that there were two meetings with Mr Glazebrook. At the first the standard presentation, including preparation of a flow chart, was given. The tax management worksheet was filled out and a copy of the Ernst & Young report given to Mr Glazebrook. Mr Glazebrook had said that he was not going to do anything then and there. He wanted to get information about the scheme because he had seen work colleagues benefit from similar schemes in previous years. He said that he was going to an adviser in Rockhampton. Mr Horner said that no pressure was applied to Mr Glazebrook to sign the documents because he knew that he was going to take them away to obtain advice. According to Mr Horner, Mr Glazebrook wanted to sign up for the scheme. Mr Horner had a vague recollection that he said he had spoken to a family friend about it.

- **Conclusion**

- (i) **Representations Case**

[215] Mr Douglas submitted that because Mr Glazebrook did not sign up at the first meeting it could not be said that he relied on anything said at that meeting. He also submitted Mr Glazebrook’s evidence was guarded on any occasion when he was asked about matters that may affect his interest. Mr Wilson, in addition to referring to the conflict between Mr Glazebrook’s and Mr Horner’s evidence, submitted that any representation as to deductibility was a future representation.

[216] The major issues are whether Mr Glazebrook was told by Mr Horner that the scheme was ATO approved and whether Mr Glazebrook obtained independent advice before deciding to enter into the scheme. I do not accept that, because Mr Glazebrook did not sign at the first meeting, he, *ipso facto*, no longer relied on any representations made at it. It was common ground that Mr Glazebrook had heard of work colleagues who had invested in similar schemes successfully before he spoke to Mr Horner. Mr Glazebrook denied having got advice in the period between the two meetings. Mr Horner did not give any firm evidence that Mr Glazebrook said that he had done so despite saying that he had told him that he was going to get such advice. On balance I prefer Mr Glazebrook’s version of events that he specifically enquired and was told that the scheme was ATO approved. I am satisfied that he relied on what he was told. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in that regard.

(ii) Recommendations Case

- [217] Mr Glazebrook gave no evidence on the subject of commission. He signed a disclosure statement advising that Mr Horner received commission of 5% per unit. The onus of establishing contravention of s 849 is not discharged.
- [218] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Gottke

- [219] Mr Gottke was a miner who left school at 15 and had obtained a dogman's ticket, but had no later formal education. He had only a limited ability to read. He had no previous experience in investing in this kind of investment. However, he had had an unsuccessful attempt to acquire an investment property at the Gold Coast which apparently fell through when someone absconded with moneys intended to be used towards the purchase. He was involved in the Base Metals and Banalasta Schemes. He said that because of his previous experience he was initially cautious about investing in the Base Metals scheme.

(a) Base Metals scheme

- [220] It was alleged at paragraph 384 that Mr Horner had expressly and orally made the common representations, which the fourth and eighth defendants denied as before and that he made other representations concerning the scheme being a good and profitable investment which would reduce income to a level where the plaintiff could claim family allowance. These were denied. A representation that Mr Gottke should invest in the scheme was admitted.
- [221] Mr Gottke had asked Mr Parish to put him in contact with Mr Horner. An appointment was made and Mr Horner gave Mr Gottke and his wife a presentation about the scheme at their home. Mr Gottke recalled being told that there would be a good tax return in the first year with a big percentage of it going to the company. He said that he asked if the scheme was approved by the tax man and was told that it was. Mrs Gottke did not give evidence.
- [222] Mr Horner said that he contacted Mr Gottke following a request to do so from Mr Parish. He said that he gave the standard presentation which lasted about 1 ½ hours to 2 hours in this case. He left a copy of the prospectus with Mr Gottke. He said that Mr Gottke had told him that he was very cautious because of his experience of losing his deposit on the Gold Coast. However, he had seen Mr Parish do well and was interested in looking at the scheme. Mr Horner denied telling him that the ATO had approved the scheme, that payments were lawfully deductible or that the scheme would effectively cost nothing. He explained how the scheme was financed and that, being a mining exploration scheme, it was speculative. He said that he recommended that Mr Gottke enter the scheme. He said that Mr Gottke mentioned that some people were claiming family allowance but was troubled about the morality of it. Mr Horner said that he told him he should get advice about how it affected him if he wished to pursue it. In cross-examination he ventured the opinion

that Mr Gottke may not have been a person who could have read and understood the prospectus.

- **Conclusion**

- (i) Representations Case**

[223] Mr Douglas' submissions contrasted Mr Gottke's description of himself as cautious because of his previous investment misfortune with his failure to read the documents relating to the scheme and his preparedness to trust Mr Horner whom he had only just met. It was submitted that he had not relied on anything said by Mr Horner. He was predisposed to do so because he knew what his work colleagues were doing. Nor was there any expressed indication that he was relying on Mr Horner.

[224] It is obvious that the evidence given by Mr Gottke accounts for only a fraction of the time involved in the meeting with Mr Horner. The major issue is whether I am satisfied that Mr Gottke was told that the scheme was approved by the Taxation Department or whether that was a conclusion drawn by him from all that was said, even if nothing of a misleading or deceptive nature was said. I am satisfied that having regard to his appearing to be an uncomplicated person and his previous unfortunate investing experience his description of himself as cautious was accurate. I am satisfied in the circumstances that he asked specifically about Taxation Department approval and was told that it was approved. I am satisfied that he relied on that advice. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in this regard. I am satisfied that there was mention of eligibility for Social Security benefits. I am not satisfied that any representation in that regard was relied on in light of Mr Gottke's uncertainty about the morality of taking advantage of it.

- (ii) Recommendations Case**

[225] Mr Gottke said that he was not told that Mr Horner would receive commission. He did not ask about it but "knew he would be getting paid somewhere". He signed a disclosure statement which stated that Mr Horner was to get "up to 6% of the money raised", but said he had not read it. Having regard to my general view of what Mr Horner said in his presentation, I am not satisfied that the onus of establishing contravention of s 849 is discharged.

[226] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

- (b) Banalasta scheme**

[227] It was alleged at paragraph 416 that Mr Horner expressly and orally made the common representations which was denied as before by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

[228] According to Mr Gottke, Mr Horner gave a presentation about the scheme. In his evidence-in-chief Mr Gottke was asked;

“And was anything mentioned about the tax office?- - I think there was a mention about the tax office being approved.

...were there any other concerns that you had in respect of this scheme?-
- The only concern I had – like I asked him the year prior of (sic) it was ATO approved and everything, and I just assumed that it was ATO approved because last year he assured me that it was ATO – or Australian Tax Office approved.”

In response to further questioning about concerns that he may have had about Banalasta he said “I have a lot of concerns, but he – but I never asked him, because he just assured that it was all tax approved and things like that, so I trusted him.”

[229] He said that he assumed that the previous scheme had been legal because the tax refund had been received in respect of it. He said that he was not as cautious in respect of Banalasta because the previous one had gone through and he assumed that it was all legal and that Banalasta was going to be the same. He was pressed about whether Mr Horner had not said that the Banalasta scheme was ATO approved. Mr Gottke said “I am sure he said that it was ATO approved”. Later in cross-examination he said “Mr Horner told me that it was tax approved and I will get a smaller sum this year and next year oh probably the same and then after that I would get dividends every year”.

[230] Mr Horner said that the meeting involved a standard presentation. No representations were made about ATO involvement or approval of the scheme nor that payments were tax deductible. In cross-examination he said that he told Mr Gottke that running costs could be claimed as a tax deduction. He did not say that they would necessarily be granted nor that it was guaranteed that they would. At the time he believed himself that they were legitimate claims.

- **Conclusion**

- (i) **Representations Case**

[231] Mr Douglas submitted that the real reason that Mr Gottke entered this scheme was because of his successful experience the previous year and his wish to obtain further deductions. He had not read the documents despite his claim to have had concerns about the scheme. Mr Wilson pointed to variances in Mr Gottke’s evidence whether it had been said that ATO approval had been given and submitted that Mr Gottke was not as cautious on this occasion because of his experience with the previous year’s scheme.

[232] Mr Gottke’s evidence concerning this scheme is not wholly self consistent, as appears above. I am not satisfied that Mr Horner was directly asked if the scheme was ATO approved or that that representation was made by Mr Horner on this occasion. There is an element of assumption inherent in the early part of Mr Gottke’s evidence that there was such approval. I am not satisfied on balance that the representation was made. Nor am I satisfied that the decision to invest was made in reliance on any representation made by Mr Horner.

(ii) Recommendations Case

- [233] Mr Gottke said that nothing was said about commission. He signed a disclosure statement advising that commission of 5% per unit was payable to Mr Horner. On a similar basis, to that in relation to the Base Metals scheme, I am not satisfied that the onus of proof of contravention of s 849 has been established.
- [234] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. Notwithstanding, and also because of, the level of assumption involved in Mr Gottke's decision to enter the scheme, a presentation that did not include, or minimised reference to risks inherent in the investment fell short of what was required.

Hinchey

- [235] At the time of relevant events Mr Hinchey was a coal miner. He left school in Year 10 and became a plumber. He had no other post school education. There is no evidence whether he had any investment experience. He was involved only in the Banalasta scheme.

(a) Banalasta scheme

- [236] It was alleged at paragraph 446 that Mr Horner had expressly and orally made the common representations, which was denied by the fourth and eighth defendants on the same basis and not admitted by the tenth and thirteenth defendants. It was alleged that he also represented that there was a hardship clause allowing Mr Hinchey out if circumstances arose where he could not pay. This was denied by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.
- [237] Mr Hinchey heard of Mr Horner through his brother. His brother arranged for Mr Horner to come to the plaintiff's flat where he gave a presentation to them on the scheme. Mr Hinchey's brother eventually did not invest. During the presentation Mr Hinchey asked Mr Horner if the tax office was ok with it. He replied "The tax office is fine with it". He did not recall Mr Horner saying that it was "ATO approved", saying that the words he had given were exactly what was said. He said that he had asked because he "wanted to know if it was a genuine thing. If it was – I suppose you would say 'legal'". He wanted to know if the tax office had a problem with it, which Mr Horner said it didn't.
- [238] In cross-examination he was asked "Is it fair to say that the reason why you asked the question, that is, 'Is the Tax Office okay with this?' is because you were concerned that there might be a difficulty with it with the Tax Office? - - No. The scheme to me was a tax driven thing. So to me, if I asked the question 'Is the Tax Office okay with it?' and he says, 'Its fine', case closed. No risk." Mr Hinchey said that he was given a prospectus at the end of the presentation. He was not advised to get independent advice. He signed the documents prior to the conclusion of the presentation.
- [239] After the amendment concerning reliance was allowed, Mr Hinchey was recalled for further cross-examination. He specifically denied that he only went into the scheme

because he was encouraged by his brother to do so. He said that he had not determined to enter into it before he went to the meeting.

[240] According to Mr Horner he gave a standard form presentation to Mr Hinchey, his brother and another man. There were three copies of the prospectus at the meeting. A tax management worksheet was prepared and a diagram done. Mr Hinchey was also advised to get independent advice. Mr Horner said that he did not tell Mr Hinchey that the scheme was ATO approved or that payments were lawfully tax deductible. With respect to Mr Hinchey's evidence concerning the hardship clause, Mr Horner said that he told Mr Horner that if he lost his job and could not make repayments they would need to look at his situation with regard to what he could afford. They would probably need a letter from his accountant stating what his income was expected to be and his case would then be taken to the project. He denied that he said that there was a hardship clause or a way in which he could get out of the transaction.

- **Conclusion**

- (i) **Representations Case**

[241] Mr Douglas submitted that Mr Hinchey was an unreliable witness because of variances in detail in his evidence. Both he and Mr Wilson drew attention to the evidence that Mr Hinchey admitted that the words ATO approved or Tax Office approved were not used by Mr Horner. It was submitted that his evidence as to what was said was highly improbable. It was submitted by Mr Douglas that the decision to invest was made in the exercise of Mr Hinchey's own judgment not as a result of any representation made to him.

[242] Mr Hinchey's evidence does not assert that there was a direct representation by Mr Horner that the scheme was ATO approved. I am not persuaded that the conversation sworn to by Mr Hinchey is sufficient to establish a misleading or deceptive representative at the time it was spoken. I am, however, satisfied that Mr Horner conveyed to Mr Hinchey that there was a "hardship" clause under which he could gain relief if his financial situation deteriorated, and that this was a representation upon which he relied in deciding to enter into the scheme. I am satisfied from Mr Horner's evidence that there was nothing of the nature of a provision having that effect. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in that regard.

- (ii) **Recommendations Case**

[243] Mr Hinchey said that, in conversation, Mr Horner said that he would get a commission, but was no more specific than that about it. He signed a disclosure statement advising that Mr Horner received commission of 5%. Mr Horner said that he had explained that he got paid by way of a percentage from the project. The onus of establishing a contravention of s 849 is not discharged.

[244] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Mrs Montgomery

[245] Mrs Montgomery was a senior clerk at North Goonyella coal mine at the commencement of her connection with events that are relevant to this case. She was 58 at the time of trial. She had left school at 14 and apart from doing typing and software courses she had no further formal education. She had a negatively geared house and owned shares in an insurance company. She had not invested in any schemes of the present kind previously. She was involved in all three schemes.

(a) Northern Rivers scheme

[246] It was alleged at paragraph 507 that Mr Francis expressly and orally made the common representations. This was not admitted.

[247] She gave evidence that her brother recommended that she see Mr Francis. A meeting was set up at the office of Karen Evans, Mrs Montgomery's accountant. Karen Evans is the 12th defendant, but her trial is to be held separately. Mr Francis gave a presentation during the course of which, according to Mrs Montgomery, he said that the "whole thing was approved by the taxation department." After that meeting, she had Karen Evans look at the scheme and on the basis of a telephone call and a subsequent letter in which Karen Evans agreed that the scheme was suitable she entered into it.

[248] When recalled for further cross-examination Mrs Montgomery denied that before she met Mr Francis, Karen Evans had gone through the prospectus with her. She denied that Mr Francis was told when he arrived that Mrs Montgomery wanted to be involved in the scheme and that he might like to fill out the application forms. She pointed out that she had not signed at the first meeting. She was not prepared to do so because she wanted to ask Karen Evans about it and needed to inform her husband about it as well.

[249] She accepted that she had received written advice from Karen Evans between the first and second meetings in which Karen Evans told Mrs Montgomery that she thought the scheme was suitable. When questioned about whether she would have entered into the scheme but for the advice from Karen Evans she said that she had also heard from one of her brothers that he had heard from people at work at the scheme had been accepted by the ATO and that he believed that it was good for her as she was approaching retirement. She denied that Mr Francis had told her only that deductions may be allowed if she went into the scheme with a long term aim of investment. She said that, subsequently to entering into the scheme but before seeing Mr Horner about the Base Metals scheme she had received a letter from Mr Francis stating that the Northern Rivers scheme was tax office and ASC approved. She said that she had used those words in her letter to the ATO when corresponding with it.

[250] Mr Francis said that he met her at Karen Evans' office after Karen Evans had contacted him. He did not give a presentation to Mrs Montgomery because Karen Evans told him she had gone through the prospectus with Mrs Montgomery, that Mrs Montgomery understood it and that she wanted to become involved. He asked Mrs Montgomery if she had any questions. She told him that there were none. He filled out parts of the tax management worksheet himself. He did not tell Mrs Montgomery that the scheme was ATO approved. He made no recommendation to Mrs Montgomery because Karen Evans had been through the scheme with her. In

cross-examination he said only he, Karen Evans and Mrs Montgomery were present. Mrs Montgomery's daughter and son-in-law were not. Mr Francis denied he gave a presentation or that he had told her the scheme was approved by the ATO. He denied that he had told her that deductible business expenses as set out were claimable as a tax deduction. He said that he believed Karen Evans had explained the scheme to her.

- **Conclusion**

- (i) **Representations case**

[251] Mr Douglas submitted that Mrs Montgomery's evidence contained inconsistencies demonstrating preparedness to safeguard her own position particularly with respect to reliance on the representations made by Mr Francis. He submitted that the evidence concerning the advice that she took from Karen Evans demonstrated that she relied on that advice not Mr Francis' representations.

[252] I accept Mrs Montgomery's evidence concerning what Mr Francis told her in preference to his evidence but do not accept that she acted in reliance on it in entering into the scheme. I am satisfied that she was not prepared to act on what Mr Francis had said and that she only entered into the scheme because Karen Evans had said that the scheme was suitable for her.

- (ii) **Recommendations Case**

[253] Mrs Montgomery said she was not told that Mr Francis was to get a commission. She looked at the documents at some time after she signed them and saw that he would get commission. Mr Francis said he had told her he got a sum per farm. She signed a letter of instruction acknowledging that Mr Francis' "fee for preparing (the) recommendation" was \$350 per farm. She gave evidence that later, she questioned her liability to pay Mr Francis commission and ultimately was not required to do so. Having regard to my view of the credibility of the respective witnesses, I am satisfied that Mr Francis did not tell Mrs Montgomery of his entitlement to commission. Section 851(3) then falls for consideration.

[254] The concern addressed by s 849 is disclosure of interests which may influence a security adviser's recommendation. Once it is established that s 849 was contravened, the question remains whether a reasonable person in the client's circumstances could be expected to have entered into the scheme in reliance on the recommendation even if s 849 had been complied with (s 851(3)). I am not satisfied that Mrs Montgomery would not have entered into the scheme had she believed Mr Francis had a pecuniary interest in the outcome. Her objection to paying commission was not an intrinsic objection, but a belief that she had discharged all her obligations.

[255] She was not prepared to act on Mr Francis' recommendation. She entered the scheme because of advice given by Karen Evans. Had she not got that advice, she would not have entered the scheme. Those are Mrs Montgomery's circumstances. In my view, it is established that a reasonable person in her circumstances could be expected to have done the relevant act in reliance on the recommendation had s 849 been complied with. Likewise I am not satisfied that there was a contravention of s 851.

(b) Base Metals scheme

[256] It was alleged at paragraph 536 that Mr Horner expressly and orally made the common representations. This was denied. It was admitted that Mr Horner had recommended that Mrs Montgomery should invest in the scheme.

[257] A meeting was arranged in March 1998 with Mr Horner at Mrs Montgomery's daughter's home. According to Mrs Montgomery a presentation was made during which Mr Horner said he was waiting on ATO approval and was not signing anyone up to the scheme at that stage. He would get back when everything was ready to go. At a second meeting the following month, which may have been instigated by Mrs Montgomery when she had heard nothing further, Mr Horner said that the scheme had been approved and was ready to go. After further discussion about the scheme she said she was willing to go ahead. It is not entirely clear whether Mr Horner said at this meeting that ATO approval had been obtained, or if she had asked about it. The flavour of her evidence is rather that she was influenced by the fact that she had received a refund the previous year and the fact that, as she put it, when they explained the scheme it was based on it being tax office approved. When the second meeting occurred she took it to be the case that what had been contingent was now definite. She said that she had no reason to doubt that it was ATO approved. She signed up because the scheme was based on ATO approval and her assumption that it had been approved by the time of the second meeting. She did not feel it necessary to consult Karen Evens on this occasion.

[258] According to Mr Horner, Mrs Montgomery phoned him when he was in town. She said she would like to talk to him about the project, of which she had got details from Karen Evans. On this occasion, Mrs Montgomery's daughter and son-in-law were present. He said that he gave them a standard presentation. He said nothing about approval by the ATO nor of payments being lawfully tax deductible. He said he recommended that she enter into the scheme and told her that from what they could see the project looked good. He suggested she take the documents away to get advice if she wanted. He said Mrs Montgomery said she had already talked to Karen Evans about the scheme. She said she had been talking to Mr Francis and was only concerned with the falling out between him and SecureInvest. However, she did not view it as affecting the way the business was being run. Mrs Montgomery did not sign the documents on that occasion. She said that she was a good friend of Mr Francis and wanted to know both sides of the story. She wanted time to think about which way she would go. At the second meeting he did not give the presentation again. He made no representations about ATO involvement or tax deductibility on this occasion either. Mrs Montgomery essentially wished only to sign the documents.

- **Conclusion**

(i) Representations Case

[259] It was submitted that even if at the first meeting Mrs Montgomery was told that there was a delay in providing a new scheme because ATO approval was awaited the evidence disclosed that she had acted on her own judgment in entering into the scheme on the occasion of the second meeting. It was submitted that she had formed an opinion that because the previous scheme had produced deductions and

she was confident that the schemes were similar she entered into the present scheme.

- [260] The evidence whether any positive representation that the scheme was ATO approved was made by Mr Horner is not very satisfactory. According to Mrs Montgomery, she believed, from the sequence of events that the scheme was ATO approved. I accept this. However I am not persuaded that any representation that was misleading or deceptive upon which she relied was made in a positive sense when she entered into the scheme.

(ii) Recommendations Case

- [261] Mrs Montgomery said that Mr Horner was “upfront” about commission. He said he told her he was paid out of the project. She signed a disclosure statement advising that brokerage of up to 6% would be received by Mr Horner. Mr Horner said he had told her what he “actually (got) paid out of from the dealer”. The onus of establishing contravention of s 849 is not discharged.

- [262] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client’s investment objectives, financial situation and particular needs.

(c) Banalasta scheme

- [263] It was alleged at paragraph 572 that Mr Horner expressly and orally made the common representations, which was denied by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants. It was also alleged that he made a representation that there was a “get out” clause under which she could opt out in certain circumstances. This was denied by the fourth and eight defendants as untrue and not admitted by the tenth and thirteenth defendants.

- [264] According to Mrs Montgomery, on this occasion Mr Horner came to her home and gave a presentation. By this time Mrs Montgomery had been retrenched from her job, taken a redundancy payment and was not working. She was worried whether the scheme (which was a 2 year scheme) was suitable for her in the circumstances. She said that Mr Horner assured her that she could opt out if she wished. It was put to her that at no time during the meeting did Mr Horner say that the scheme was tax office approved. She replied that she did not agree because she “would have been worried to know that it was tax office approved”. Under further questioning she said she “would also be presuming that it would have been”. Then she conceded that she could not be specific that she asked him exactly if it was ATO approved. She did not seek any independent advice on this occasion either. At the end of the meeting with Mr Horner she signed up for the scheme.

- [265] Mr Horner said that he gave a standard presentation without the flow chart at her home. Her husband was there but did not participate in the meeting. According to Mr Horner she told him that she had finished work at the mine, but hoped to look for another job paying \$40,000 to \$50,000 per annum in the new financial year. He said that they would need to work out what she would earn because it was a 2 year project. If her income did not meet the assumptions upon which the investment was made he would need verification from her accountant and see what could be worked

out with the project. He said that he did not say that the project had ATO approval or that payments were lawfully tax deductible. In cross-examination, he agreed that Mrs Montgomery had told him she was out of work but hoping to get a new job. He said that nevertheless she wanted to get into the 2 year scheme and he followed her instructions. He did not advise her not to join although he viewed himself as a salesman of the scheme. He said that he had offered to look at readjustment of her obligations if she did not achieve the salary level anticipated, by which he meant readjusting payments only.

- **Conclusion**

- (i) **Representations Case**

[266] Mr Douglas submitted that Mrs Montgomery did not rely on anything said by Mr Horner. Her decision to enter the scheme was based upon the prior success in having her deductions granted. It was submitted that the evidence established that she was prepared to sign before Mr Horner arrived for the second meeting because of her successful prior dealings in the schemes. Mr Wilson made the same point and submitted that the evidence established that she had merely presumed that the scheme was ATO approved. She was prepared to proceed on the basis that the previous schemes had produced the deductions expected.

[267] Mr Wilson submitted that she had presumed that the scheme was ATO approved. She could not be specific if Mr Horner had said so. She was prepared to proceed on the basis that the previous two schemes had been successful in producing the expected refunds. The evidence does not establish satisfactorily that any representation was made about ATO approval. The tenor of Mrs Montgomery's evidence is that there was an assumption on her part that it was ATO approved but no positive assertion is made by her of a representation to that effect. However, I am satisfied that during the presentation, she was told that there was a process under which she might opt out in certain circumstances. I am satisfied that this was a representation upon which she relied in deciding to enter the scheme. I am satisfied that, from Mr Horner's evidence, there was no such provision in the scheme. I am satisfied that Mr Horner engaged in misleading or deceptive conduct in this regard.

- (ii) **Recommendations Case**

[268] Mrs Montgomery gave no evidence on the subject of commission. She signed a disclosure statement showing that Mr Horner received commission at the rate of 5% per unit. Mr Horner did not give any evidence on the subject either. The onus of proof of a contravention of s 849 has not been discharged.

[269] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. As mentioned earlier in these reasons, the change in her financial circumstances made the advice wholly inappropriate.

Mr Montgomery

[270] Mr Montgomery was a truck driver, 58 at the time of trial, who had left school at 13. He had no further formal education and had no experience in investing. He was involved only in the Northern Rivers scheme. He had no personal contact with any salesman prior to signing the documents. At the time when he executed the documents he was working in New South Wales.

(a) Northern Rivers scheme

[271] It was alleged at paragraph 598 that Mrs Montgomery acted as agent for the fourth defendant, or in the alternative, that Mr Francis conveyed representations made to her about the scheme to Mr Montgomery. This was denied.

[272] According to Mr Montgomery his wife rang him and told him that there was a scheme that could probably be right for their retirement. He asked "What's the tax on it". She said "It's all above board as far as I know". He said that he left the decision to her. He subsequently received documents relating to the scheme which he signed and returned. He said that his wife had told him she was looking into the scheme. She had satisfied herself about it and wanted him to enter into it. He relied on what his wife told him. He was vague as to whether she had said that it had the approval of the ATO.

[273] Mrs Montgomery gave evidence that she phoned her husband and told him that her brother had become involved in the scheme. She said that it looked good for them, according to the presentation, and that she was having Karen Evans look at it. She told her husband that if Karen Evans agreed, she felt that he should join it also. She subsequently got a letter from Karen Evans agreeing that the scheme would work in their favour at their age and that there were good returns on it. She did not know if she said to her husband that the scheme was ATO approved. Following that advice the necessary papers were sent to Mr Montgomery to sign, which he did. She said in re-examination that she had been told that there were other people at the mine who had been in the scheme prior to her brother and their deductions had been approved by the taxation department. She concluded "So it was just a foregone conclusion that it was approved by the taxation department, so I don't know that I actually said to Henry, who probably wouldn't have been very interested either, that it was Tax Office approved, but I could have also".

[274] Mr Francis said that she mentioned her husband at the meeting. He said that she had told him she wanted her husband, who was working away from home, to get involved. The necessary documents were posted to him by Karen Evans. When they came back he was given them and processed them. Mr Horner said that he had no dealings with Mr Montgomery beyond being introduced to him on the second and third occasions he visited Mrs Montgomery. He took no part in any presentation to Mr Montgomery.

- **Conclusion**

(i) Representations Case

[275] Mr Douglas pointed to the pleaded case which alleged that Mrs Montgomery acted as agent for the fourth and fifth defendants in respect of the representations made by Mr Francis and in connection with the transaction entered into. He submitted that

there was no evidence that Mrs Montgomery was acting as agent for either of those parties and that he relied on what he was told by her in her private capacity. It was pointed out that Mr Francis had had no direct contact with Mr Montgomery.

- [276] There is no evidence that Mr Montgomery acted in reliance on any representation made to him by anyone connected with the scheme, nor that any representation was made directly to him. There is no evidence that Mrs Montgomery was acting as agent for either the fourth or fifth defendant in persuading him to enter into the scheme.

(ii) Recommendations Case

- [277] Mr Montgomery had no direct contact with Mr Francis in connection with the scheme. Among the documents he signed was a disclosure statement that identified that Mr Francis was entitled to brokerage of \$300 per farm. There is no basis for finding there was a contravention of s 849.
- [278] There is no basis for finding that a contravention of s 851 has been proved.

Parish

- [279] Mr Parish was a machine operator aged 50 at the time of trial who had left school at 14. Apart from acquiring trade skills he had no further formal education. He was involved in the Base Metals and Banalasta schemes. He had previously been in a similar kind of scheme concerning cattle. Mr Francis had been the salesman of that scheme. Mr Parish also owned some BHP shares under an employee scheme.

(a) Base Metals scheme

- [280] It was alleged at paragraph 626 that Mr Horner had made the common representations orally and expressly, which was denied by the fourth and eighth defendants. An alleged representation recommending that Mr Parish should invest in the scheme was admitted.
- [281] According to Mr Parish, Mr Horner gave a presentation to him and his wife at their home. Mr Horner gave an explanation of how the scheme worked. Mr Parish said that his wife asked Mr Horner whether the taxation department approved these projects and Mr Horner said that it did. Mr Parish said that Mr Horner appeared to read a section of the prospectus that stated that there was tax approval. He subsequently looked for this in the prospectus but could not find it. He said that he was concerned about the taxation department's attitude since he had read of it looking closely at some kinds of schemes and did not want to be involved in a scheme that was illegal. He said that he felt he had been placed under pressure to sign the documents by the hint that he may miss out if he did not do so immediately. He signed the documents at the end of the meeting.
- [282] Mrs Parish was also present at the meeting. She said that during the explanation of how it worked she asked about the involvement of the tax office in it and whether it was legal. Mr Horner said it was perfectly legal and that he would not do anything that was not above board. She said that her concern was that she did not understand how it could be funded from her husband's taxation. By that she meant that his tax went to the ATO; under the scheme it came back to him and was paid to Base Metals; they had to outlay no cash themselves. However, she was assured that it

was legal. Subsequently, when the tax return was being done by their accountant they were told it was within the guidelines. She also said that Mr Horner had pushed her husband to sign the documents although he was a little hesitant.

[283] Mr Horner said that Mr Parish was on SecureInvest's client database because he had been in the cattle scheme previously. When Mr Horner was next in the area he contacted, he thought, Mrs Parish. He explained that Mr Francis was not with SecureInvest any more and asked if he could talk to them. When they met, Mr Parish asked a number of questions about the cattle scheme which, because Mr Horner could not answer them, were to be referred to Mr Pawski. Mr Parish said that he was interested in looking at the Base Metals scheme. Mr Horner said he spoke to Mr Parish about getting independent advice. Mr Parish told him everything would go through his accountant before he did anything. Mr Horner said that he did not say that the ATO had approved the scheme or that payments were lawfully tax deductible. Mr Parish signed on the day notwithstanding this. Mr Horner said that he could not recall being pressed for time but accepted that it was a busy time and he had other clients to see. He did not say that if Mr Parish did not sign at that time he would miss out. He said that Mr Parish appeared uncertain still at the end of the presentation and asked for the documents, but signed the relevant papers.

- **Conclusion**

- (i) **Representations Case**

[284] Mr Douglas submitted that the evidence of Mr and Mrs Parish conflicted as to what was said by Mr Horner about ATO approval. Further Mr Parish's professed lack of interest in the tax benefits and his failure to ask for time to consider the documents or show them to his accountant or to check with the ATO should affect his credibility.

[285] The issue is whether a misleading or deceptive representation was made. The focus of the evidence of Mr and Mrs Parish is upon whether the scheme was "legal". Mr Parish's evidence is that Mr Horner appeared to read a passage from the prospectus that stated that there was tax approval. Mr Horner denied that he had said that the ATO had approved the scheme or that payments were lawfully tax deductible. This is another instance where the *modus operandi* of apparently referring to a document (although it appears to be a different document from that described by other witnesses) and stating that there was ATO approval was said to be employed. I accept Mr Parish's evidence in preference to that of Mr Horner in this instance. I find that Mr Horner engaged in misleading or deceptive conduct in that regard.

- (ii) **Recommendations Case**

[286] Mr Parish said that there was nothing said by Mr Horner about commission. He signed a disclosure statement which showed that Mr Horner received brokerage of "up to 6% of the money raised". He said he had signed it without reading it. Mr Horner said he had explained what they were paid. On the basis of my general view of what Mr Horner said during his presentation, I am not satisfied that a contravention of s 849 has been proved.

[287] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate

having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

(b) Banalasta scheme

[288] It was alleged that at paragraph 657 that Mr Horner had orally and expressly made common representations. This was denied by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

[289] According to Mr Parish, he was advised that Mr Horner would be back in the area and arranged for him to see him and his wife. According to Mr Parish, Mr Horner said that the scheme had good products and that "the tax people loved it". He said that he was under the impression that the ATO refund in respect of the Base Metals scheme implied that it had been accepted by the ATO. He said that he did not recall the term "product ruling" being referred to. He said that he put a good deal of trust in Mr Horner. He also said that Mr Horner tried to persuade him not to use his own accountant but to use one in Mackay who understood the schemes.

[290] Mrs Parish said that she was present at the meeting. She said that she kept asking about the tax side of it because she was aware of items in the news that said that the ATO was looking at tea tree projects. Mr Horner assured her that the project did not involve tea trees. She said that she could not remember if Mr Horner said that the scheme was ATO approved or taxation office approved. She said she was still concerned about the taxation position but knew that a refund had been made in respect of the scheme from the previous year. She thought that if it was not legal, the ATO would have done something about it. She said that she kept mentioning the taxation department and that Mr Horner kept assuring her that it was legal. She was unable to say whether Mr Horner had said that the "tax people love it". She said that on this occasion as well her husband was pushed to sign by the implication that he might miss out if he did not sign immediately.

[291] Mr Horner said he gave his usual presentation, but without a flow chart. He gave Mr Parish a copy of the prospectus. He said that Mr Parish asked a number of questions about the Base Metals scheme and the cattle project which he was told would have to be referred to the schemes. He did not tell Mr Parish that the scheme was ATO approved, nor that payments were tax deductible, nor that the tax office loved it. He said that he would have explained that the scheme did not result in tax being avoided because the tax was paid later when the scheme began to generate income.

- **Conclusion**

(i) Representations Case

[292] It was submitted that Mr Parish's lack of interest in reading the documents or getting advice from his accountant before signing them demonstrated that he had formed an opinion that there was no risk in entering into the scheme. Mr Wilson submitted that Mr Parish's evidence was equivocal about what was said and that Mrs Parish did not recall a positive statement that the scheme was ATO approved.

[293] On this occasion the evidence suggests that Mr Parish assumed, from his experience of having received a refund in respect of the former scheme that it had been

accepted by the ATO. Mrs Parish did not recall any positive statement that the scheme had been approved by the ATO. The statement that it was “legal” does not in context necessarily amount to a misleading or deceptive representation. I am not satisfied that anything said on this occasion can be characterized as such a representation.

(ii) Recommendations Case

- [294] Mr Parish gave no evidence whether or not he was told that Mr Horner was entitled to commission. The documentation includes a disclosure statement, showing that Mr Horner received commission at the rate of 5%. There is no basis for finding a contravention of s 849 on the evidence as it stands.
- [295] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client’s investment objectives, financial situation and particular needs. The level of assumption apparent in Mr Parish’s approach to the investment required a presentation which drew attention to the risks with greater emphasis than was given.

Reid

- [296] Mr Reid had been an underground coal miner. However, he had been involved in two industrial accidents and at the time of the hearing was an invalid pensioner. He had left school in Year 10. He qualified as a butcher and had done a TAFE course in plastics but had no further education apart from that. He was in the Base Metals scheme and the Banalasta scheme. Prior to his involvement in the Base Metals scheme he had no experience in investing.

(a) Base Metals scheme

- [297] It was alleged at paragraph 684 that Mr Horner had orally and expressly made the common representations, which was denied as untrue. It was also alleged that Mr Horner had expressly and orally made representations about reduction of taxable income and eligibility for family allowance, which was denied. It was admitted that Mr Horner recommended that Mr Reid enter the scheme.
- [298] Mr Reid said that he had spoken to Mr Horner on two occasions by phone about the scheme, once from the mine where he was working and the other from his home. The first call resulted from his hearing about the scheme from work colleagues and obtaining Mr Horner’s phone number. The information he received, apart from documents which were subsequently sent, was conveyed by telephone since Mr Horner was not going to be in Mackay again prior to the end of the financial year.
- [299] According to Mr Reid, Mr Horner told him in the first conversation that the scheme was ATO approved. A few days later the documents arrived which he signed without reading because he believed that there was some urgency to do so. These documents were sent to Mr Horner. He said that he was not told to seek independent advice and took Mr Horner’s word that the scheme was ATO approved.

- [300] Mr Horner said that Mr Reid had rung him from work. He said that Mr Reid told him that he wanted to get involved in the scheme in which his work colleagues were involved. Mr Horner said that he had left town and would not be able to see him. Mr Reid asked him nevertheless to send him the documents he needed to fill in. According to Mr Horner there was no presentation in the ordinary way because the contact was by telephone. He said that Mr Reid did not want to know about the scheme. He just wanted to get into it to get tax relief. He denied that he told Mr Reid that the scheme was ATO approved. He said that he suggested to Mr Reid that he could get advice from Karen Evans who was fairly familiar with the project. He said that Mr Reid said to him "No, the boys at work are doing it; I want in". Mr Reid then told him to send the papers and said that when he got them he would ring Mr Horner who could tell him where to sign.
- [301] In cross-examination, Mr Horner accepted Mr Hack's formulation that by the end of the conversation Mr Reid was begging him to send the documents to him to sign. He maintained that nevertheless during the conversation he suggested to Mr Reid that he should get independent advice and suggested Karen Evans because he believed she had some knowledge of the project and its structure. He agreed in cross-examination that he had witnessed Mr Reid's signature even though he was not in Mr Reid's presence when he signed it.

- **Conclusion**

- (i) **Representations Case**

- [302] Mr Douglas submitted that Mr Reid's evidence that he had heard about the schemes from colleagues, discussed them with them and became aware of their satisfaction, along with his failure to read the documents or make inquiries indicated that he had decided to enter into the scheme irrespective of what he was told by Mr Horner.
- [303] The circumstances of the initial phone call from Mr Reid to Mr Horner are such that any conversation would necessarily have been brief and certainly not a comprehensive presentation. I am satisfied that the scheme was prompted by Mr Reid's desire to become involved in the scheme. I am not satisfied, having seen the respective witnesses, that an explicit representation in terms stated by Mr Reid was made in either telephone conversation. From my observation of the plaintiff I do not place any significance in his favour in resolving that question on the fact that, notwithstanding that he had the documents, he did not read them or get advice. I am not prepared to infer that that course of conduct is an indication that he was told that the documents had been ATO approved. I am not satisfied that any deceptive or misleading statement was made on this occasion. With regard to eligibility for Social Security benefits, there is no evidence of reliance in view of Mr Reid's reaction that it would be unlawful and immoral.

- (ii) **Recommendations Case**

- [304] Mr Reid denied that he was told by Mr Horner that he was to receive a commission. His reaction to one question implied that he did not know what a commission was. He thought Mr Horner was a paid employee. This was the occasion when a relatively short telephone call to Mr Horner resulted in the documents being sent to him for completion. Among them was a disclosure statement, which he signed, stating that Mr Horner was to receive up to 6% of the money received. He said he

was not sure if he had read it before signing it. I am not satisfied, in the circumstances, that a contravention of s 849 is established.

- [305] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

(b) Banalasta scheme

- [306] It was alleged at paragraph 718 that Mr Horner had expressly and orally made the common representations. This was denied on the basis that it was untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

- [307] At the time of the meeting about this scheme Mr Reid was facing the prospect of going off workers' compensation and on to the invalid pension. Mr Horner came to his home where they discussed the project. Mr Horner had a sample of the kind of product produced. According to Mr Reid he was told that the tax deductions would not be as large as in the case of the Base Metals scheme but the profits would come more quickly.

- [308] Mr Reid said he was excited about the product and the investment potential of the scheme. The investment potential was important to him because of the prospect of being on the invalid pension (although he had civil actions pending). He pointed out however that the taxation position was also important because, without the tax deductions, he could not afford to invest in the scheme. He said it was important to him that the scheme was legal so far as the ATO was concerned. He said he asked Mr Horner on more than one occasion whether it was approved and was told that it was. There was no suggestion to him to seek independent advice. He said that he signed the documents without reading them because he had faith in Mr Horner as his investment adviser.

- [309] Mr Horner said that on this occasion he did a standard presentation. He also explained the Base Metals scheme because he had not had the opportunity to meet Mr Reid in person previously. He went through a flow chart with him. He said that he did not say the scheme was ATO approved, nor that payments were legally tax deductible. He told Mr Reid again that he should seek independent advice.

- **Conclusion**

(i) Representations Case

- [310] Mr Douglas submitted that Mr Reid's evidence was faulty as to when he signed the documents. It was submitted that the evidence established that he entered the scheme because he had received a deduction for the second scheme. Mr Wilson submitted that Mr Reid had at first given no evidence of a direct representation as to the deductibility of the investments. It was submitted that his evidence then shifted to a more positive statement that the ATO had recommended investment. He submitted that the evidence established that Mr Reid's concern was that it was not "illegal".

- [311] On this occasion I am satisfied that Mr Reid's position was such that it was very important for him to ensure that he would get the tax benefits from the scheme. There was a full scale presentation. I am satisfied that it was unlikely that he would not have asked whether the scheme had the approval of the Taxation Office. I am satisfied on the balance of probabilities on this occasion that he was told that the scheme was ATO approved. I prefer his evidence to Mr Horner's on this. I find that Mr Horner engaged in misleading or deceptive conduct in this regard.

(ii) Recommendations Case

- [312] Mr Reid denied that Mr Horner told him he would receive commission. A disclosure statement showing that Mr Horner was entitled to commission at the rate of 5% was signed by him. Mr Horner said that he told Mr Reid that he was paid a commission on the number of investments (units or participations) they achieved. He said Mr Reid was happy with that. In accordance with my general view of what Mr Horner said in his presentation and the specific evidence of the conversation in this instance, I am not satisfied that a contravention of s 849 has been proved.
- [313] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. When this presentation was made to Mr Reid, his financial circumstances as known to Mr Horner required proper advice as to the risks, especially in the following year. No such caution was exercised.

Roach

- [314] Mr Roach was a coal miner, 55 at the time of trial. He left school at 16 and had no subsequent formal education. He was in the Base Metals and Banalasta schemes.

(a) Base Metals scheme

- [315] It was alleged at paragraph 747 that Mr Horner had expressly and orally made the common representations and a representation that Mr Roach should invest in the scheme both of which were denied as untrue.
- [316] Mr Roach said that he knew that a number of work colleagues were in schemes before the Base Metals scheme. David Sheppard with whom he worked had told Mr Roach that he was in the Base Metals scheme. After that Mr Horner contacted Mr Roach to ask if he could talk to him about it. Mr Horner came around soon afterwards to Mr Roach's home. He explained the scheme and, after finishing, Mr Roach said he asked "Is that ok by the taxation department", Mr Horner replied "Yes it is definitely all right by the taxation department".
- [317] Mr Roach intended to retire at 55 and said that he did not want to get involved in any trouble with the ATO. He asked Mr Horner how the scheme could be sanctioned if he was not paying any money except that which came to him from the ATO. Mr Horner told him that the ATO was not worried because they recouped their money from the taxation on returns he would receive later from the investment. Mr Horner referred to the fact that others were getting returns. Mr Roach said that as long as Mr Horner could guarantee that it was all right by the ATO, he did not see a problem and signed the documents.

- [318] The fact that others were receiving refunds in respect of other schemes was an influence on him, as well as Mr Horner's assurances. He said that he saw a document that said that the investment was ATO approved. He said that he had not been advised to get independent advice. He denied that he went into the scheme because of other colleagues' experiences.
- [319] Mr Horner said that Mr Sheppard contacted him and asked him to phone Mr Roach. Mr Horner said that Mr Roach told him that he had talked to Mr Sheppard and a few other colleagues who had entered schemes of this kind over the last couple of years. He referred in the conversation with Mr Horner to Mr Sheppard's tax audit and said that he wanted to look at how he could get involved in it as well. According to Mr Horner, when he arrived at Mr Roach's home, Mr Roach and his wife were there. He put a prospectus on the table and gave his standard presentation. He said that he told Mr Roach at the start to get independent advice. He did not say that the ATO had approved the scheme, nor that payments were tax deductible. There was no pressure placed on him to sign the documents. In cross-examination he was questioned about a discrepancy in two copies of documents signed by Mr Roach. A paragraph relating to alternatives concerning advice was crossed out in a document from the fourth and eighth defendants' possession but not in one from Banalasta's records. Mr Horner agreed that it could not have been crossed out by Mr Roach.

- **Conclusion**

- (i) Representations Case**

- [320] Mr Douglas submitted that Mr Roach's evidence safeguarded his own position. He was aware of people who had had negative experiences with other schemes. He had heard of the nature of this scheme from a work colleague. He had not previously met Mr Horner but having spoken to him had not read the documents, seen an accountant, and assumed from his knowledge of others receiving refunds that the scheme was suitable. It was submitted that he had not relied on anything said by Mr Horner.
- [321] The context of the discussion between Mr Roach and Mr Horner was whether the scheme was "OK" or "alright" by the ATO. The question is whether there was a representation that the scheme was approved by the ATO. The discussion happened in the context of an explanation of how the scheme was funded essentially by money received from the ATO as a taxation refund. An explanation was given about the ATO's attitude to schemes of this kind. Mr Roach accepted this. I am not satisfied that a specific question was asked. I am also satisfied that his knowledge of the experience of others who had benefited from similar schemes in entering into the scheme supports that conclusion. I am not persuaded that there was misleading or deceptive conduct on this occasion on the part of Mr Horner.

- (ii) Recommendations Case**

- [322] Mr Roach said that Mr Horner had not mentioned commission. He signed a disclosure statement showing that Mr Horner was entitled to brokerage of up to 6% of the money raised. In accordance with my general view of what Mr Horner said in his presentation, I am not satisfied that a contravention of s 849 has been proved.

- [323] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

(b) Banalasta scheme

- [324] It was alleged at paragraph 777 that Mr Horner had expressly and orally made the common representations, which was denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

- [325] On this occasion Mr Horner contacted him about the scheme. Shortly after, he arrived at Mr Roach's home and asked him if he had got his taxation cheque the previous year. When Mr Roach said that he had, Mr Horner said "You see, I told you it was all right, didn't I?". Mr Horner then said that he had another scheme. According to Mr Roach the following conversation then occurred:

"... he said, "I've got another one here now.' He said, 'It's taken us a while to find this one because we had to find one that was acceptable to the Taxation Department and it's taken a fair bit to find one that would suit, and there are going to be changes in the taxation laws down the track, so this one will be for two years.' And I asked him at that stage, 'Is this one all right by the Taxation Department as well, are you sure? Are you positive?' He said, 'Yes. I just explained to you that we've done a lot of work and found one that is approved by the Taxation Department', or he said 'ATO', that's just been the Taxation Department to me for years. I said, 'Righto'."

- [326] Mr Roach said he then inquired about how the Base Metals scheme was progressing. Mr Horner said, in answer to his inquiry, that there would not be a dividend that year but there would be one the following year. Mr Roach said that he had asked a number of times whether the Banalasta scheme was approved by the taxation department because he had known that a number of people had suffered financially over a scheme at a colliery at which he had previously worked. He said that he was not interested in getting involved in that situation so close to retirement.

- [327] Mr Horner said he gave a standard presentation which included advice to seek independent advice. His practice was to read this from the prospectus. He said he did not say that the scheme was ATO approved or that payments were lawfully tax deductible.

• **Conclusion**

(i) Representations Case

- [328] It was submitted by Mr Douglas that Mr Roach had entered into this scheme because his colleagues had got refunds from the Base Metals scheme. He did not rely on anything said by Mr Horner. He made no attempt to read or discuss the documents relating to the scheme before signing. Mr Wilson submitted that under cross-examination Mr Roach had said that he had been shown a reference to an ATO approval. This was the first reference to this event since it was not pleaded. It was submitted that notwithstanding the reference to the document Mr Roach had not suggested that Mr Horner had told him anything about the document.

- [329] By this time Mr Roach had obtained a taxation refund in respect of the Base Metals scheme. Mr Roach said that on this occasion, as part of the explanation of the scheme Mr Horner volunteered that it had been difficult to find a scheme approved by the ATO. This was denied by Mr Horner. Mr Roach said that he asked a number of times if the scheme was approved by the ATO because he was aware of people at a colliery at which he had previously worked who had suffered financial loss over another scheme. At the time he had the incentive of approaching retirement not to become involved in a scheme which was likely to cause trouble. On balance I accept Mr Roach's evidence about events leading up to his entering into the scheme. I find that misleading or deceptive conduct was engaged in by Mr Horner in this regard.

(ii) Recommendations Case

- [330] Mr Roach said that Mr Horner did not tell him he would receive commission. He signed a disclosure statement which refers to Mr Horner being entitled to 5% commission. In accordance with my general view of what Mr Horner said in his presentation, I am not satisfied a contravention of s 849 has been proved.
- [331] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Scott

- [332] Mr Scott was a boilermaker by trade, 37 at the time of trial. He had left school in Year 10 and had no further education apart from obtaining his trade qualifications. He was unemployed at the time of relevant events, since he had taken a redundancy package in January 1998 from Blair Athol Coal. He was involved only in the Base Metals scheme.

(a) Base Metals scheme

- [333] It was alleged at paragraph 805 that Mr Nunis expressly and orally made the common representations, which was denied as untrue. It was alleged at paragraph 810 that Mr Horner at a second meeting had expressly and orally made the common representations which was also denied on that basis.
- [334] Mr Scott went to the home of a friend Mr McCormick to attend a presentation on the scheme by Mr Nunis. Karen Evans, who was his friend's accountant, was present. When Mr Scott arrived with his wife, Mr McCormick and Karen Evans were looking at a prospectus for the scheme. He believed they had got it from Mr Francis who by that time had severed his connections with SecureInvest. Mr Nunis and Mr Horner were delayed at another meeting and came an hour or more late.
- [335] Mr Nunis explained the scheme, including an explanation that the tax refund was used to buy units in the scheme. Mr Scott said he asked about the legality of the scheme. He said he was concerned about being personally liable and possibly losing the house he had recently bought. He said that he was told that the scheme was tax approved and Government approved. His recollection was that he signed the documents that evening. The documents tendered in evidence were actually

dated 21 May 1998, some months after the initial meeting. However, the document states that it was prepared by Mr Nunis, who was not there at a second meeting attended by Mr Scott.

- [336] The second meeting was held at another friend's home. Mr Horner gave the presentation and gave a similar explanation about how it was funded and said that it was legal, ATO approved and Government approved. Mr Scott denied that on either occasion he had been told that the scheme was ASIC approved. The reason why he had gone to the second meeting was that the person at whose home it was held had also received a redundancy payment. After the first meeting Mr Scott spoke to Karen Evans about the size of his refunds with and without the scheme. He was initially told that he would receive a larger sum than he subsequently learnt and he said he was less keen to go into the scheme because of that.
- [337] Mrs Scott could not recall the full explanation given by Mr Nunis. She said that during the course of the meeting her husband was asking whether the scheme was safe, legal and approved by the government. Mr Nunis said "Yes". Her husband asked questions designed to establish whether if anything happened to the company they could be personally liable. He was told that they could not. The idea was mooted of having Karen Evans, who was present but whom Mr and Mrs Scott had not met before work out what their tax position was having regard to the voluntary redundancy payment. However, after Mr Nunis said the scheme was selling fast, Mr Scott signed it on the basis that he would send a cheque if he wanted to participate. On a later date Karen Evans worked out that they would get more without being in the scheme and they decided not to proceed with it. However still later Karen Evans revised her estimate and found that they would get more back if they joined the scheme. Mr and Mrs Scott then went to another meeting where Mr Horner made a presentation. Mr Horner said in answer to a question by another person present that the scheme was encouraged by the government. They then made a joint decision to participate.
- [338] Mr Nunis gave evidence that Mr McCormick at whose home the meeting was held told him that another man and his wife would be present at the presentation. In addition to Mr Scott and his wife, Karen Evans and Mr Horner were there as well as Mr and Mrs McCormick. Karen Evans said she was there to have a look at the Base Metals project and to assist her clients in relation to the presentation which she wanted to see. Mr Nunis said he gave a full presentation to Mr and Mrs Scott and produced a prospectus to which he referred in his presentation. Mr Horner was giving a presentation to Mr McCormick nearby. Mr Nunis did not say to Mr Scott that the scheme was approved by the ATO or that it was lawfully tax deductible. The only reference he made in this regard was to draw attention to the taxation opinion in the prospectus and say that according to the opinion they were all deductions that could be claimed.
- [339] After the presentation was completed Mr Scott indicated that he wanted to see how his redundancy would affect the situation. Mr Scott told him to ask Karen Evans about his taxable income. Mr Scott looked towards her and she gave an estimated figure. When Mr Nunis started to work out the figures based on that estimate, Karen Evans then said that the taxable income could be different because of the redundancy. Karen Evans gave further information about the redundancy payment but they were unable to reach an agreed figure. Mr Nunis said that the information was insufficient to work out Mr Scott's taxable income. He used the tax

management worksheet with the original figure in it to explain the scheme to Mr Scott. Determination of the final figure for taxable income was left on the basis that Karen Evans would contact Mr Nunis with regard to it. She phoned Mr Nunis on or about 21 May 1998 with a figure which he substituted for the figure originally written into the worksheet. In cross-examination Mr Nunis said he assumed Mr and Mrs Scott were clients of Karen Evans. He said that the tax management worksheet was not with Mr Horner in Mackay at the time he had the second meeting with Mr Scott. Mr Nunis said he did not have any experience of a case involving a redundancy.

[340] There was a second occasion when Mr Scott was present at a presentation. Mr Horner said it was principally a presentation to Mr Campbell, but he accepted that Mr Scott was in a position where he could hear. The evidence is quite superficial as to what occurred at the meeting.

- **Conclusion**

- (i) **Representations Case**

[341] It was submitted that while Mr Scott signed at the first meeting his participation in the scheme was provisional upon paying the cheque on being satisfied with the scheme. He did not initially decide to proceed because Karen Evans believed he could get a larger net tax refund without the scheme. When she revised this view he decided to enter the scheme. It was submitted that there was no causal connection between anything said by Mr Horner and his entry into the scheme.

[342] In conformity with my general impression of Mr Nunis' credibility I accept Mr Scott's evidence that he was told that the scheme was ATO approved during the presentation by him. There is no evidence sufficient to support a finding that he did not rely on the representation. The evidence concerning the presence of Karen Evans at the meeting is insufficient to found a conclusion that he relied on her advice to the exclusion of the effect of representations made by Mr Nunis. I find that misleading or deceptive conduct was engaged in by Mr Nunis in the above respect. I am not, in the circumstances described above, prepared to conclude that any misleading or deceptive conduct was engaged in by Mr Horner.

- (ii) **Recommendations Case**

[343] Mr Scott denied that either Mr Nunis or Mr Horner mentioned that they were to receive commission. He signed a disclosure statement showing that Mr Horner would receive up to 6% of the money raised. Mr Nunis said that he went through the disclosure form to explain payment of commission. In cross-examination he said that when he explained that he was going to receive a payment, he may have used the terms "brokerage" and "commission" interchangeably. He said that whichever way it was described, the client knew that he was being paid. He said he invariably recited the words of the acknowledgement on the form, but then modified it to "in most cases". He said he "possibly" recited the words to Mr Scott. I have come to the conclusion, on balance, that Mr Nunis probably referred to an entitlement to commission or brokerage during the course of his presentation. Accordingly, a contravention of s 849 has not been proved.

[344] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate

having regard to the information that, when making the recommendation, the salesmen had about the client's investment objectives, financial situation and particular needs.

Sich

[345] Mr Sich was a leading hand underground electrical fitter mechanic, 31 at the time of the hearing. He had left school at Year 12. After that he did his trade course and later part of an associate diploma of electrical engineering. He had no investing experience before he became involved in the Banalasta scheme, which was the only one with which he was concerned.

(a) Banalasta scheme

[346] It was alleged at paragraph 841 that Mr Horner made the common representations, which was denied on the basis that he did not make them. It was also alleged that Mr Horner made representations concerning the utility of having an accountant consider the scheme and as to a hardship clause. These were denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

[347] Mr Sich said that he heard about tax minimisation schemes from co-workers. He got Mr Horner's phone number from one of them who was in the scheme and arranged a meeting with Mr Horner because he was interested in the scheme and wanted to know more about it. Unlike many of the plaintiffs, Mr Sich was able to give a detailed account of what was said to him by Mr Horner at the meeting. Amongst the particularly relevant matters Mr Sich said that he was looking for a legal way to reduce his tax and Mr Horner replied, "That's what I'm going to sell you today". During the course of the presentation Mr Horner went through aspects of the prospectus and explained the way in which the scheme worked. Mr Sich said that he asked about the situation if he were retrenched from his job. According to Mr Sich, Mr Horner told him that there was a hardship clause under which the number of units for which Mr Sich would be required to pay was reduced. He asked whether it was in the prospectus. According to Mr Sich, Mr Horner said to him that it was not in the prospectus but in a separate document, of which he did not have a copy, because the taxation department would not be happy with such a clause.

[348] Mr Sich also said he raised the question of talking to another financial adviser but was talked out of it by Mr Horner on the basis that the accountants he had employed in the past would not know as much about the schemes as particular accountants nominated by Mr Horner. When Mr Sich persisted, Mr Horner told him that by the time he was back in Mackay, he may not have any of the units left. He said that on more than one occasion Mr Horner told him that the scheme was ATO approved. Mr Sich says that he said "...if I sign this sheet by today, ... and I wasn't real happy with what was going on afterwards ... could I still get out of it?" and that Mr Horner said that he could. As Mr Sich put it "I wanted to be in it but I wanted to make sure that there was lots of other people in it as well" He made inquiries when he was next working and the consensus of opinion was that Mr Horner appeared a genuine person. Mr Sich persuaded himself that there was safety in numbers and made the decision to pay the cheque.

[349] In cross-examination he said that he did not know what a product ruling was and only became aware of the term when he received a letter from Plantation Equity, after he had done his tax for that financial year, saying that there was no product ruling and that the directors did not deem it necessary to have one. It was then that he made inquiries about what a product ruling was and was told by one of his workmates that it was a new requirement of the ATO. He was also asked about a letter that he wrote, apparently in late October 1999, to Banalasta in which he asked if he could have his contract cancelled because of concerns that the ATO was going to disallow deductions in respect of expenditure under the scheme. The thrust of the cross-examination was that the letter did not mention that he had been told that the scheme was ATO approved. He said that he had adopted the approach in the letter because he was asking to be released from what he believed was a binding contract and did not want to sound threatening or angry. He wanted to “ask in the nicest possible way to be released”.

[350] Mr Horner said that Mr Sich, with whom he had no previous dealings, contacted him and said that he had heard talk at work of the scheme and wanted to look into it. He gave a standard presentation at Mr Sich’s home. Mr Sich’s wife was there “flitting around in the kitchen”. He did not tell Mr Sich that the scheme was ATO approved, nor that payments were tax deductible. He did not say that he could legally claim his investment out of tax. He said that Mr Sich had told him at the outset that he was not going to jump into the scheme because he wanted to have it looked at. Mr Horner also said that during the course of the meeting Mr Sich said he was going to take it to his accountant. He said that he advised Mr Sich to get independent advice. Although the evidence is not entirely clear, it appeared that Mr Horner was alleging there was a second meeting at which Mr Sich said that he had had the scheme checked out and was happy to go through with it. There was also reference to a phone call, about a week after the first meeting, in which he said that he wanted to go through with the investment. He also said that Mr Sich had asked what happened if he decided he didn’t want to follow it through. Mr Horner said that he would have to let him know before the end of the financial year because once the loan had been funded the obligation was in place.

- **Conclusion**

- (i) **Representations Case**

[351] Mr Douglas submitted that Mr Sich’s evidence suffered from contradictions. Notwithstanding that he portrayed himself as prudent, suspicious about the scheme and expressing his doubts to Mr Horner he nevertheless signed the documents at the meeting. It was submitted that his decision was prompted not by anything that Mr Horner said but by the expectation of a tax benefit and the fact that he felt safe in entering into the scheme because work colleagues were in it. Mr Wilson submitted that Mr Sich’s evidence as to the terms of the representation were unlikely. He pointed out that he had not been shown a document purporting to be an approval by the ATO. He also submitted that Mr Sich had not been asked what he would have done if he had not been told that the scheme was ATO approved. What he was asked was what he would have done if he had been told that it was not ATO approved.

[352] Mr Sich was a witness who did not tend to overstate his case. I am satisfied that he was fairly cautious and wary in his approach to the scheme but succumbed to the

salesmanship evident in his account. However, even allowing for his explanation of the purpose of the letter, it is difficult to reconcile it with what he wrote. There is no mention of either the assurance that the scheme was ATO approved or the fact that a hardship clause was said to be available. The letter effectively concedes that he knew there was no product ruling and a belief that the contract was binding. In the circumstances, I am not satisfied that misleading or deceptive conduct was engaged in by Mr Horner in the respects alleged.

(ii) Recommendations Case

- [353] Mr Sich said that Mr Horner had told him that he got commission. He particularly remembered because he had, when the documents were being signed, explained that he made \$200 per unit per sale, implying it was important that Mr Sich sign that particular document. The disclosure statement refers to commission at the rate of 5%. The onus of establishing a contravention of s 849 is not established.
- [354] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Cameron

- [355] Mr Cameron was a coal miner, aged 39 years of age and on extended sick leave at the time of the trial. He left school at 16 and had no further formal education. He had no previous experience in investing before his involvement with the Base Metals scheme. He was involved in that and the Banalasta scheme.

(a) Base Metals scheme

- [356] It was alleged at paragraph 870 that Mr Horner had expressly and orally made the common representations, denied as untrue. Allegations concerning representations that investment in the scheme was a good commercial venture and recommending investment were admitted. An allegation concerning representations which minimized the risk were denied as untrue.
- [357] According to Mr Cameron he could not recall whether he contacted Mr Horner or Mr Horner had contacted him. In cross-examination Mr Cameron recalled that he had been at the home of Mr Wattie, a friend of his, when Mr Nunis and Mr Horner had spoken to Mr Wattie about the scheme. However, he did not take part in that discussion. He agreed that he told Mr Horner that he had spoken to Mr Francis, who by this time was not employed by SecureInvest, about a tea tree project and was comparing the two. He had asked Karen Evans for an opinion as to the relevant merits of the schemes before he saw Mr Horner. She had said that Mr Horner's scheme was better. He said there were two meetings with Karen Evans one before and one after the meeting with Mr Horner.
- [358] Mr Cameron said that Mr Horner explained how the scheme worked, using the prospectus in some respects. According to Mr Cameron he asked about approvals and was told it was tax approved. Mr Horner told him to ring the ASIC to check the registrations. Mr Cameron said that he did so and was told that the companies were registered but not much else. He said that he had checked with accountants who

had said that the schemes were viewed as a “good viable thing” by the government. However, the overall effect of the evidence seems to be that most of those inquiries were after he had entered into the arrangement with Mr Horner.

[359] Mr Cameron said that he asked several times “Are these things up front? Are they ok?”. He said that Mr Horner said “yes, they are tax approved”. He said that Mr Horner said that there were no troubles with them. He also said that Mr Horner had told him to talk to an accountant and nominated several of whom Karen Evans was one.

[360] According to Mr Horner he first met Mr Cameron at a presentation by Mr Nunis and himself to a man whose name he believed was David Watson. When he had his meeting with Mr Cameron, Mr Cameron said that he had already had the scheme checked out by Karen Evans and that he wanted to sign up. He was not given a full presentation because of what Mr Cameron said. According to Mr Horner, Mr Cameron said that he had been talking to Mr Francis and also trying to persuade his friend not to invest with Mr Francis but to go with Mr Horner. According to Mr Horner, Mr Cameron said that he had been considering a tea tree project but after discussing it with Karen Evans she told him that the Base Metals scheme was a more viable option. Mr Horner said that he did not say that the loan was no risk. He remembered discussions about the shares being redeemable.

- **Conclusion**

- (i) **Representations Case**

[361] Mr Douglas submitted that it should not be accepted that Mr Cameron relied on representations from Mr Horner in light of his previous advice from Karen Evans concerning the scheme. He had been advised by Mr Horner to make inquiries about the scheme, which he did. It was submitted that he had entered into the scheme on the basis of relying on advice from his accountant.

[362] By the time Mr Cameron spoke to Mr Horner he had advice from Karen Evans that this scheme was better than one being sold by Mr Francis. The background to his entering into the scheme is therefore somewhat different from that in the cases of other plaintiffs. With respect to the evidence as a whole concerning what he was told, I have reservations about the accuracy of his recollection that he was told specifically by Mr Horner that the scheme was ATO approved. I am not satisfied that the balance favours his version of events over that of Mr Horner in this case. I am not satisfied positively that he was told by Mr Horner that the scheme was ATO approved or tax approved.

- (ii) **Recommendations Case**

[363] Mr Cameron said that he was not sure if the word “commission” was used, but he knew –he thought because Mr Horner had told him – that he paid Mr Horner an amount for his work. Mr Cameron signed a disclosure statement advising that Mr Horner would receive brokerage of up to 6% of money raised. The onus of establishing a contravention of s 849 has not been discharged.

[364] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the

salesman had about the client's investment objectives, financial situation and particular needs.

(b) Banalasta scheme

[365] It was alleged at paragraph 903 that Mr Horner had orally and expressly made the common representations, denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants. It was alleged he also presented a letter purporting to be from the ATO in support of the common representations. This was denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants.

[366] Mr Cameron did not recall if he had called Mr Horner or Mr Horner had called him. According to Mr Cameron he initially asked Mr Horner about an olive scheme that he had seen on television. Mr Horner suggested that Banalasta was better and told him that it was the last scheme that did not need a product ruling. Mr Horner said that the ATO had been to the plantation and were happy with it although they were placing more scrutiny on schemes of this kind to make sure that they were not being set up and then closed down. Mr Cameron said that he did not get all the papers on the night of the presentation. He agreed that it was possible that he had said that he wanted to get advice. He said that Mr Horner had definitely said that the scheme was ATO approved. He confirmed that he had spoken to an uncle of his wife's who was an accountant but subsequently to the meeting with Mr Horner.

[367] Mr Horner on this occasion said that he gave a standard presentation without a flow chart. He did not say that the project had ATO approval or that payments were lawfully tax deductible. He said that there was no letter from the ATO saying that it was ATO approved. He said that he gave Mr Cameron a copy of the Ernst & Young report, that he told him that the scheme was speculative and that he should get independent advice. He said that the completed forms were subsequently posted to the office by Mr Cameron.

- **Conclusion**

(i) Representations Case

[368] Mr Douglas submitted that it should not be accepted that there was reliance on Mr Horner. There was evidence that Mr Cameron had been told the scheme was speculative. He did not enter into it at the meeting because he was unsure about it. He then consulted his wife's uncle who was an accountant. Mr Wilson submitted that Mr Cameron never clearly said that the representation had been made that the ATO had approved the scheme.

[369] On this occasion I am satisfied that a fuller presentation was made by Mr Horner than in relation to the Base Metals scheme. However the issue of whether representations were made that ATO approval had been given is problematical, as is the question whether Mr Cameron relied on what he was told, since he conceded that he may have told Mr Horner that he wanted to get advice, took the papers away and later sent them to Mr Horner by post and did get advice from his father-in-law, who was an accountant, after he had spoken to Mr Horner. Bearing in mind the onus on the plaintiff, I am not satisfied on balance that he was specifically told that the scheme was ATO approved or that he relied on what was said to him in entering into the scheme.

(ii) Recommendations Case

- [370] Mr Cameron did not give any evidence concerning information about commission in this instance. Mr Cameron's evidence was that not all the documentation was signed at the meeting. In any event, he signed a disclosure statement showing that Mr Horner was to receive 5% commission. The onus of establishing a contravention of s 849 has not been discharged.
- [371] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. The evidence concerning Mr Cameron being told that the investment was speculative is subject to the same comments made concerning Mr Borg in relation to this scheme. The possibility that he spoke to his wife's uncle informally about it does not, in the particular circumstances, displace the obligation to give a reasonably based recommendation (by reference to appropriateness).

Purdie

- [372] Mr Purdie was a senior employee development coordinator with Capricorn Coal, 33 at the time of trial. He had left school at 17, then did a business degree majoring in Human Resource Management at UCQ. He also did a graduate diploma in Industrial Relations and began a Law Degree externally but deferred completion of it after 2 years. Prior to investing in the Banalasta scheme his investment experience was limited to investment properties, managed funds and the like. He was only in the Banalasta scheme and had never been in such a scheme before.

(a) Banalasta scheme

- [373] It was alleged in paragraph 932 that Mr Horner expressly and orally made the common representations, which was denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants. It was alleged in paragraph 933 that he had advised Mr Purdie that he would be entitled to obtain Social Security benefits.
- [374] Mr Purdie said that a colleague had told him about schemes for reducing his taxable income. He obtained Mr Horner's telephone number and arranged to meet him. He said that he had particularly intended to ask Mr Horner about product rulings since he had read an article in a financial magazine about them.
- [375] He said that he had been shown a list of projects available for that year and was told by Mr Horner that the ATO had been active in recent years towards more questionable scheme structures. SecureInvest had reviewed the projects available and selected the Banalasta scheme because they were of the view that it was compliant with the current tax legislation. Mr Purdie says that after an explanation of the potential of the scheme and the way in which the financial aspects of it operated, he asked Mr Horner whether the project had a product ruling. Mr Horner said that it did not but that the scheme had been operating prior to the advent of the requirement for product rulings. He said that, despite that, it was compliant with tax legislation and that the deductions which had been explained were legitimate tax deductions for him. Mr Purdie says that he was sceptical about being able to claim the deduction, but Mr Horner assured him that the scheme was compliant and that

previous schemes based on the same structure had never been a problem with the ATO.

- [376] Mr Purdie said that he was not going to sign on the spot because he would like to have a look at the documentation. Mr Horner urged him not to delay for too long. Mr Horner asked who his accountant was and tried to persuade him to go to a firm in Mackay, which he nominated, that would be briefed by him about the scheme. After a period of several days during which Mr Purdie says that he read the prospectus to the best of his ability, he signed the documentation for the scheme. In the intervening period he did not seek accounting advice nor advice from the tax office. He conceded that he had probably read a statement in the prospectus that the scheme was a speculative one and that advice should be taken. However, he summarised his position by saying that at the end of the day he went ahead with the investment because there was nothing in the prospectus that said “do not invest in this project” and because he had been convinced by Mr Horner’s presentation that the tax laws had been exploited in a legal manner to make the scheme legitimate.
- [377] Mr Purdie said that he had faith in the fact that Mr Horner purported to be a financial planner and that he was with a professional investment advisory company. He also believed the statement that the product had been created and was running prior to the ATO requirements for a product ruling. He said that the other thing that probably assisted with his decision was the fact that the scheme had been operating and had not come under scrutiny or been challenged and that people had been participating in previous years. Mr Purdie agreed that Mr Horner never used the words “ATO approved” or “tax office approved”. He said however that he had been told by Mr Horner that investment in the scheme would enable him to claim a legitimate tax deduction when he put his tax return in for the year, which proved to be incorrect. He was not shown any document which purported to be a product ruling or approval from the ATO.
- [378] Mr Horner said that Mr Purdie rang him to make an appointment. He said that he was aware that work colleagues had been involved in schemes and he wanted to find out what was involved in getting into them. He was given a standard presentation and a prospectus. Mr Horner said that he did not say that the scheme was ATO approved nor that payments were lawfully tax deductible. He said that he advised Mr Purdie that the scheme was speculative and that he should get independent advice. Mr Purdie replied that he was going to get it checked out by his accountant. Mr Horner said that he cautioned Mr Purdie to take it to someone who was qualified to comment on that kind of scheme, perhaps a financial adviser. Mr Purdie took the documents with him and later phoned him to say that he wanted to get involved. He asked what he had to do. Mr Horner called in on him when he was next in Moranbah and got the completed forms. Mr Purdie asked no questions on that occasion and said that he had had it checked out. Mr Horner did not recollect if he said by whom.
- [379] In cross-examination he said that the issue of compliance with tax legislation had been discussed. He said that he told Mr Purdie that the scheme did not have a product ruling and one would not be applied for because it had been lodged under the old system. He explained that new projects had to have a product ruling before issuing a prospectus. He said that he did not receive the signed documents at the first meeting and that there were about 1½ weeks between the meeting and receipt of the documents.

- **Conclusion**

- (i) **Representations Case**

[380] It was submitted that Mr Purdie was experienced in investing and reading about investments. He consciously chose not to seek advice before entering into the scheme. It was submitted that he had not alleged that he had been told that the scheme was ATO approved. He was told there was no product ruling. He took the documents away after the first meeting to read them. He was aware of warnings about the speculative nature of the scheme. It was submitted that it was only after consideration that he decided to enter into the scheme. The fact that he found Mr Horner convincing was not probative of his having been misled by anything said by him. Mr Wilson essentially relied on the same matters. However he submitted that Mr Purdie was a significant witness for wider purposes since his evidence appeared reliable and tended to confirm Mr Horner's evidence as to the content and format of the standard presentation.

[381] Mr Purdie's evidence impressed me as straight forward. He conceded that what was said to him was to the effect that the scheme pre-dated the need for a product ruling and was compliant with tax legislation. He said that he was never told that it was ATO approved or Tax Office approved. He was told that he could claim legitimate deductions in respect of payments to the scheme. Mr Purdie exercised his own judgment after reading the prospectus as to whether to invest. I am not satisfied that his decision to invest was induced by a misleading or deceptive statement by Mr Horner. I am satisfied that eligibility for Social Security benefits was discussed, but it is clear from the evidence that Mr Purdie reacted negatively to the suggestion and did not rely on it in entering into the scheme.

- (ii) **Recommendations Case**

[382] Mr Purdie gave evidence that when he signed the disclosure statement, he was aware of the commission to be paid to Mr Horner. The onus of establishing a contravention of s 849 has not been discharged.

[383] Mr Purdie had a degree of financial sophistication beyond that of any of the other plaintiffs. He appreciated that the scheme was speculative, and had taken the opportunity to give his own detailed consideration to entering into the scheme. He was aware of the framework within which such schemes operated. Within those confines, and, in particular, his focus in his discussion with Mr Horner on tax effectiveness, I am not persuaded that s 851 was contravened on the facts proved. A conclusion that the recommendation was appropriate was open in the circumstances.

Rapson

[384] Mr Rapson was a metallurgist, 39 at trial, who had done a Diploma in Extractive Metallurgy at the equivalent of TAFE level in South Africa. He had two investment properties negatively geared in Western Australia, where he had previously worked. He was in the Banalasta scheme only.

- (a) **Banalasta scheme**

[385] It was alleged at paragraph 961 that Mr Horner had expressly and orally made the common representations, denied as untrue by the fourth and eighth defendants and

not admitted by the tenth and thirteenth defendants. It was also alleged that he had been told he was entitled to Social Security benefits.

- [386] He was told about the scheme by a friend at the mine where he worked. He obtained Mr Horner's telephone number from him and made an appointment to see him. Mr Horner came to his home and gave a presentation at which Mrs Rapson was present for at least part of the time. According to Mr Rapson, Mr Horner explained the way in which the project operated and did some calculations concerning his participation in the scheme. Mr Rapson said that he questioned the amount of deductions but was given an explanation to the effect that it was based on the proposition that the company was investing money which would generate income which would create jobs and taxation revenue for the Government. He also said, although Mr Rapson did not understand what it was, that they would be able to get a product ruling, which they did not have at the time. He accepted, following the discussion, that the scheme was legal. He said that he believed that Mr Horner was there as an adviser and believed what he had been told.
- [387] He agreed that the words "this scheme was ATO approved" had not been used but said that he had been concerned about the legality of the scheme but accepted what Mr Horner had told him. He denied that he had made up his mind to go into the scheme before Mr Horner arrived. He said that it was his understanding that upon making the investment he would be able to claim a deduction in his tax return for the year. Mr Rapson said that he also noticed at some point that the prospectus had expired. However, Mr Horner told him that the prospectus related to an earlier phase of the scheme and did not apply to the purchase of units in it by Mr Rapson.
- [388] Mrs Rapson gave evidence that she was there for part of the meeting. She said that there was reference to the marketing side of the project and reference to whether the taxation office approved of the scheme. However, she agreed that Mr Horner did not use the words "tax office approved" but said that he said "something similar". She said that she had read in a newspaper about product rulings shortly before the meeting and agreed that she had asked Mr Horner about that. Her recollection was that he said that the scheme did not have one but could get one if necessary or something to that effect. She agreed that she was not told that a product ruling had been sought.
- [389] Mr Horner said that Mr Rapson had contacted him and told him that he wanted to look at the investment that was going around. He was given a standard presentation. Mr Horner said he did not say that the scheme was tax office approved nor that it was lawfully tax deductible. He said that he put Mr Rapson under no pressure to sign the documents and gave him the prospectus. At the commencement of the presentation he had told him that the scheme was speculative and that he should get independent advice. Mr Rapson said that his work colleagues were getting family allowance and he wanted to know how they were able to do that. Mr Horner said that he told Mr Rapson to speak to his accountant about it. Mr Rapson's wife was present for part of the meeting. He repeated that he had not said that the scheme was ATO approved, nor could he recall saying that the tax-man approved of the scheme.

- **Conclusion**

- (i) **Representations Case**

[390] It was submitted by Mr Douglas that Mr Rapson's evidence was characterized by equivocal answers concerning matters detrimental to his case and lapses of memory. It was submitted that he was reticent in admitting previous investment experience. It was submitted that his evidence concerning the reason for not seeking advice from his accountant was implausible. He had conceded that he was not told that the scheme was ATO approved and there was no misrepresentation as to the existence of a product ruling. Mr Wilson's submissions largely mirrored those submissions. He submitted that the evidence established that he had neither been told that the scheme was ATO approved nor that a product ruling had been applied for.

[391] A presentation of a fairly standard kind was given. Mr Rapson formed the opinion that the scheme was "legal" as a result of it. It was not suggested by him or his wife that he had been told that the scheme was ATO approved. Mrs Rapson's evidence that "something similar" was said is not of any assistance in determining what was actually said. On balance I am not satisfied that a misleading or deceptive representation was made. With regard to the representations about Social Security benefits, I am satisfied that Mr Rapson reacted negatively to the suggestion and did not rely on it in entering into the scheme.

- (ii) **Recommendations Case**

[392] Mr Rapson said that he did not recall being advised by Mr Horner that commission was payable to him. He signed a disclosure statement showing that Mr Horner received 5% commission per unit. In accordance with my general view of what Mr Horner said in his presentation, I am not satisfied that a contravention of s 849 has been established.

[393] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs.

Jozinovic

[394] Mr Jozinovic was an overburden driller, aged 52 at trial. He left school in Croatia at 12 ½ years of age and worked on the family farm. He migrated to Australia in 1970. He was not particularly fluent in English and said that his reading was not as good as his spoken English. He invested in the Base Metals scheme and the Banalasta scheme, but for reasons connected with the granting of a separate hearing in respect of Karen Evans, only the Banalasta scheme is involved in the present proceedings. At the time he invested in the Banalasta scheme he had three rental properties on the Gold Coast and some shares.

- (a) **Banalasta scheme**

[395] It was alleged at paragraph 1054 that Mr Horner expressly and orally made the common representations, denied as untrue by the fourth and eighth defendants and not admitted by the tenth and thirteenth defendants. It was admitted that

representations were made that the scheme was a good investment and that Mr Horner recommended that Mr Jozinovic should invest in it. It was denied as untrue that it had been represented that the number of units he had could be reduced if circumstances required.

[396] He said that Mr Horner rang him in June and said that he would like to discuss a new project with him. He said that he had not dealt with him before. Mr Horner explained the project to him and Mr Jozinovic says that he asked whether it was legal by the tax department. Mr Horner said it was. He told him that it was an employment creating project which the ATO encouraged. He said that Mr Horner also asked him if he had received his refund in respect of the Base Metals scheme. He said that he had and Mr Horner said “That’s the proof it is perfectly legal by the ATO”. Mr Horner explained the scheme’s financial implications to him. Mr Jozinovic said that he had trusted Mr Horner and signed the documents. He said that he did not see a prospectus during the meeting and was not told to get independent advice. He denied he had given a post dated cheque because he wanted to get advice. He also gave some evidence that he had been told by Karen Evans that he would be silly not to go into the scheme.

[397] Mrs Jozinovic was also a Croatian migrant. She said that one of the first things they asked was whether the scheme was legal. She said that she was told that it was a project which created employment and was legal.

[398] Mr Horner said that he had met Mr Jozinovic through another client at the time of the Base Metals scheme (which is not involved in this matter so far as Mr Jozinovic is concerned). He was given a standard presentation and the returns were discussed by reference to the prospectus. According to Mr Horner, Mr Jozinovic was excited by the potential returns. He said that he told him to get independent advice. Mr Jozinovic signed the application at that meeting but asked him to hold it because he wanted to talk to his accountant. The cheque was sent later. Mr Jozinovic’s wife was present for part of the meeting. He said that Mrs Jozinovic asked questions about the samples which he had with him but did not ask any questions about the legal status or approval of the scheme or anything else concerning the business side of the project.

- **Conclusion**

- (i) **Representations Case**

[399] Mr Douglas submitted that the evidence concerning the provision of the documents relating to the scheme was unsatisfactory. The evidence concerning his meeting with Mr Horner was hard to reconcile with his failure to seek independent advice. There was evidence of advice in general terms prior to signing the documents from Karen Evans. It was submitted that Mr Jozinovic’s evidence was generally unsatisfactory. Mr Wilson submitted that the evidence as to a representation that the scheme was ATO approved was unclear, unsatisfactory and variable. He submitted that Mrs Jozinovic’s evidence referred only to the scheme being “legal by the ATO” and did not prove a misleading or deceptive representation.

[400] On the state of the evidence, I am not satisfied that a misleading or deceptive statement was made by Mr Horner. Mr Jozinovic had had some advice from Karen Evans (the nature of which is vague except to the extent that it was favourable to the scheme). He had previously obtained a refund in respect of the Base Metals

scheme. With respect to what was actually said in the presentation, his and his wife's evidence is rather vague. I am not satisfied that an explicit statement that there was ATO approval was made. In the absence of evidence in that regard there is no basis upon which a finding can be made that Mr Jozinovic was told that his number of units could be reduced in the case of hardship or that it was a representation that induced him to enter into the scheme.

(ii) Recommendations Case

- [401] Mr Jozinovic said Mr Horner never mentioned commission. He signed a disclosure statement showing that Mr Horner received commission at the rate of 5%. He said he had not read it because his reading of English was poor. In accordance with my general view of what Mr Horner said in his presentation, I am not satisfied a contravention of s 849 has been proved.
- [402] I am satisfied that there was a contravention of s 851. I am also satisfied that it is not proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the salesman had about the client's investment objectives, financial situation and particular needs. In Mr Jozinovic's circumstances, particular care should have been taken to ensure he understood the risk.

PART 3 – LIABILITY OF FOURTH AND EIGHTH DEFENDANTS

- [403] The essential nature of the case against the fourth and eighth defendants has been summarised earlier in these reasons. In cases where the eighth defendant has been found to have contravened s 851 of the *Corporations Law* or the prohibition against misleading or deceptive conduct, his liability to the particular plaintiff is established. Where Mr Francis, Mr Nunis or Mr Horner have been found to have contravened provisions prohibiting misleading or deceptive conduct or s 851 of the *Corporations Law*, the fourth defendant is liable for their actions.

PART 4 – LIABILITY OF TENTH AND THIRTEENTH DEFENDANTS

- [404] The broad structure of the plaintiffs' case against the tenth and thirteenth defendants is summarised earlier in these reasons. For reasons expressed in detail earlier, the recommendations case alleging liability of the tenth and thirteenth defendants for any contraventions of s 851 of the *Corporations Law* by the fourth and eighth defendants fails. The representations case against the tenth and thirteenth defendants succeeds in cases where contraventions by salesmen are established.

PART 5 – SUMMARY OF FINDINGS

- [405] The following is a summary of the findings. The intention is that the parties have the opportunity to make submissions concerning the appropriate final orders to be made on the basis of the findings. Of necessity, issues of quantum, including the consequences of the Taxation Commissioner's decision referred to in paragraph [8] of these reasons and the thirteenth defendant's counterclaim, which the parties

agreed should be deferred, could not be finalised at this time. They may be the subject of further submissions. Plainly, the more agreement there is on these issues, the more expeditiously they can be disposed of. The issue of costs remains to be decided at a later time also. The findings are as follows:

BORG

(a) Northern Rivers Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation only. Fourth defendant liable for Mr Francis' conduct.

- **Recommendations Case**

Contravention of s 849 not proved.
Contravention of s 851 proved; exemption from liability under s 852(4) not proved.
Fourth defendant liable for Mr Francis' conduct.

(b) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.
Contravention of s 851 proved; exemption from liability under s 852(4) not proved.
Fourth defendant liable for Mr Nunis' conduct.

(c) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.
Contravention of s 851 proved; exemption from liability under s 852(4) not proved.
Fourth defendant liable for Mr Horner's conduct.

BYRNE

(a) Northern Rivers Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation. Fourth defendant liable for Mr Francis' conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Francis' conduct.

(b) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Nunis' conduct.

(c) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of "get out" clause only.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

COPPO

(a) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

DIXON

(a) Base Metals Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation.

Fourth defendant liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

GLAZEBROOK

(a) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

GOTTKE

(a) Base Metals Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of ATO representation.

Fourth defendant liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

HINCHEY

(a) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of "hardship clause" only.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

MRS MONTGOMERY

(a) Northern Rivers Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Not proved in respect of s 849 or s 851.

(b) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(c) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of "hardship clause" only.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

MR MONTGOMERY

(a) Northern Rivers Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Not proved.

PARISH

(a) Base Metals Scheme

- **Representations Case**

Misleading or deceptive conduct proved.

Fourth defendant liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

REID

(a) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

ROACH

(a) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Misleading or deceptive conduct proved.

Fourth, tenth and thirteenth defendants liable for Mr Horner's conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

SCOTT

(a) Base Metals Scheme

- **Representations Case**

Misleading or deceptive conduct proved in respect of Mr Nunis.

Fourth defendant liable for Mr Nunis' conduct.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Nunis' conduct.

SICH

(a) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

CAMERON

(a) Base Metals Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

(b) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

PURDIE

(a) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Not proved.

RAPSON

(a) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.

JOZINOVIC

(a) Banalasta Scheme

- **Representations Case**

Not proved.

- **Recommendations Case**

Contravention of s 849 not proved.

Contravention of s 851 proved; exemption from liability under s 852(4) not proved.

Fourth defendant liable for Mr Horner's conduct.