In section 14.2.1 between the second and third paragraphs insert the following paragraph

In *Grant-Taylor v Babcock & Brown Ltd (in liq)*, the Full Court of the Federal Court, said that the concept of “materiality” in terms of its capacity to influence a person whether to acquire or dispose of a financial product must refer to information that is non-trivial at least. It cannot be information that “may” or “might” influence a decision but must be such that it “would” or “would be likely” to influence a decision. The Court also said that materiality may also depend on a “balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event on the company’s affairs”.

In section 14.4 delete the first paragraph and insert the following:

The meaning of the words “reasonable steps” in the context of this defence has been considered in a first instance Victorian Supreme Court decision. In this decision, Croft J noted that the Revised Explanatory Memorandum to the *Financial Services Reform Bill 2001 (Cth)* intended to adopt an approach that was mid-way between the due diligence approach that applies to prospectuses and the key features statement approach that applied in relation to superannuation.

Therefore in his Honour’s view, the reasonable steps defence is not intended to require product issuers to undertake a due diligence exercise to discover all material information and the PDS need only include information to the extent that it is within the actual knowledge of the relevant persons. It was not the intention of Parliament to “shackle responsible entities, and those other persons, with the processes and systems imported by the words ‘due diligence’”. His Honour held that the intention of Parliament in relation to this defence was to “mitigate the injustice of penalising a regulated person who has taken reasonable steps to ensure that a PDS is not defective”. Therefore a person will have taken reasonable steps if the person “does not exhibit a negligent, or reprehensible, state of mind” and is “conscientious, diligent and careful, and endeavours to abide by the law”.

However, although “reasonable steps” does not require “due diligence”, this is not to say that there should not be a proper system in place directed to ensuring that the PDS is not defective. In fact, his Honour held that in “most cases, if not all, a reasonable step would

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1 [2016] FCAFC at [96].
2 Ibid, citing *TSC Industries* in support.
3 Ibid.
4 *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs & mrs apptd) (in liq)* [2014] VSC 516.
5 Ibid at [513]-[516].
6 Ibid at [516]-[517].
7 Ibid at [544].
8 Ibid at [519].
9 Ibid.
include the creation of a proper system to ensure compliance, a compliance plan, and the adequate supervision of that system", although His Honour qualified this statement in that it also "does not necessarily require the institution of such a system, or supervision".\(^{(10)}\)

The use of the expression "reasonable steps" was designed to permit a flexible approach depending on the circumstances of each particular case.\(^{(11)}\) It is an objective test applied to the circumstances of each case.\(^{(12)}\)

The question also arose in this case as to whether the obligation to take reasonable steps permits the delegation or part of all of the system and its design by the directors to others. His Honour held that delegation is a permissible component of the reasonable steps defence, but it must be reasonable and must be viewed and judge itself as being a reasonable step to ensure compliance.\(^{(13)}\) In making this finding, his Honour relied upon and approved decisions in earlier cases that were to the effect that it is reasonable for a director to rely on advice without independent verification or scrutinisation of the material or circumstances on which such advice is based if there is no cause for suspicion and no circumstances exist which demand critical and detailed attention.\(^{(14)}\)

Interestingly, his Honour also was of the view that ASIC Regulatory Guide RG 282, which sets out ASIC’s view on what a responsible entity should disclose in a PDS for an agribusiness scheme, was of limited assistance in interpreting the legislation and had no more weight that the submission of the parties.

Nevertheless, given the ASIC is the regulatory authority responsible for enforcement of the above provisions of the law, it would be wise to have some consideration to their views on what a responsible entity should do to satisfy the reasonable steps defence.

In a previous version of the current ASIC Regulatory Guide RG 168, ASIC was of the view that while it is not a mandatory requirement, having a systematic process for preparing a PDS or SPDS would help a product issuer meet the PDS or SPDS requirements.\(^{(15)}\)

Page 275 – Before the last paragraph insert the following:

Similarly the following steps undertaken by a responsible entity would appear to point to reasonable steps having been taken:

(a) formation of a due diligence committee to ensure compliance with the legislation;

(b) the development by that committee of a work plan for the due diligence process requiring the agreement of the responsible entity and each member of the committee; and

(c) verification of information from directors and management including formal signed representations.\(^{(16)}\)

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10 Ibid at [546].
11 Ibid.
12 Ibid.
13 Ibid at [543].
14 Vines v ASIC [2007] NSWCA 75 at [731] per Santow JA and to similar vein ASIC v Adler [2002] NSWSC 171 at [372], both cited with approval in ibid at [543].
15 ASIC Regulatory Guide RG 168.
16 Woodcroft-Brown v Timbercorp Securities Ltd (in liq) [2011] VSC 427 at [436], referred to in Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs & mgs apptd) (in liq) [2014] VSC 516 at [510].
ASIC has issued a report on due diligence practices in initial public offerings.\(^{17}\) While, as discussed above, taking reasonable steps is not the same as undertaking due diligence, nevertheless the material contained in that consultation paper would be helpful in evidencing that a responsible entity has established and maintained a proper system to ensure the PDS is not defective and therefore has taken reasonable steps.\(^{18}\)

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In section 14.5 at the end of the first paragraph commencing “There is” add the following words:

The absence of dishonesty is not sufficient.\(^{19}\)

**Pages 277-278**

In section 14.5 delete the last paragraph and all paragraphs to the end of the section and insert the following in lieu thereof:

The basic question is whether the person has acted honorably, fairly, in good faith and in a common sense manner as judged by the standards of others of a similar professional background.\(^{20}\) Although there is no exhaustive list of all the considerations that may assist the court to make that value and while it has been said to not particularly fruitful to attempt to do so,\(^{21}\) the courts have provided some matters that are likely to be relevant in making this value judgement. These include:

- the nature of the person’s “appointment” or office;\(^{22}\)
- the degree to which a defendant’s conduct has fallen short of the statutory standard of reasonable care and diligence;\(^{23}\)
- the presence or absence of contrition;\(^{24}\)
- the seriousness of the contravention;\(^{25}\)
- the seriousness of the potential consequences of a contravention;\(^{26}\)
- whether the person concerned obtained and followed competent advice before acting in contravention;\(^{27}\)

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18 Ibid at para 79.
19 *ASIC v Healey (No 2)* [2011] FCA 1003 at [87] (“Healey (No 2)").
22 Ibid at [869]; *ASIC v Cassimatis (No 8)* [2016] FCA 1023 at [813]; *ASIC v Australian Property Custodian Holdings Ltd (recs & mgrs apptd) (in liq) (controllers apptd)* [2014] FCA 1308 at [73(l)] (“Australian Property”).
24 *Trilogy* [2015] FCA 1452 at [873]; *ASIC v Vines* [2005] NSWSC 1349 at [85]; *Australian Property* [2014] FCA 1308 at [73(j)].
25 *Trilogy* [2015] FCA 1452 at [871]; *ASIC v Vines* [2005] NSWSC 1349 at [52]; *Australian Property* [2014] FCA 1308 at [73(f)].
26 *Healey (No 2)* [2011] FCA 1003 at [90]; *Australian Property* [2014] FCA 1308 at [73(g)].
27 *ASIC v Vines* [2005] NSWSC 1349 at [41]; *Maelor Jones* (1989) 54 SASR 285 at 293; *Australian Property* [2014] FCA 1308 at [73(e)].
whether the conduct was in accordance with some established practice;\(^{(28)}\)
whether the person concerned was paid for undertaking the contravening conduct;\(^{(29)}\)
whether or not the conduct involved the obtaining of personal gain;\(^{(30)}\)
the flagrancy of the breach;\(^{(31)}\)
whether there was any impropriety such as deceptiveness;\(^{(32)}\)
the consciousness of another’s impropriety;\(^{(33)}\)
whether the conduct was deceptive;\(^{(34)}\)
unreasonableness in post-contravention conduct;\(^{(35)}\)
the person’s service to the community, the effect of the proceedings on his or her reputation and career, and the suffering caused to him her and his or family;\(^{(36)}\) and
whether to give the relief would do serious disservice to the administration of company law into the commercial community.\(^{(37)}\)

A person may be excused from liability even though the contravening conduct has been found to have been unreasonable.\(^{(38)}\) However, it has been said that it is difficult to lay down general principles because, of necessity, each case will very much depend on its own circumstances.\(^{(39)}\)

If these two conditions precedent are met, then the next task of the Court is to decide whether the person should be relieved from liability wholly or in part and, if in part, to what extent.\(^{(40)}\)

The burden of proof is on the person relying on this provision to satisfy the Court that each of the two conditions precedent have been met and that in those circumstances that person should be relieved from liability wholly or in part and, if in part, to what extent.\(^{(41)}\)

\(^{28}\) ASIC v Vines [2005] NSWSC 1349 at [57].
\(^{29}\) Ibid at [84].
\(^{30}\) Ibid; Australian Property [2014] FCA 1308 at [73(o)(i)].
\(^{32}\) Ibid; Trilogy [2015] FCA 1452 at [872].
\(^{33}\) ASIC v Vines [2005] NSWSC 1349; Australian Property [2014] FCA 1308 at [73(o)(iii)].
\(^{34}\) ASIC v Vines [2005] NSWSC 1349 at [83].
\(^{35}\) Ibid at [33]; Australian Property [2014] FCA 1308 at [73(n)].
\(^{36}\) Australian Property [2014] FCA 1308 at [73(m)].
\(^{37}\) ASIC v Vines [2005] NSWSC 1349 at [54]; Australian Property [2014] FCA 1308 at [73(i)].
\(^{38}\) ASIC v Vines [2005] NSWSC 1349 at [41].
\(^{39}\) Maelor Jones (1989) 54 SASR 285 at [1251], cited with approval in ibid.
\(^{40}\) Healey (No 2) [2011] FCA 1003 at [84].
\(^{41}\) Ibid; Australian Property [2014] FCA 1308 at [68]; ASIC v Flugge (No 2) [2017] VSC 117 at [57].