

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

LIST E

SCI 2009 10699

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 066 601 250) and WESTPAC BANKING CORPORATION
(ACN 007 457 141)**

Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) & ORS (according to the attached Schedule)**

Defendants

AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 3 March 2010
Filed on behalf of: the Second, Third and Fourth Defendants

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I, **MARK ANTHONY KORDA**, of Level 24, 333 Collins Street, Melbourne, in the State of Victoria,
Chartered Account, SAY ON OATH that:

- 1 I am, with Leanne Kylie Chesser, the liquidator of Timbercorp Securities Limited (In Liquidation) (ACN 092 311 469) (**TSL**), Almond Management Pty Ltd (In Liquidation) (ACN 094 429 419) (**Almond Management**), Timbercorp Limited (In Liquidation) (ACN 055 185 067) (**Timbercorp**), Almond Land Pty Ltd (In Liquidation) (ACN 091 460 392) (**Almond**



Land) and Timbercorp Finance Pty Ltd (In Liquidation) (ACN 054 581 190) (**Timbercorp Finance**).

- 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true. I am authorised by Ms Chesser to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.
- 3 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391) (**KordaMentha**). I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Insolvency Practitioners Association of Australia and a member of the Institute of Chartered Accountants. Before founding KordaMentha in 2002, I had a 24-year career with the firm Arthur Andersen, during which I held the positions of Director of Corporate Finance, Managing Partner Asia Pacific Corporate Recovery Services Practice and Managing Partner Australia Accounting and Audit Practice. I was also a Member of the Australian Executive Committee and Board of Partners. I have been practising in the area of corporate insolvency and financial reconstructions for 20 years.

External Administration of the Timbercorp Group

- 4 On 23 April 2009, the directors of Timbercorp and thirty nine (39) of its wholly owned subsidiaries, including TSL, Almond Land and Almond Management (together, the **Timbercorp Group**) appointed Ms Chesser and I, and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Cliff Stuart Rocke, as administrators of those companies. All of the appointments were made by those companies pursuant to section 463A of the *Corporations Act 2001* (Cth) (**Corporations Act**). Now shown to me and marked **MAK-1** is a true copy of a list of the Timbercorp Group which details the administrators appointed to each Timbercorp Group company.
- 5 On 29 June 2009, the voluntary administrators convened a second meeting of the creditors of TSL and a separate meeting of the creditors of the Timbercorp Group at which the creditors resolved to wind up TSL and the Timbercorp Group companies respectively. From 29 June 2009 Ms Chesser and I have been the liquidators of TSL, Timbercorp, Almond Land and Almond Management.
- 6 Now shown to me and marked **MAK-2** are true copies of the records of searches of the records maintained by the Australian Securities and Investments Commission (**ASIC**) in relation to each of the companies in the Timbercorp Group.

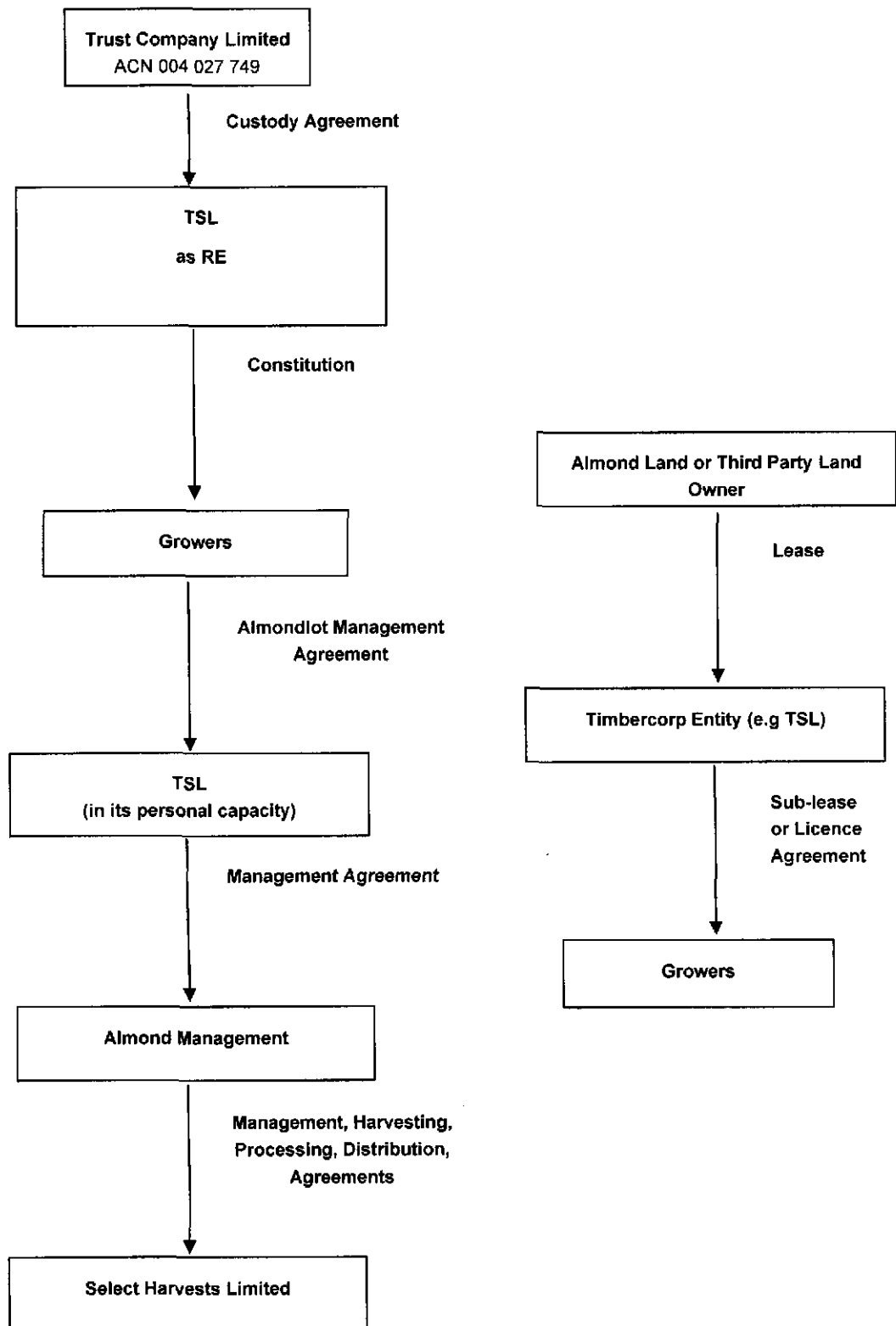


Overview of the Timbercorp Group

- 7 The Timbercorp Group operated an agribusiness investment company. Timbercorp is the parent entity of the Timbercorp Group and is a publicly listed company on the Australian Securities Exchange (**ASX**) (however, the listing is currently suspended).
- 8 The Timbercorp Group's primary business activities were the establishment, development, marketing and management of primary industry based projects, the acquisition of land, water rights and infrastructure and the provision of finance to "Growers" in projects. The Timbercorp Group have invested more than \$2 billion in agribusiness projects on behalf of 18,500 investors since 1992.
- 9 The activities of the various Timbercorp Group included the establishment of financing and marketing of projects and harvesting, processing and end-sales. The various Timbercorp Group companies were major participants in domestic and export markets including almonds, olive oil, citrus, table grapes, mangoes, avocados, garlic and glasshouse tomatoes, as well as Australia's wood fibre exports through eucalypt plantation projects.
- 10 Now shown to me and marked **MAK-3** is a true copy of a Timbercorp Group structure chart. In summary, the group structure comprises 4 corporate entities, 7 forestry entities and 29 horticulture entities. The operations of the Timbercorp Group can be broadly categorised as follows: corporate (including head office located at 461 Bourke Street, Melbourne), forestry, almonds, olives, other crops and a loan book.
- 11 Now shown to me and marked **MAK-4** is a true copy of a chart that summarises the forestry and horticultural assets the Timbercorp Group have under management, by geographical location.
- 12 At the time of appointment of administrators, the Timbercorp Group operated 33 managed investment schemes, generally referred to as 'Projects' (the **Projects**). TSL, a wholly-owned subsidiary of Timbercorp, is the responsible entity (**RE**) for each of the Projects. TSL holds an Australian Financial Services Licence, licence number 235653 (**AFS Licence**). The AFS Licence remains in place. TSL has notified ASIC of recent breaches of its licence conditions arising from or in connection with the insolvency of TSL. Now produced and shown to me and marked **MAK-5** is a copy of TSL's AFS Licence.
- 13 Various other Timbercorp Group companies act as managers for two forestry and horticultural projects which are not registered as managed investment schemes under the Corporations Act (**Private Offer Projects**). There are 2 Private Offer Projects in addition to the 33 Projects.

Timbercorp Almond Projects

- 14 TSL is currently the RE of 7 almond Projects which are registered managed investment schemes under Part 5C of the Corporations Act. In addition, there is one almond scheme *managed by Almond Management* which is not registered, and because it was only offered to wholesale clients (within the meaning of the Corporations Act), it was not required to be registered under Part 5C of the Corporations Act. I refer to these together as the "**Almond Projects**". In this affidavit, I refer to each of the Almond Projects individually by their year, for example, "2001 Almond Project". The only exception is the 2002 unregistered Almond Project which I refer to as the "**2002 Private Offer Project**".
- 15 The following Almond Projects are relevant to this proceeding because they were conducted on the land sold pursuant to the sale and purchase deed executed on 18 September 2009 (**SPD**) the subject of this proceeding:
- (a) the 2002 Private Offer Project;
 - (b) the 2002 Almond Project;
 - (c) the 2005 Almond Project;
 - (d) the 2006 Almond Project; and
 - (e) the 2007 Almond Project.
- 16 The members of the Almond Projects are referred to in the documents relating to the Almond Projects as "**Growers**" and I adopt that terminology here. The purpose of the Almond Projects was the cultivation of almonds for commercial sale.
- 17 Apart from operating the Almond Projects, TSL also entered into various agreements and carried out certain functions in relation to each of the Almond Projects, in its personal capacity. For example, TSL entered into head leases with land owners and contracts with each of the Growers under which TSL was obliged to manage the operations of growing crops and perform certain services in relation to the crops for each of the Almond Projects.
- 18 The following diagram illustrates the general structure of the registered Almond Projects, the various companies which formed part of each Almond Project and the agreements governing them.



19 In respect of the 2002 Private Offer Project, Growers entered into a licence and joint venture agreement with Almond Land (**2002 Private LJVA**) similar to the licence and joint venture agreement used in the 2002 Almond Project. Growers appointed Almond

hu *ML*

Management to act as project manager pursuant to a Project and Management Agreement between the 2002 Private Offer Project Growers, TSL and Almond Management (**PMA**). Now produced and shown to me marked **MAK-6** and **MAK-7** respectively are copies of the 2002 Private LJVA (with a variation dated 15 July 2002) and the PMA.

- 20 Under the PMA, Almond Management, as project manager, was required to:
- (a) generally manage and administer the 2002 Private Offer Project;
 - (b) cultivate the Orchard, harvest the Almonds and perform the Orchard Services (as defined in the PMA);
 - (c) as agent and attorney for the Growers, procure and perform the Orchard Services; and
 - (d) sell the Almonds as agent and attorney for the Growers.
- 21 The properties on which each Almond Project the subject of this proceeding was conducted, as well as the first ranking security holder in relation to each of those properties, are set out in the following table:

Project	Property	First Ranking Security Holder
2002 Private Offer Project	Carina (Block 13)	A syndicate of lenders comprising Bank of Scotland International, ANZ and Westpac Banking Corporation (the Syndicate)
2002 Almond Project	Carina (Block 13)	Syndicate
	Carina West	Syndicate
2005 Almond Project	Nenandie	Australia and New Zealand Banking Group Limited (ANZ)
	Carina West	Syndicate
2006 Almond Project	Mitchell	Syndicate
	Narcooyia	ANZ
	Westmore	Syndicate
2007 Almond Project	Annuello	Syndicate
	Menegazzo	Syndicate
	Westmore	Syndicate

- 22 In Supreme Court Proceeding No. 7114 of 2009, I made an affidavit in relation to each Almond Project which detailed for that Project information under the following sub-headings:
- (a) the Scheme Documents;
 - (b) Growers' contributions;
 - (c) Solvency of the Scheme;
 - (d) Cashflow – Historic;
 - (e) Projected Cashflow for 2010;
 - (f) Arrears and Defaults;
 - (g) Long term viability;
 - (h) Termination of Agreement on Winding Up pursuant to the Constitution; and
 - (i) Impediments to Restructure.
- 23 Now produced and shown to me marked **MAK-8 - MAK-11** are true copies of my affidavits made in respect of each of the 2002, 2005, 2006 and 2007 Almond Projects.
- 24 For each of the Almond Projects above, the Australian Taxation Office (**ATO**) issued certain Product Rulings (**PR**). The relevant Product Rulings for each Almond Project are set out as follows:
- (a) in relation to the 2002 Private Offer Project, PR 2002/15;
 - (b) in relation to the 2002 Almond Project, PR 2002/24 and PR 2002/83;
 - (c) in relation to the 2005 Almond Project, PR 2005/15 and PR 2005/16;
 - (d) in relation to the 2006 Almond Project, PR 2006/1 and PR 2006/2; and
 - (e) in relation to the 2007 Almond Project, PR 2006/145 and 2006/146.
- 25 Now produced and shown to me marked **MAK-12 - MAK-20** are true copies of the PR for each Almond Project referred to above.
- 26 By way of overview of the Almond Projects, in most cases the structure was that a Grower would invest in an Almond Project by:
- (a) applying to become a member of that Almond Project;
 - (b) sub-leasing identifiable allotments of land, typically from TSL in its personal capacity;
 - (c) engaging TSL or another Timbercorp Group company in its personal capacity to plant, tend, harvest, process or sell the Almond product (**Management Services**).
- The Growers' respective interests in the Almond Projects were referred to as "**Almondlots**".

- 27 In other instances, Growers were granted licences to use the Almond lots and entered into joint venture agreements with Almond Land and TSL. TSL delegated many of the Management Services to other Timbercorp Group companies or third parties.
- 28 Many Growers funded their contributions through loans from Timbercorp Finance. As security for the repayment of those loans, Timbercorp Finance would take an assignment from the relevant Growers of their rights, title and interest in any debt or other monetary obligation owed to them by TSL under or in relation to their investment in the Almond Project or in any other Timbercorp Project.
- 29 Arnold Bloch Leibler (ABL) has advised us in relation to the Projects. Leon Zwier, a partner of ABL, has told me that ABL requested all documentation relevant to the Almond Projects from the General Counsel for Timbercorp. Based on the documents provided to ABL by the General Counsel, ABL has informed me that the Almond Projects are governed by a complex suite of documents.
- 30 Based on the documents provided by Timbercorp to ABL, I am informed that the documents for the Almond Projects total 223, which is estimated to be about 4000 pages (or eight lever arch folders). I note that the Scheme Documents for each of the Almond Projects referred to above in subparagraph 15 above are materially the same. These documents have been made available to stakeholders on the KordaMentha website (<http://www.kordamentha.com/main/display-creditor.aspx?CID=51>) and ABL's website (www.abl.com.au/timbercorp/timbercorp.htm) but not all are exhibited to this affidavit.

Secured creditors

- 31 I am informed by John Stragalinis of Corrs Chambers Westgarth of the matters to which I depose below in paragraphs 32 to 46 regarding the bank facilities and securities relating to the Almond Projects.

- 32 The following secured creditors advanced lending facilities for the purposes of the Almond Projects:

- (a) ANZ; and
- (b) the Syndicate.

BOSI Security Services Limited (formerly named BWA Custodians Limited) acts as security trustee for the Syndicate.

- 33 The above secured creditors provided the following principal facilities in relation to the Almond Projects:

- (a) ANZ Almond Facility for \$45m to Almond Land dated 26 September 2006 (as amended) (**ANZ Almond Facility**). Now produced and shown to me marked **MAK-21** is a copy of the ANZ Almond Facility; and
 - (b) Syndicated Loan Agreement to TL dated 15 December 2006 (as amended) for \$200m (**Syndicate Facility**). The Obligors to the Syndicate Facility include Almond Land and Almond Management. Now produced and shown to me marked **MAK-22** is a copy of the Syndicate Facility.
- 34 There were a range of securities provided by Timbercorp Group entities to secure the debts owed pursuant to the above facilities. These included:
- (a) Almond Land:
 - (i) Limited Fixed and Floating Charge (ASIC No 1364261) in favour of ANZ registered 6 October 2006;
 - (ii) Limited Fixed and Floating Charge (ASIC No 1364257) in favour of ANZ registered 6 October 2006;
 - (iii) Registered Land Mortgage (No: AE683873S) dated 26 September 2006 in favour of ANZ.
 - (iv) Registered Land Mortgage (No AG360673L) dated 30 December 2008 in favour of BOSI Security Services Limited (**BOSI Registered Land Mortgage**).
 - (v) Registered Land Mortgage (No: AG290139V) dated 24 December 2008 in favour of ANZ.
 - (vi) Water Mortgage No MOR001572 dated 30 December 2008 in favour of BOSI Security Services Limited (**BOSI Water Mortgage**).
 - (vii) Water Mortgage No MOR001491 dated 24 December 2008 in favour of ANZ.
 - (b) Almond Management:
 - (i) Limited Fixed and Floating Charge (ASIC No 1364250) in favour of the ANZ registered 6 October 2006;
 - (c) Timbercorp:
 - (i) Feartherweight fixed and floating charge (ASIC No 1410090) in favour of BOSI Security Services Limited;

(d) TSL:

- (i) Limited Fixed and Floating Charge (ASIC No 1364219) in favour of Almond Land registered 6 October 2006;
- (ii) Limited Fixed and Floating Charge (ASIC No 1364242) in favour of the ANZ registered 6 October 2006.

Now produced and shown to me marked **MAK-23** - **MAK-33** respectively are copies of the securities outlined in paragraph 34 above.

35 The Syndicate Facility was also secured by an unlimited guarantee and indemnity dated 15 December 2006 (**Syndicate Guarantee**) from Almond Land, Almonds Australia Pty Ltd, B.B. Olives Pty Ltd, Jindalee Enterprises Pty Ltd, Mango Land Pty Ltd, OIM#4 Pty Ltd, Olivecorp Land Pty Ltd, Olivecorp Processing Facility Pty Ltd, Timbercorp Finance, Timbercorp Lands Pty Ltd, Timbercorp Plantations Pty Ltd, Timbercorp Plantations 2002 IAB Pty Ltd, and Timbercorp Treasury Pty Ltd. Now produced and shown to me marked **MAK-34** is a copy of the Syndicate Guarantee.

36 By a series of accession deeds dated 16 May 2007, the following companies became a party to and agreed to be bound by the Syndicate Guarantee: Almonds Management Pty Ltd, TSL, Avcorp Management Pty Ltd, Mangocorp Management Pty Ltd, Olivecorp Management Limited and Timbercorp Forestry Pty Ltd. Now produced and shown to me and marked **MAK-35** are copies of the 16 May 2007 accession deeds.

37 By a series of accession deeds dated 30 December 2008, the following companies became a party to and agreed to be bound by the Syndicate Guarantee: Timbercorp Properties Limited, OIM#6 Pty Ltd, OIM#8 Pty Ltd, OIM#10 Pty Ltd and Timbercorp Lot Investments Pty Ltd. Now produced and shown to me and marked **MAK-36** are copies of the 30 December 2008 accession deeds.

38 The ANZ Facility was also secured by the following deeds of guarantee and indemnity:

- (a) Deed of Guarantee and Indemnity from TSL, Almond Management, Almonds Australia Pty Ltd, Timbercorp Finance, Timbercorp Finance (Vic) Pty Ltd, Timbercorp Lands Pty Ltd and Timbercorp Forestry Pty Ltd dated 26 September 2006 (**Deed of Guarantee**); and
- (b) Limited Deed of Guarantee and Indemnity from Timbercorp dated 26 September 2006 (**Limited Deed of Guarantee**).

Now produced and shown to me marked **MAK-37** and **MAK-38** respectively are copies of the Deed of Guarantee and Limited Deed of Guarantee.

39 There were also a range of ancillary documents to these facilities and securities which included:

- (a) Almond Agreement Deed of Covenant dated 26 September 2006 between ANZ, TSL and Almond Management;
- (b) Tripartite Deed dated 26 September 2006 in relation to the 2005 and 2006 Almond Projects between Almond Land, TSL, Almond Management and ANZ;
- (c) Deed of Covenant dated 28 February 2007 by BOSI Security Services Limited in favour of Growers of schemes conducted by Timbercorp and TSL as RE of the schemes.

Now produced and shown to me marked **MAK-39 - MAK-41** respectively are copies of the securities outlined in paragraph 39 above.

- 40 As at the time of swearing this affidavit I have been informed by Bryan Webster, an Executive Director of KordaMentha that the outstanding sums in relation to the principal facilities are in excess of \$49 million (including interest) in relation to the ANZ Almond Facility and in excess of \$217 million (including interest) in relation to the Syndicate Facility.
- 41 Certain of the securities held over the assets of Almond Land are subject to a deed of priority dated 30 August 2008 (**Nenandie Deed of Priority**) between Almond Land, TSL, ANZ and BOSI Security Services Limited dated 30 August 2008 (as amended on 11 August 2009 and 10 November 2009) which, in summary, provides first priority to the ANZ up to \$50,044,000 plus interest and costs with respect to the Nenandie and Narcooyia properties. Now produced and shown to me marked **MAK-42** is a copy of the Nenandie Deed of Priority.
- 42 Certain of the securities held over the assets of Almond Land and Timbercorp are subject to a deed of priority dated 30 December 2008 (**Syndicate Deed of Priority**) between Almond Land, Timbercorp, Almonds Australia Pty Ltd (In Liquidation), B.B. Olives Pty Ltd (In Liquidation), ANZ and BOSI Security Services Limited (as amended on 11 August 2009 and 10 November 2009). In summary, the Syndicate Deed of Priority provides first priority to BOSI Security Services Limited up to \$202,556,960 plus interest and costs with respect to the securities listed. Now produced and shown to me marked **MAK-43** is a copy of the Syndicate Deed of Priority.
- 43 Some of the securities were created within six months from the commencement of the Timbercorp Group's winding up. We have reserved our rights regarding the validity of these securities.
- 44 In addition, ANZ provided a Loan Facility for \$150m to Timbercorp Finance dated 21 August 2006 (as amended and restated on 13 July 2007, October 2007 and 27 March 2008) (**ANZ Loan Facility**) in order, amongst other things, to fund loans made by

Timbercorp Finance to Growers in the Almond Projects. Now produced and shown to me marked **MAK-44** is a copy of the ANZ Loan Facility.

- 45 The appointment of administrators to TSL and the Timbercorp Group without the consent of the relevant secured creditors triggered a breach of covenant of the various facility agreements described above. As such, on 29 April 2009 ANZ served a notice of default in respect of the ANZ Almond Facility. Now produced and shown to me marked **MAK-45** is a true copy of the notice of default served in respect of the ANZ Almond Facility.
- 46 Further, the appointment of administrators to TSL and the Timbercorp Group without the consent of the relevant secured creditors also constituted an event of default on 23 April 2009 under the BOSI Registered Land Mortgage and the BOSI Water Mortgage. BOSI Security Services Limited did not waive that event of default in writing.

Administration strategy

- 47 On 5 May 2009, the first meetings of creditors of each of the Timbercorp Group were held pursuant to section 436E of the Corporations Act. The first meetings of creditors of each of the Timbercorp Group (save for TSL) were held at 11 am in Melbourne. Approximately 200 creditors and observers attended those meetings of creditors. Now produced and shown to me marked **MAK-46** is a true copy of the minutes (excluding the attendance register) of the first meetings of creditors of each of the Timbercorp Group, with the exception of TSL.
- 48 The first meeting of creditors for TSL was held at 2 pm on 5 May 2009. Approximately 1000 creditors and observers attended the first meeting of creditors of TSL, many of those comprising or representing Growers. Now produced and shown to me marked **MAK-47** is a true copy of the minutes (excluding the attendance register) of the first meeting of creditors of TSL.
- 49 At the first creditors' meeting for TSL, I informed the creditors of TSL of the conclusions reached by Ms Chesser and I that:
- (a) the then position of TSL was bleak, with insufficient funds to continue operations;
 - (b) there were many complex issues ahead for TSL, including a web of legal documents and ownership interests, as well as multiple managed investment schemes at varying stages of their life cycles;
 - (c) TSL has dual functions, to act as the RE and in its personal capacity;
 - (d) due to the complexities of TSL's multiple functions and obligations, it was unclear what the assets at that time were available to creditors and when they may be realised;

- (e) in order to continue operations, TSL would be dependent upon funding from multiple sources, and the ongoing provision of corporate head office support from Timbercorp;
- (f) the administrators of TSL needed to analyse assets and liabilities on a Project by Project basis to determine the resulting cash flows and no certainty could be given to any creditors at this initial stage.

50 In relation to the horticultural schemes, I informed the creditors of TSL (as was the fact) that the horticulture operations had insufficient funds to continue operations. I confirmed the majority of head leases of land were paid up until 30 June 2009, and that the Timbercorp intermediary management entities had no funds to meet obligations to third party managers. I concluded by saying that significant amounts were owed to third party service providers and this had the potential to impact on the ability of some service providers to continue managing the schemes.

51 Upon our appointment as administrators, Ms Chesser and I implemented a three point plan which comprised:

- (a) an immediate suspension of forestry and horticulture operations to enable funding options to be determined;
- (b) commencing the process of assessing the viability of each project and seeking to develop and execute a strategy for each forestry and horticulture project on a project by project basis; and
- (c) attending to statutory reporting, investigations, creditor and shareholder liaison.

52 The review of each Project in order to develop a strategy was both complex and time consuming and significant resources were dedicated to that review. In the course of our review, we undertook the following tasks:

- (a) reviewing forestry and horticultural land and equipment lease commitments;
- (b) reviewing forestry and horticulture scheme documents pertaining to distribution of harvest proceeds;
- (c) held meetings with horticultural project partners to discuss immediate operational issues in relation to their respective schemes;
- (d) investigating property used in connection with the Projects and the business affairs, financial circumstances and viability of the Projects; and

- (e) reviewing Projects from two perspectives, the Grower and the manager of each Project and analysing and considering a strategy for each Project and considering whether a project meeting of Growers ought to be held.

53 I explained the results of the investigations described above conducted in respect of the 2002, 2005, 2006 and 2007 Almond Projects in exhibits **MAK-8 - MAK-11** to this affidavit.

Financial position of the Timbercorp Group

54 Since the date of our appointment, Ms Chesser and I have undertaken the following investigations in relation to the financial position of the Timbercorp Group:

- (a) examining the flow of funds through the various Timbercorp Group and the use of intercompany accounts;
- (b) assessing the process for receipt and distribution of harvest proceeds to the Timbercorp Group and Growers;
- (c) preparation of corporate and operational cash flows to understand the Timbercorp Group monthly commitments;
- (d) assessing each Project to understand the underlying viability of the Project from both a Grower and Timbercorp Group perspective; and
- (e) analysis of the Grower loan arrears.

55 Preliminary investigations indicated that the Timbercorp Group had combined liabilities of \$661 million owing to secured lenders, \$250 million owing in other loans and debts, \$14 million owing to unsecured creditors and \$5 million owing in respect of employee entitlements (including redundancy payments).

56 Preliminary investigations also indicated that the Timbercorp Group had combined assets of 120,000 hectares of large scale forestry and horticulture land (owned or leased), approximately 150,000 mega litres of water rights, \$478 million in loans (mostly due from Growers) and some plant and equipment.

57 In my affidavit sworn 4 June 2009 and filed in Supreme Court Proceeding No. 7114 of 2009, I summarised TSL's then financial position as follows:

- (a) TSL had no funds on hand, in its own capacity. To the extent that it did come into funds (for example, fees it may have been entitled to under scheme documents) such funds would be insignificant compared to the funds required by TSL to meet its obligations as RE. TSL also held Grower proceeds on trust in agency accounts

but these funds beneficially belonged to Growers and, as such, were not available for use by TSL in its own right.

- (b) TSL, in its own right, had no significant assets;
- (c) TSL had no employees; and
- (d) TSL had no infrastructure.

58 Further, I also deposed:

- (a) the quantum and timing of harvest proceeds of a number of the Timbercorp Projects was uncertain;
- (b) the majority of head leases of the land which was utilised in relation to the Timbercorp Projects (including the Almond Projects) (many of which were with the Timbercorp Group and some of which were with third party landowners) were only paid until 30 June 2009;
- (c) due to direct and joint venture ownership in a number of schemes, the Timbercorp Group was required to contribute to ongoing Project costs. The Timbercorp Group did not have the financial capacity to meet these ongoing obligations;
- (d) Timbercorp had historically borne a portion of the management costs of many of the Projects pending receipt of harvest proceeds or payment by Growers of management fees in arrears, but Timbercorp was not in a position to do so in the future;
- (e) Timbercorp Finance, a Timbercorp subsidiary, had historically provided finance to certain Growers, to enable them to pay their ongoing scheme obligations and Timbercorp Finance was no longer in a position to continue to finance Growers.

Now produced and shown to me marked **MAK-48** is a copy of my affidavit sworn 4 June 2009.

59 In that affidavit I also deposed that approximately \$247 million was required for operations, rental and other expenditure (**opex**) in relation to the Almond Projects for the 2010 crop management and harvest over the following 12 months. TSL did not have \$247 million. Under the Almond Project constitutions, TSL was not permitted as RE to borrow \$247 million, or any funds at all. TSL could have invoiced Growers for the estimated opex of the 2010 crop management and harvest. Historically, TSL did so in September each year, requiring Growers to pay their proportionate contributions of the opex by the end of October of that year. Historically, Timbercorp paid for the opex for the months of July, August, September and October, and then collected the estimated opex from Growers for

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the period of July to June at the end of October in each year. In other words, Timbercorp invoiced Growers four months in arrears and eight months in advance.

60 However, even if TSL then invoiced the Growers for the opex for the 2010 crop management and harvest, we knew that it would not be paid in full by them. First, Timbercorp Group owned (either as joint venture partners or as holder of lots in their own right) a small percentage of the interest in the Almond Projects and as those companies were insolvent, they could not pay any opex charge levied on them by TSL. Secondly, some Growers had previously been able to borrow contributions from Timbercorp Finance but it too was insolvent and could not make further advances to Growers who required financial assistance. Thirdly, a percentage of Growers would, in any event, default in making payments.

61 On that basis, we determined that TSL was hopelessly insolvent and was unable to continue managing the registered Almond Projects. At that time, we also determined that Almond Management was hopelessly insolvent and was unable to continue managing the 2002 Private Offer Project.

62 The insolvency of TSL and the Timbercorp Group is also described in the Administrators' Report made pursuant to section 439A of the Corporations Act and dated 18 June 2009 (**Creditors' Report**). Now produced and marked **MAK-49** is the Creditors' Report. TSL's position is set out at pages 16 and 17 of the Creditors' Report. The report of the directors of TSL appears at Appendix 9 to the Creditors' Report and a summary of the historical management accounts of the Timbercorp Group, including of TSL, is attached as Appendix 10 to the Creditors' Report.

Viability of the Almond Projects

63 Now produced and shown to me marked **MAK-50** is a chart which I exhibited to my affidavit sworn 4 June 2009 setting out, in relation to each of the 2001 - 2007 Almond Projects, a forecast for each of the net sales, the gross proceeds, the total operating expenditure for the 2010 harvest, the net operating cashflow, and operating cashflow over time, for each Project.

64 These charts were prepared from historical accounts for those Almond Projects, Timbercorp management budgets and assumptions, and available third party data. It is clear from the chart that each of the Almond Projects was unable to meet their obligations, as and when they fell due. On that basis, I stated in my affidavit sworn 4 June 2009 that each of the Almond Projects was insolvent. I deposed that, in simple terms, the proceeds of sale for the almonds to be harvested in 2010 would have been less than the cost of growing them.

65 Further, I deposed that, having regard to the then financial position of TSL, the cash requirements to complete the management and harvest of the 2010 almond crops, the likelihood of Grower defaults and the insolvency of the Timbercorp Group of Companies, I stated in my affidavit sworn 4 June 2009 that I did not believe that it was in the best interests of Growers for KordaMentha to raise invoices requesting them to pay the estimated opex for the 2010 financial year on an accelerated basis, or at all.

66 As described in my affidavits sworn in relation to each of the 2002, 2005, 2006 and 2007 Almond Projects (which appear as exhibits **MAK-8 - MAK-11** to this affidavit), we also prepared a long term viability analysis based on Timbercorp management's cashflow model for each of those Almond Projects (**Viability Analysis**). We outlined that information to demonstrate a range of possible outcomes for Growers, but we did not hold out any one outcome as being more likely to be achieved than any other. The Viability Analysis prepared in respect of each of the 2002, 2005, 2006 and 2007 Almond Projects shows the net present value (**NPV**) of estimated future cash flows on a per lot basis at three different discount rates (10%, 15% and 20%). The expected level of future cash flows are particularly influenced by the price achieved for the crop each year, crop yield (kilograms of almonds per hectare) and the allocation of permanent water rights. To demonstrate the potential impact of these variables on the NPV the Viability Analysis included a sensitivity analysis. The base case included in the sensitivity analysis was provided by Timbercorp management. The base case forecasted that the average price of almonds of \$5.22 per kilogram would increase to \$6.09 in 2010 and \$6.70 for the 2011 crop.

67 The three sections of each Viability Analysis show:

- (a) first, the impact of price on Almond Project NPV;
- (b) second, the impact of variations in crop yields (+ / - 15%) on Almond Project NPV; and
- (c) third, the impact of varying permanent water right allocations on NPV.

68 The Viability Analysis for each of the 2002, 2005, 2006 and 2007 Almond Projects suggests that if the base case assumptions concerning yield and water allocations are realised an average almond price of between \$6/kg and \$7/kg is required to achieve a positive NPV, depending upon the particular Almond Project.

69 The NPV calculations assume that the permanent water rights and irrigation infrastructure necessary to operate the Almond Projects have been provided. However, the results of each Viability Analysis suggested that:

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- (a) in respect of the 2002 Almond Project, capital expenditure of \$0.13 million was still required for 2002 Almond Early Project and \$0.7 million was still required for the 2002 Almond Standard Project in addition to the cash flows identified above;
- (b) in respect of the 2005 Almond Project, capital expenditure of \$14.96 million was still required for this project in addition to the cash flows identified above;
- (c) in respect of the 2006 Almond Project, capital expenditure of approximately \$47 million was still required for this Project in addition to the cash flows identified above; and
- (d) in respect of the 2007 Almond Project, capital expenditure was still required for this Project in addition to the cash flows identified above in the amounts as follows:
 - (i) 2007 Almond Early Project, \$69.85 million;
 - (ii) 2007 Almond Post June Project, \$6.29 million; and
 - (iii) 2008 FinYr Almond Project, \$228.80 million.

70 As such, we determined from the results of the Viability Analysis for each of the 2002, 2005, 2006 and 2007 Almond Projects that the actual NPV for each project, from a Grower perspective, would be lower than the amounts included in the sensitivity analysis to the extent Growers would have been required to make additional contributions to meet the capital expenditure requirements. I noted the potential for difficulties in binding Growers to those additional cost commitments outlined above.

Steps to wind up the Almond Projects

71 Following our assessment of the financial position of the Timbercorp Group and, in particular TSL as RE of the Almond Projects, and also our assessment of the viability of the Almond Projects themselves, Ms Chesser and I formed the view that the only option available to us was to seek a winding up of the Almond Projects which would allow for an orderly realisation or recapitalisation of the Almond Projects.

72 On 3 June 2009, a meeting of the committee of creditors of TSL was held, concurrently with the meetings for the committees of creditors for other Timbercorp Group. The committee of creditors comprises:

- (a) financiers;
- (b) landlords; and
- (c) Grower/investor representatives.

73 I informed TSL's committee of creditors that Ms Chesser and I would be making an application to the Court seeking directions that, amongst other things, we were justified in applying to formally wind up the Almond Projects under the Corporations Act. That application was considered necessary because we apprehended that Growers would

criticise us for seeking to wind up the Almond Projects, and we sought protection from the Court. This would also allow the Growers to be heard in relation to the process.

- 74 As had been discussed at the meeting of the committee of creditors of TSL and the meetings for the committees of creditors for the other Timbercorp Group companies, on 4 June 2009, we filed an originating process seeking a direction that we were justified in applying to wind up the Almond Projects. We explained to the Court in that application that TSL, the RE, was hopelessly insolvent, and we did not have the money required to continue maintaining the Almond Projects. I note that the 2002 Private Offer Project was not the subject of these Court proceedings.
- 75 On 5 June 2009, at the first directions hearing of this originating process, Clarendon Lawyers (**Clarendons**) appeared for a Grower, Chris Garnaut, to oppose the direction.
- 76 On 10 June 2009 and 14 June 2009, when the matter was further heard, Counsel appeared on behalf of the then newly formed unincorporated association of Timbercorp Growers established by Chris Garnaut, named Timbercorp Growers Group (**TGG**). Chris Garnaut is the chairman of the TGG.
- 77 On 17 June 2009 Justice Robson made a direction that we were justified in procuring TSL to apply to wind up the Almond Projects.
- 78 After the Court directed that we were justified to apply to wind up the Almond Projects, we sought that relief in relation to the Almond Projects. The hearing of the winding up applications was held from 15 July 2009 to 20 July 2009.
- 79 TGG opposed the winding up applications. TGG also issued an interlocutory application seeking the appointment of a temporary replacement RE for the Almond Projects. As at the date of swearing this affidavit, no alternative RE has provided its unconditional consent to replace TSL as RE of the Almond Projects. (However, I am aware that a meeting of the Growers in various Timbercorp projects including the Almond Projects has been scheduled for 12:00 pm on 4 March 2010 at Powerhouse, Albert Park Lake, Melbourne at which it may be proposed that a company called Mediterranean Olives Estate Limited be appointed as replacement RE to those projects).
- 80 The TGG submitted amongst other things that the Court should not wind up the Almond Projects because the winding up order may of itself immediately extinguish Growers' rights, which they were anxious to avoid. The TGG also submitted that the Growers did not wish the Almond Projects to be terminated and should be given an opportunity to consider their options at a meeting of Growers. We submitted that the winding up order would not have that immediate effect. We also submitted that because the RE was hopelessly insolvent

and the Almond Projects required an injection of immediate cash that we did not have and could not realistically raise from Growers, the Almond Projects should be wound up.

- 81 On 20 July 2009 the winding up applications were adjourned by consent with Orders by Justice Robson that we cause TSL to call separate meetings of the Almond Projects to put Grower resolutions before the Growers.

Meetings of Almond Growers

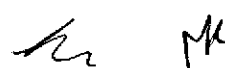
- 82 On 31 July 2009, pursuant to the orders made by Justice Robson on 21 July 2009 (the **21 July Orders**), we caused TSL to hold concurrent meetings of the Growers in the 2001-2007 Almond Projects (**Meetings**). Matthew Walsh, Special Counsel of Gadens Lawyers, agreed to take the role of chairperson at the Meetings (**Chairman**).

- 83 On 24 July 2009, in accordance with the process stipulated by the 21 July Orders my staff sent a notice of meeting and a proxy form by e-mail or post to the 6,957 Growers in the Almond Project. The number of letters and emails sent by my staff is summarised in the following table.

Almond Project Year	Letters	Emails	Total
2001	102	81	183
2002	340	262	602
2003	576	362	938
2004	438	225	663
2005	466	202	668
2006	1,204	511	1,715
2007	1,657	531	2,188
Total	4,783	2,174	6,957

- 84 Now produced and shown to me marked **MAK-51** is the notice of meeting with an example of the proxy form (for the 2001 Almond Project Meeting). Of the 4,783 letters sent via post, 27 were 'Returned to Sender'.

- 85 On 27 July 2009, my staff sent a further 3,850 email notifications to those Growers who also had their business email addresses registered with TSL. This was in addition to the emails and letters sent by post on 24 July 2009. Therefore, all Growers who we emailed on 27 July 2009 had already been notified of the Meetings by post.



- 86 On 28 July 2009, I arranged to have posted on the ABL and KordaMentha websites the following documents:
- (a) Notice of meeting;
 - (b) Proxy forms;
 - (c) An explanatory statement from the TGG Growers. Now produced and shown to me marked **MAK-52** is TGG's explanatory statement; and
 - (d) An opinion of Charles Scerri QC. We briefed Mr Scerri QC to provide a written opinion to advise whether each resolution (if passed) would be effective to amend the Constitutions or otherwise to alter the legal rights or obligations of the Growers, or the legal rights, powers and obligations of TSL as the RE of the Almond Projects. He advised that they would not be. Now produced and shown to me marked **MAK-53** is the opinion of Charles Scerri QC (**Opinion**).
- 87 TGG posted on their website (<http://www.timbercorpgrowergroup.com.au/>) the notice of meeting, proxy forms and their explanatory statement. They did not post Mr Scerri QC's opinion but told readers to "please ignore the legal advice of Charles Scerri ... posted on the KordaMentha website, as TGG believes this advice is fatally flawed". Now produced and shown to me marked **MAK-54** is a print out of the TGG website home page on 29 July 2009.
- 88 The deadline for proxy forms to be returned was 4 pm on 30 July 2009, the afternoon before the meeting. We also accepted proxy forms presented at the Meetings on 31 July 2009. In total we received 2926 proxies.
- 89 The Meetings were held in the Victory Room at Etihad Stadium. Approximately 350 Growers and interested parties attended in person. Now produced and shown to me marked **MAK-55** is a transcript of the Meetings (**Transcript**). The structure of the Meeting was:
- (a) Introduction by the Chairman (page 1 of the Transcript);
 - (b) Update by the liquidators, which I presented (pages 1 to 4 of the Transcript). Now produced and shown to me marked **MAK-56** are the PowerPoint slides of my presentation;
 - (c) Comments by Chris Garnaut on behalf of TGG (pages 5 to 7 of the Transcript);

- (d) Presentation by Stephen Lynch on the almond industry in Australia and world wide (pages 7 to 14 of the Transcript). Now produced and shown to me marked **MAK-57** are the PowerPoint slides of Mr Lynch's presentation;
- (e) Presentation by Sam Baillieu on behalf of Align Funds Management Limited (pages 14 to 16 of the Transcript). Now produced and shown to me marked **MAK-58** are the PowerPoint slides of Mr Baillieu's presentation;
- (f) Questions from the floor (pages 16 to 37 of the Transcript); and
- (g) Voting (pages 37 to 39 of the Transcript).

90 The following resolutions were put to the Growers (the amendments relate to the Constitutions for each of the relevant Projects):

- (a) a resolution that the constitutions of the Almond Projects continue and not be wound up (**Resolution 1**);
- (b) a special resolution that the constitutions of the Almond Projects be modified as follows (**Resolution 2**):
 - (i) inserting after Clause 11 the following clause:
 "11A Responsible Entity's additional powers
 The Responsible Entity has the power to:
 - (A) borrow, for the limited purpose provided in sub-clause (d) below (and repay such borrowing and pay interest and costs in relation to such borrowing from monies in the Agency Account);
 - (B) grant security over the moneys in the Agency Account, for the limited purpose provided in sub-clause (d) below;
 - (C) advance funds using the moneys in the Agency Account, for the limited purpose provided in sub-clause (d) below;
 - (D) seek out, negotiate and implement any restructure proposal and working capital funding proposal to be approved by Growers by ordinary resolution;"
 - (ii) Inserting after Clause 14 the following clause:
 "14A Responsible Entity's entitlements
 The Responsible Entity is entitled to pay or be reimbursed for expenses reasonably and properly incurred in relation to sub-clause 11A(d) out of the Agency Account.";
 - (iii) replacing the words, "five months after 30 June each year" in sub-clause 13.7(d) with the words, "eleven months after 30 June each year".
- (c) Subject to Resolution 2 being passed, an ordinary resolution approving a working capital funding proposal in terms put to such meeting (**Resolution 3**).



- (d) Subject to Resolution 2 being passed, an ordinary resolution (**Resolution 4**):
 - (i) that it is in the best interests of Growers to have the opportunity to consider a restructure proposal which may or may not include all or any of the following:
 - (A) converting Growers' interests to ownership interests;
 - (B) the issue of listed or unlisted securities in exchange for Growers' interests; and
 - (C) the converting of meetings under section 411 of the Corporations Act for Growers to approve a compromise of their contractual claims against Timbercorp Securities Limited (in Liquidation) ACN 092 311 469 and related bodies corporate as defined in the Corporations Act;
 - (ii) that the responsible entity take or cause to be taken all necessary and incidental actions to allow the restructure proposal to be submitted to Growers for their consideration at one or more meetings of Growers (whether in their capacity as members of the Scheme, creditors of the Timbercorp Group (all in Liquidation) or otherwise).
- (e) A resolution that proposed resolutions 6 and 7 be held over to an adjournment of the meeting (**Resolution 5**).
- (f) An extraordinary resolution that TSL be removed as responsible entity (**Resolution 6**).
- (g) An extraordinary resolution choosing a company to be the new responsible entity (**Resolution 7**).
- (h) Alternatively, a resolution that the TGG prosecute the Interlocutory Processes forthwith (**Resolution 8**).

91 All of the Meetings reached the quorum of 25%. Voter turnout (including proxy votes) was between 39% (2001 Almond Project) and 57% (2005 Almond Project). The Growers passed the first five Resolutions and Resolution 8 in every Almond Project. The only exception to this was Resolution 2 in the 2002 Almond Project. Timbercorp and Timbercorp Lot Investments Limited (In Liquidation) (ACN 125 427 492) (**Timbercorp Lot**) are Growers in the 2002 Almond Project. I voted those entities' interests and voted against Resolution 2. Now produced and shown to me marked **MAK-59** is a table of the results of the voting of the Meetings.

92 The returning officer, Paul Jones, a manager at KordaMentha, reported the results to the Chairman on 3 August 2009. Paul Jones explained that Resolution 2 had not been passed as a result of Timbercorp and Timbercorp Lot voting their interests in the 2002 Almond Project. Now produced and shown to me marked **MAK-60** is a copy of the e-mail from Paul Jones to the Chairman.




- 93 The Growers had intended to put a specific recapitalisation proposal before the Meetings but were unable to do so because they had not been able to put together a proposal which could be voted on by Growers. As noted above, Resolution 5 was a resolution that Resolutions 6 and 7 be held over to adjournment of the Meetings. Resolution 5 was passed for all 2001-2007 Almond Projects. As a result, at the conclusion of the meeting, the Chairman did not close but instead adjourned the Meetings to a date to be fixed.
- 94 The Chairman certified the results and returned them by e-mail on 4 August 2009. Now produced and shown to me marked **MAK-61** is a copy of that email with the certified results attached. I arranged for these results to be uploaded to the ABL and KordaMentha websites on 4 August 2009.
- 95 If the constitution of a registered managed investment scheme has been modified by a special resolution of the members of the scheme, I am told by Jane Sheridan of ABL that section 601GC of the Act requires the RE to lodge with ASIC a copy of the modification. I do not think that Resolution 2 was effective to modify the constitutions of the Almond Projects. However, I caused those amendments to be lodged with ASIC on 11 August 2009. Now produced and shown to me marked **MAK-62** is a deed recording the special resolutions that were passed to amend the constitutions (**Deed**).
- 96 While Resolution 2 was not passed for the 2002 Almond Scheme (as I note above) because I voted the Timbercorp interests, I deducted those votes before calculating whether Resolution 2 had passed for the purposes of lodging the Deed with ASIC. The Deed therefore records amendments to the constitutions of all of the Almond Projects.

Resumed winding up applications

- 97 On 17 August 2009, Ms Chesser and I pressed our application to wind up the Almond Projects as TSL remained hopelessly insolvent and the Almond Projects each had a cashflow deficiency. We had discussed between ourselves our concern about the risk of severe wastage of the almond orchards if the almond assets were not sold or Almond Projects recapitalised in the near term. We also decided that in order to achieve the best outcome for the stakeholders, we would need to demonstrate to a potential bidder that it could, if it wished, buy the Almond assets with title clear from the secured creditors' claims and the Growers' claims. (By way of example, prior to the voluntary administration the Timbercorp Group attempted to sell some of the assets subject to Forestry Projects, but the process failed in part because of the complexity of the Project structure and the inability to give clear title to a purchaser).
- 98 TGG again opposed the winding up of the Almond Projects. As an alternative to immediately winding up the Almond Projects, Ms Chesser and I resolved to seek directions

from this Court that we were justified in amending the Constitutions of the Almond Projects to give the RE an express power to terminate Growers' rights so that we could engage in an orderly sale or recapitalisation process.

- 99 On 21 August 2009 Justice Robson made a direction that we were justified in causing TSL to amend the constitutions of the 2001-2007 Almond Projects to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sub-lease/Licence and Joint Venture Agreement". Now produced and shown to me marked **MAK-63** is the order of Justice Robson made 21 August 2009 (the **21 August Order**).
- 100 On 28 August 2009, the constitutions were amended accordingly and I caused the amendments to the Almond Project constitutions to be lodged with the ASIC. Now produced and shown to me marked **MAK-64** are the deeds amending the Almond Project constitutions.

Communication with Growers

- 101 When Justice Robson made the 21 August Order, Ms Chesser and I also formally undertook to convene fortnightly meetings of the executive of the TGG (Christopher Garnaut, David Haintz, Kerree Bezencon, Neil White and Darren Steinhardt) to provide updates regarding the sale or recapitalisation of Almond Projects and to consult with the TGG after the receipt of all bids under the sale process and before entering into a sale of the assets relating to the Almond Projects. The consultation was conditional on members of the TGG providing confidentiality undertakings, which they gave. This cleared the way for a consensual sale and recapitalisation process of the Almond assets.
- 102 We held Almond Project related meetings with the TGG on:
- (a) 25th August at 2.30 pm;
 - (b) 2nd September at 9 am; and
 - (c) 15th September at 10 am.
- 103 Throughout the sale or recapitalisation process, we communicated with the Growers' representatives and secured creditors and continued to update the ABL and KordaMentha websites about that process. We and our staff at KordaMentha and our solicitors ABL, engaged in numerous telephone discussions, in-person discussions and e-mail correspondence with the TGG and Clarendons.

Sale or Recapitalisation Process

- 104 On 4 August 2009, Ms Chesser and I published an advertisement in the Australian Financial Review in which we sought expressions of interest for the possible purchase of the assets used in conjunction with the Almond Projects or the recapitalisation of the Almond Projects. Now produced and shown to me marked **MAK-65** is a copy of the advertisement that appeared in the Australian Financial Review on 4 August 2009.
- 105 As part of the sale and recapitalisation process, we resolved to consider all bona fide alternative proposals to replace TSL as RE for any one or more of the Almond Projects if that proposal was in the best interest of Growers and to make all necessary information available to bona fide parties who wished to consider such a proposal.
- 106 In relation to the 2002 Private Offer Project, Almond Management was required to retire immediately as project manager if it went into liquidation other than for the purposes of reconstruction or amalgamation or a controller or an administrator was appointed in relation to all or any part of its undertaking.
- 107 Following our appointment as administrators of Almond Management, we sought consent from the Growers for Almond Management to remain as project manager. We did so because we formed the view that in order to maximise the sale proceeds of the assets used in conjunction with the Almond Projects for all stakeholders it would be better for there to be only one sale or recapitalisation process managed by us. We obtained the consent of most, but not all, Growers. The PMA does not contain any provisions allowing for a majority of Growers to bind all Growers in this regard. However, Almond Management has continued to act as project manager of the 2002 Private Offer Project.
- 108 Andrew Malarkey, a partner of KordaMentha, had responsibility for coordinating the expressions of interest. Mr Malarkey has informed me of the matters which I depose to below.
- 109 A number of parties contacted KordaMentha, and some executed a Confidentiality Agreement (the **Interested Parties**). Upon execution, each of the Interested Parties was provided with a copy of a confidential Information Memorandum prepared by KordaMentha (**IM**) and a clarification to the IM. Each of the Interested Parties was also granted access to an on-line data room which contained confidential information about the Almond Projects.
- 110 The assets (together the **Almond Assets**) that we offered for sale were described in the IM as follows:
- (a) 11,900 hectares of high-yielding premium quality almond orchards in various stages of growth located in the Sunraysia region of northwest Victoria including:



(i) 8,100 hectares of freehold planted orchards spanning across six sites; and

(ii) 3,800 hectares leasehold interest of planted orchards spanning two sites.

(together **Properties**)

(b) 40,800 mega litres per annum of permanent water rights (**PWR**) linked to the Properties.

111 The IM also advertised for sale:

(a) Timbercorp's 11.6% (4,500,000 shares) ownership in Select Harvests Limited (ACN 000 721 380) (ASX:SHV) (**Select**). (**Select** is the almond orchard manager);

(b) Timbercorp's 46.4% ownership interest in Timbercorp Primary Infrastructure Fund (ARSN 116 024 830) (**TPIF**) (owner of the leasehold interest);

(c) 48,300 mega litres per annum of PWR leasehold interest; and

(d) 9,600 mega litres per annum of additional PWR not linked to the Properties.

However, those assets were ultimately not sold to the purchaser of the Almond Assets.

112 Some of the land on which the Almond Projects are operated did not form part of the Almond Assets as it is owned, directly or indirectly, by TPIF, through two of its wholly owned sub-trusts, Timbercorp Orchard Trust #3 (**TOT#3**) and Timbercorp Orchard Trust #5 (**TOT#5**). These are the Liparoo and Yungera properties (which incorporates properties known as Wandown and Wangera). Now produced and shown to me marked **MAK-66** is a map showing marked in orange the location of the Almond orchards. Those marked in a black line are owned by TPIF. All others marked in orange are owned by Almond Land. The latter properties formed part of the Almond Assets offered for sale under the IM.

113 The IM set out a timetable, which we also communicated to TGG on 25 August 2009 at the meeting on that day, for the sale or recapitalisation process and stipulated that the closing date for first and final binding offers was 5.00 pm on Friday, 28 August 2009.

114 The IM stipulated that any final binding offer to include a completed price allocation schedule which required each bidder to ascribe a dollar value to the water rights, land, plant and equipment, trees and cultivation and harvesting rights (cropping rights) in each of the Almond Projects. This was included to assist us in determining the apportionment of sale proceeds between the various assets and various creditor groups. The issue was also discussed between counsel and Justice Finkelstein in Federal Court Proceedings VID 595 of 2009 and between counsel and Justice Robson in Supreme Court Proceeding 7114 of 2009. Now produced and shown to me marked **MAK-67** are the extracts of the transcripts from those discussions between Court and counsel.

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- 115 We received seven bids for the Almond Assets. All were conditional on a transfer of clear title to the Almond Assets, unencumbered by the Growers' rights. While bidders were requested to apportion the purchase price between several categories, including cropping rights, each of the bidders in fact only apportioned between PWR and other assets.

Olam Orchard's Bid

- 116 On 11 September 2009 Ms Chesser and I selected Olam Orchards Pty Ltd (**Olam Orchards**) as the preferred purchaser. In my opinion, the terms and conditions that Olam Orchards offered were clearly the most favourable of all the bids received. Ms Chesser expressed the same view.
- 117 Olam Orchard's bid offered a total purchase price of \$128m allocated as \$81.65m for PWR and \$46.35m for the other Almond Assets.
- 118 In addition, Olam Orchard's bid allocated the purchase prices as \$47m to the ANZ securities (\$31.488m in PWR and \$15.512m in other Almond Assets) and \$81m to the Syndicate's securities (\$50.164m in PWR and \$30.836m in other Almond Assets).
- 119 Olam Orchards' purchase was guaranteed by Olam Limited (**Olam**). I understand from public information available to me that Olam is a listed entity on the Singapore Stock Exchange with a market capitalisation of A\$4.2 billion. Olam is a global leader in the supply chain management of agricultural products and food ingredients. It operates in 60 countries, has over 10,000 staff and more than 6,000 customers. Olam has recently raised, via debt and equity, in the order of A\$1.0 billion. I believed that Olam Orchards had the financial capacity to complete the purchase and to manage the assets. More information about Olam can be found at <http://www.olamonline.com>.
- 120 On 18 September 2009, the SPD was executed by the following parties:
- (a) Timbercorp;
 - (b) TSL in its capacity as RE of the Almond Projects and in its personal capacity;
 - (c) Almond Land;
 - (d) Almond Management;
 - (e) Ms Chesser and me;
- (together, the **Sellers**)
- (f) Olam Orchards; and
 - (g) Olam.

Handwritten signatures in black ink, appearing to be 'hr' and 'MK'.

Now produced and shown to me marked confidential exhibit **MAK-68** is the SPD. The SPD is subject to confidentiality orders made by Justice Robson on 9 October 2009. Olam Orchard and Olam also assert that the SPD imposes continuing confidentiality obligations on the parties.

- 121 Between the date of executing the SPD and settlement Olam Orchards nominated the consideration to be attributed to the PWR and the Properties for the purposes of the transfer instruments and the executed statutory declarations. Now produced and shown to me marked confidential exhibit **MAK-69** is a copy of a letter from Corrs Chambers Westgarth to Blake Dawson dated 18 February 2010 summarising details of the consideration to be attributed to the PWR and the Properties.
- 122 One of the conditions precedent of the SPD was that the liquidators (Ms Chesser and I) were to obtain a direction from the Court that we were justified in entering into the SPD and extinguishing Growers' rights. The deadline for the satisfaction of this condition precedent was 9 October 2009.
- 123 Another of the conditions precedent (clause 3.1 (c) of the SPD) was that the relevant secured creditors (ANZ and BOSI Security Services Limited) provide at completion:
- (a) releases of their charges in respect of any of the Almond Assets (as defined in the SPD) encumbered by the secured creditors' security; and
 - (b) discharges of the mortgages over the relevant properties and the PWR included in the sale.
- 124 Additionally, at Completion executed copies of surrender deeds for each relevant Almond Project, under which TSL or Almond Management (as appropriate) agreed to terminate or surrender the Grower Leases (as defined in the SPD) with effect from Completion, were required to be delivered to Olam (clause 7.2(b) of the SPD).

Appointment of special purpose liquidator

- 125 As a result of disagreements between the Growers and the secured creditors concerning apportionment of the Olam sale proceeds during the sale or recapitalisation process, we decided to appoint a special purpose liquidator to help facilitate the settlement of the disputes between the Growers and secured creditors and, if necessary, to provide a report to the Court on the reasonableness of any offer that we may receive for the Almond Assets.
- 126 On 11 September 2009, we filed an application in this Court for a direction in proceeding 7114 of 2009 that TSL was justified in entering into an agreement to appoint Ian Carson of PPB Australia to fulfil the role of a special purpose liquidator in relation to the Almond Projects. We considered we would be aided by appointing Ian Carson to assist with the

conflicts between our roles as liquidators of TSL and Almond Land. These conflicts are explained in more detail in the affidavit of Andrew Malarkey filed in support of the application for a direction. Now produced and shown to me marked **MAK-70** is the interlocutory application and Andrew Malarkey's affidavit.

- 127 On 14 September 2009 the hearing of that application took place before Justice Robson who ordered that the liquidators were justified in appointing Ian Carson as special purpose liquidator. Now produced and shown to me marked **MAK-71** is the judgment of Justice Robson directing we were justified in appointing Ian Carson by private treaty to fulfil the role of a special purpose liquidator.
- 128 Ian Carson retained Mallesons Stephen Jaques to advise him independently in relation to his appointment and discharging his function.
- 129 Ian Carson began discussions with the stakeholders, including the TGG, before the Court made the direction on 14 September 2009. His retainer required him to consider whether he would or would not accept Olam Orchard's offer if he were the liquidator of TSL. He was also asked to consider the apportionment of the sale proceeds between the Growers, in return for surrender of the Growers' sub-leases/licence and joint venture agreements, and the secured creditors in return for the release of their securities.
- 130 The TGG and secured creditors indirectly negotiated with one another, in the main through either Ian Carson or myself and our respective lawyers. In a letter of offer dated 30 September 2009 (the **Bank Offer**), the secured creditors authorised Almond Land to make a conditional offer to TSL and Almond Management in exchange for the termination or surrender of the Growers' sub-leases and licence and joint venture agreements. The Growers did not accept the Bank Offer and no agreement has been reached regarding apportionment of the sale proceeds.
- 131 On Friday 2 October 2009, we requested that Ian Carson complete his report based on the SPD and the then state of the negotiations. On 4 October 2009 (early Sunday morning) Ian Carson issued his report. Now produced and shown to me marked **MAK-72** is Ian Carson's report.

Application to approve sale to Olam

- 132 As liquidators of Almond Land, Ms Chesser and I supported the Olam Orchard offer contained in the SPD and the Bank Offer.
- 133 I deposed in an affidavit filed on 6 October 2009, that by accepting the Bank Offer and completing the SPD, Almond Land:
- (a) maximised value to all its creditors;

- (b) avoided the requirement for us to disclaim the sub-leases and the licence and joint venture agreements as onerous contracts under section 568 of the Corporations Act and any resultant litigation if some Growers sought to challenge those disclaimers or sought relief from forfeiture;
- (c) avoided the spectre of prolonged expensive litigation with TSL, secured creditors and Growers;
- (d) avoided damage to its property arising from cessation of maintenance of the Almond Orchards;
- (e) achieved certainty of outcome; and
- (f) reserved its rights (via the liquidators) to challenge the securities.

134 Further, as liquidators of TSL we decided to support the sale to Olam and also decided to accept the Bank Offer as it was then the best option available to TSL for the following reasons, namely:

- (a) the Bank Offer exceeded the value of the Growers' interests in the Almond Projects according to the Ian Carson report;
- (b) based on our own assessment of the commercial value of the Growers' interests in the Almond Projects, we also believed that the Bank Offer exceeded the value of the Growers' interests in the Almond Projects;
- (c) the Growers would have been relieved of any further financial obligations to contribute to the Almond Projects and would have shared rateably in the 2009 crop proceeds of about \$33m, together with Growers in the TPIF Almond Projects;
- (d) we placed less weight on both the TGG valuation reports and the Secured Creditors' Ferrier Hodgson report as, in our view, they were prepared as advocacy positions;
- (e) leaving aside the commercial value of the Growers' proprietary interests, if any, the proprietary interests of the Growers could be disclaimed or terminated by Almond Land or Almond Management given their insolvency, or may have been terminated on the winding up of the Almond Projects;
- (f) if TSL, on behalf of Growers, sought relief from the termination or to set aside the disclaimers, TSL would have been required to commence and prosecute expensive litigation and there was uncertainty as to whether TSL would succeed. TSL did not itself have the funds necessary to do so and, based on ABL advice, it was highly unlikely that TSL could obtain litigation funding to do so;

- (g) if Growers wished to seek the relief themselves (assuming they had the necessary funds to do so), their likelihood of success may have been adversely affected if the percentage of Growers seeking that relief was small. The percentage of Growers who could or would seek that relief would be impacted by the fact that Timbercorp Group entities own Almondlots and that Timbercorp Finance financed Growers to acquire their Almondlots;
 - (h) we conducted a robust recapitalisation and sale process and accepted the best offer available following a competitive bidding process and, given this, we believed that the sale to Olam Orchards should not be jeopardised;
 - (i) the satisfaction of the Immediate Conditions Precedent under the SPD, the implementation of maintenance arrangements to replace the crop sale arrangements and the Bank Offer were all required to be resolved by 9 October 2009; and
 - (j) we had also provided the forum to give all stakeholders, including the Growers, the opportunity to put forward their position and to negotiate for what they considered was the best outcome.
- 135 On that basis, on 5 October 2009, we brought an application seeking a direction from the Court that, among other things, we were justified in:
- (a) entering into and performing the SPD;
 - (b) procuring TSL to enter into and perform the SPD and terminate the Growers interests in the Almond Projects;
 - (c) disclaiming the PMA in respect of the 2002 Private Offer Project to also achieve a termination of those Grower interests in the 2002 Private Offer Project.
- 136 As previously noted, the SPD required, as a condition precedent to completion, that we obtain a direction from the Court that were justified in terminating and surrendering the Growers' sub-leases or licence and joint venture agreements. Now produced and shown to me and marked **MAK-73** is a copy of the amended originating process dated 6 October 2009 filed in Supreme Court Proceeding No. SCI 2009 9408 (**Liquidators' Almond Sale Proceeding**).
- 137 On 6 October 2009, Justice Robson heard the Liquidators' Almond Sale Proceeding.
- 138 On 8 October 2009, Justice Robson delivered a judgment in the Liquidators' Almond Sale Proceeding. Now produced and shown to me and marked **MAK-74** is a copy of Justice Robson's judgment.

139 On 9 October 2009, Justice Robson made orders in the Liquidators' Almond Sale Proceeding (**9 October Orders**). Now produced and shown to me and marked **MAK-75** is a copy of the 9 October Orders.

140 The 9 October Orders contemplated that a proceeding would be commenced to determine the rights of the Growers and the creditors who had securities over the assets the subject of the SPD to the net proceeds of the sale under the SPD (**Rights Proceeding**). Until the Rights Proceeding is heard and determined, the net proceeds of sale under the SPD are to be held on trust by Almond Land.

Completion of Olam Sale

141 On 2 December 2009, completion of the SPD occurred.

142 In accordance with the 9 October Orders, the sum of \$99,747,174.60 was transferred to the following account by Almond Land pursuant to paragraph 7 of the 9 October Orders:

Account name: Mark Korda & Leanne Chesser as liquidators of Almond Land Pty Ltd (In Liquidation) – Almond Land Settlement

BSB: 013128

Account number: 835632161

(Almond Land Account)

143 A retention amount of \$25,600,000.00 is being held in the Michael Trumble Law Practice Account in accordance with the terms of the SPD.

144 With effect on and from completion of the SPD:

(a) TSL surrendered in accordance with the Surrender Deeds all of the right, title and interest of the Participant Growers in the 2002, 2005, 2006 and 2007 Almond Projects in, arising under, or in connection with the Grower Licences (as defined in the Surrender Deeds) and those parts of all of the Almond lots as were located on the land on which the Almond Projects the subject of this proceeding were conducted (the **Surrender Deeds**).

(b) in relation to the 2002 Private Offer Project:

(i) Almond Land and Almond Management disclaimed the 2002 Private LJVA;
and

(ii) Almond Management disclaimed the PMA; and

Two handwritten signatures are present at the bottom right of the page. The first signature is a stylized 'Z' or 'L' shape, and the second is a more complex, cursive signature.

(c) the secured creditors released their security over the Almond Assets.

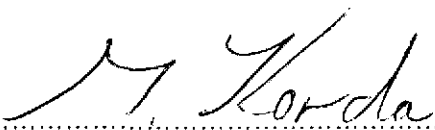
Now produced and shown to me marked confidential exhibits **MAK-76** and **MAK-77** respectively are copies of the Surrender Deeds and disclaimer notices. I am informed by Lucy Kirwan, a solicitor employed by ABL, and believe that Olam is currently asserting that the Surrender Deeds and disclaimer notices are confidential.

145 I am informed by John Bird of Select, the manager of the Almond Projects, that at the time of settlement of the sale to Olam the almond trees on the land sold to Olam as part of the Almond Assets were beginning to develop a nut, however there were no completely formed almonds. In terms of formation:

- (a) the outer hull was formed;
- (b) no shell was formed at that time, rather there was a thin membrane covering the kernel; and
- (c) the kernel/embryo was at full length, but it was still jelly-like;
- (d) during February and March (depending on variety) the kernel will harden as dry weight accumulation occurs and the hull will split as the fruit ripens ready for harvest.

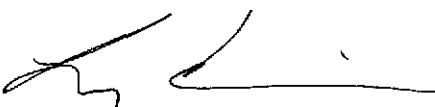
146 I am further informed by John Bird that, at the time of settlement of the sale to Olam, the nuts were not at a maturity level required for harvesting, and if watering had stopped at that time, the developing nuts would have shrivelled and died.

SWORN by **MARK ANTHONY KORDA** at)
Melbourne in the State of Victoria)
this 3rd day of March 2010.)



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Before me:



LUCY HANNAH KIRWAN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

SCHEDULE

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT**

LIST E

SCI 2009 10699

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 066 601 250) and WESTPAC BANKING CORPORATION
(ACN 007 457 141)**

Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522)**

First Defendant

and

ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)

Second Defendant

and

**MARK ANTHONY KORDA
(in his capacity as liquidator of Almond Land Pty Ltd (in Liquidation))**

Third Defendant

and

**LEANNE KYLIE CHESSER
(in her capacity as liquidator of Almond Land Pty Ltd (in Liquidation))**

Fourth Defendant