

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

**IN THE MATTERS OF:**

**Proceeding S APCI 2011 0103 (Almond Land Rights Appeal Proceeding)**

**Proceeding S CI 2011 6604 (Liparoo and Yungera Rights Proceeding)**

**Proceeding S CI 2011 6606 (Solara Rights Proceeding)**

**Proceeding S CI 2010 1354 (BB Olives Rights Proceeding)**

**Proceeding S CI 2011 6777 (Fenceport Rights Proceeding)**

**OUTLINE OF SUBMISSIONS ON BEHALF OF THE VARIOUS  
REPRESENTATIVE DEFENDANTS**

1. These submissions are made in each of the above proceedings on behalf of the various representative defendants (appellants in the Almond Land Rights Appeal Proceeding) appointed in the various proceedings **(Representative Growers)**.
2. A summary of the Representative Growers and the capacity or capacities in which they each appear is contained in Schedule 1 to these submissions.
3. These submissions address the following issues:
  - (a) the process undertaken to obtain instructions to accept the proposed settlement;
  - (b) responses to material filed in opposition to the settlement that is directed towards the Representative Growers and those who act on their behalf;
  - (c) comments or objections received from the represented parties.

4. To avoid unnecessary duplication, these submissions do not address the issues to be taken into account by the Court when considering whether to approve the settlement as we understand that this will be comprehensively addressed in the Banks' submissions.

### **Confidentiality application**

5. Schedule 2 to these submissions sets out the confidential exhibits filed by the Representative Growers. They consist of:
  - (a) privileged and confidential advice to the Representative Growers (copies of which have been supplied to represented parties on request and subject to an appropriate undertaking); and
  - (b) call sheets of correspondence from represented parties (summaries of which have been provided in Ms Armstrong's affidavit material).
6. An application for confidentiality was foreshadowed in Ms Armstrong's affidavit material. We anticipate that minutes of consent can be filed before the hearing.

### **Process undertaken to obtain instructions**

7. The process undertaken to obtain instructions to agree to the settlement is set out in the affidavits of Celia Jane Armstrong filed in the various proceedings.
8. Schedule 3 of these submissions sets out the relevant paragraphs of Ms Armstrong's affidavits filed in the various proceedings.
9. In summary, the process undertaken is as follows:
  - (a) copies of our advice were circulated to each of the representative defendants in each proceeding;
  - (b) on 20 July 2012, a meeting was held at Clarendon Lawyers' office to discuss the advice and any questions about the advice. Six

Representative Growers attended in person, two by telephone and four were unable to attend;

- (c) the Representative Growers in attendance at the meeting, both in person and by telephone, there and then gave instructions to accept the offer;
- (d) the Representative Growers who were unable to attend the meeting subsequently provided instructions to accept the offer;
- (e) the updated version of our advice was provided by email to the Representative Defendants;
- (f) on 29 August 2012 our supplementary memorandum of advice was provided to the Representative Growers by email; and
- (g) on 1 October 2012 a further supplementary note will be sent to the Representative Growers and those who had requested copies of the advice previously.

### **Response to Ms Bezencon's material**

- 10. An affidavit dated 18 September 2012 in opposition to the settlement was filed by Kerree Anne Bezencon. The vast majority of that material is objected to as inadmissible.
- 11. The fourth affidavit of Celia Jane Armstrong filed in the Solara Rights Proceeding responds to Ms Bezencon's affidavit. A copy of that affidavit is exhibited to Ms Armstrong's fourth affidavit in each of the BB Olives and Fenceport Proceedings.
- 12. In summary, Ms Armstrong gives evidence of:
  - (a) the extensive involvement of Clarendon Lawyers and the Timbercorp Growers Group in litigation following the insolvency of the Timbercorp Group;

- (b) steps taken to keep Ms Bezencon and organizations associated with her informed of developments in the various proceedings (see paragraphs 14, 18, 21 and 33-40 of Ms Armstrong's fourth affidavit);
- (c) Ms Bezencon having been involved in numerous legal proceedings relating to the Timbercorp managed investment schemes, including:
  - i. making various complaints about the bidding process and applying unsuccessfully to appoint a temporary responsible entity to the Almond Land Almond Projects (see paragraphs 10-11 of Ms Armstrong's fourth affidavit);
  - ii. unsuccessfully applying to be appointed as representative defendants in the Almond Land Rights Proceeding (see paragraphs 12-13 of Ms Armstrong's fourth affidavit); and
  - iii. unsuccessfully applying for a representative nominated by her organisation to be appointed as representative defendant in the Solara Rights Proceeding (see exhibit CJA-22 to Ms Armstrong's fourth affidavit at pp 25-31);
- (d) Clarendon Lawyers having received instructions to accept the settlement offer from each of the Representative Defendants (see paragraphs 25-29 of Ms Armstrong's fourth affidavit); and
- (e) unanswered requests made to Ms Bezencon for information (see paragraphs 30-31 of and exhibit CJA-26 to Ms Armstrong's fourth affidavit).

13. We are instructed that, at the date of this outline:

- (a) Clarendon Lawyers has attempted to contact each of the Representative Growers in the five rights proceedings to obtain affidavits from them to confirm that they were acting

independently of Mr Garnaut when giving instructions to accept the settlement offer;

- (b) Clarendon Lawyers has received confirmation from David Sydney Butterfield, Goran Runje, Robert Bugden, Michael Charles Vicary, Christopher Mark Littley, Shun King Li, Pauline Emma Hammer and Graham Goldenberg that they will swear affidavits in this regard;
- (c) Celia Jane Armstrong of Clarendon Lawyers is prepared to swear an affidavit deposing to:
  - i. instructions received from Constantine Moshopoulos and Graham Dace who are both away and will be unable to give affidavits themselves; and
  - ii. instructions received from Graeme Cole that he is prepared to give an affidavit but may not be able to do so in time;
- (d) Both Celia Armstrong and Alexandra Gleed of Clarendon Lawyers have attempted to telephone Pamela Jan Dry but have not received a response; and
- (e) appropriate affidavit material will be filed to confirm those instructions as soon as possible.

### **Outstanding costs**

- 14. There are orders in each proceeding other than the Almond Land Rights Appeal Proceeding that the Representative Growers be paid their costs from the relevant Fund on provision of a certificate from an agreed independent costs consultant.
- 15. We are instructed by Clarendon Lawyers that:
  - (a) there are costs outstanding in all proceedings other than the Almond Land Rights Appeal Proceeding;

- (b) the agreed independent costs consultant has recently indicated that she now has capacity to attend to the outstanding costs certificates whereas previously she was occupied on other matters;
  - (c) bills and files for the outstanding amounts will be provided to her shortly; and
  - (d) affidavit material will be filed shortly to confirm those instructions.
16. If a certificate of costs cannot be obtained by the hearing of this matter, it is submitted that the orders in this matter will need to allow for the payment of the outstanding amounts. Submissions will be made at the hearing as to the appropriate way to resolve that issue.

28 September 2012

Garry Bigmore QC and Sam Hopper

## Schedule 1 – Representative Growers and their capacities

### Almond Land Rights Appeal Proceeding S APCI 2011 0103

<b>Representative Grower Name</b>	<b>Scheme Representing</b>	<b>Date of Representative Order</b>
David Sydney Butterfield	2002 Timbercorp Almond Project (Private Offer) (Unregistered) 2007 Timbercorp Almond Project (ARSN 122 511 040)	22 December 2009
Graham Goldenberg	2002 Timbercorp Almond Project (ARSN 099 611 935)	22 December 2009
Christopher Mark Littley	2005 Timbercorp Almond Project (ARSN 112 935 092)	22 December 2009
Constantine Moshopoulos	2006 Timbercorp Almond Project (ARSN 118 387 974)	22 December 2009

### Boundary Bend Rights Proceeding S CI 2010 1354

<b>Representative Grower Name</b>	<b>Scheme Representing</b>	<b>Date of Representative Order</b>
Michael Charles Vicary	2006 Timbercorp Olive project (ARSN 119 182 179)	22 March 2010
Pamela Jan Dry	2007 Timbercorp Olive Project (ARSN 123 155 715)	22 March 2010
David Sydney Butterfield	2008 Timbercorp Olive Project (ARSN 129 307 722)	22 March 2010

### Fenceport Rights Proceeding S CI 2011 6777

<b>Representative Grower Name</b>	<b>Scheme Representing</b>	<b>Date of Representative Order</b>
Constantine Moshopoulos	2000 Timbercorp Olive Project (Private Offer) (Unregistered)	16 December 2011
Pauline Emma Hammer	2001 Timbercorp Olive Project (ARSN 094 382 082)	16 December 2011
David Sydney Butterfield	2002 Timbercorp Olive Project (ARSN 098 233 455)	16 December 2011
Graham Goldenberg	2003 Timbercorp Olive Project (ARSN 104 648 473)	16 December 2011
Shun King Li	2004 Timbercorp Olive Project (ARSN 108 744 378)	16 December 2011

**Liparoo and Yungera Rights Proceeding S CI 2011 6604**

<b>Representative Grower Name</b>	<b>Scheme Representing</b>	<b>Date of Representative Order</b>
Graham Dace	2001 Timbercorp Almond Project (ARSN 095 649 746)	16 December 2011
David Sydney Butterfield	2002 Timbercorp Almond Project (Private Offer) (Unregistered)	16 December 2011
Graham Goldenberg	2002 Timbercorp Almond Project (ARSN 099 611 935)	16 December 2011
Goran Runje	2003 Timbercorp Almond Project (ARSN 103 197 299)	16 December 2011
Graeme Cole	2004 Timbercorp Almond Project (ARSN 108 336 670)	16 December 2011
Christopher Mark Littlely	2005 Timbercorp Almond Project (ARSN 112 935 092)	16 December 2011

**Solara Rights Proceeding S CI 2011 6606**

<b>Representative Grower Name</b>	<b>Scheme Representing</b>	<b>Date of Representative Order</b>
Robert and Elizabeth Bugden	2005 Timbercorp Citrus Project (ARSN 114 091 299)	16 December 2011

## Schedule 2 – Confidential exhibits

### Almond Land Rights Appeal Proceeding S APCI 2011 0103

Affidavit	Date Sworn	Exhibit
Affidavit of Celia Jane Armstrong	30 August 2012	Confidential exhibit CJA-1 Confidential exhibit CJA-2 Confidential exhibit CJA-3
Third Affidavit of Celia Jane Armstrong	19 September 2012	Confidential exhibit CJA-9

### Boundary Bend Rights Proceeding S CI 2010 1354

Affidavit	Date Sworn	Exhibit
Affidavit of Celia Jane Armstrong	30 August 2012	Confidential exhibit CJA-1 Confidential exhibit CJA-2 Confidential exhibit CJA-3
Third Affidavit of Celia Jane Armstrong	19 September 2012	Confidential exhibit CJA-9

### Fenceport Rights Proceeding S CI 2011 6777

Affidavit	Date Sworn	Exhibit
Affidavit of Celia Jane Armstrong	30 August 2012	Confidential exhibit CJA-1 Confidential exhibit CJA-2 Confidential exhibit CJA-3
Third Affidavit of Celia Jane Armstrong	19 September 2012	Confidential exhibit CJA-9

### Liparoo and Yungera Rights Proceeding S CI 2011 6604

Affidavit	Date Sworn	Exhibit
Affidavit of Celia Jane Armstrong	30 August 2012	Confidential exhibit CJA-1 Confidential exhibit CJA-2 Confidential exhibit CJA-3
Third Affidavit of Celia Jane Armstrong	19 September 2012	Confidential exhibit CJA-9

### Solora Rights Proceeding S CI 2011 6606

Affidavit	Date Sworn	Exhibit
Affidavit of Celia Jane Armstrong	30 August 2012	Confidential exhibit CJA-1 Confidential exhibit CJA-2 Confidential exhibit CJA-3
Third Affidavit of Celia Jane Armstrong	19 September 2012	Confidential exhibit CJA-9

### **Schedule 3 – Evidence of process to obtain instructions to accept offer**

#### **Almond Land Rights Appeal Proceeding S APCI 2011 0103**

<b>Affidavit</b>	<b>Date</b>	<b>Paragraph Reference</b>
Affidavit of Celia Jane Armstrong (including confidential exhibits CJA-1, CJA-2 and CJA-3)	30 August 2012	5, 6, 7

#### **Boundary Bend Rights Proceeding S CI 2010 1354**

<b>Affidavit</b>	<b>Date</b>	<b>Paragraph Reference</b>
Affidavit of Celia Jane Armstrong (including confidential exhibits CJA-1, CJA-2 and CJA-3)	30 August 2012	5, 6, 7
Fourth Affidavit of Celia Jane Armstrong (including exhibit CJA-11)	25 September 2012	Paragraph 25 – 29 in exhibit CJA-11

#### **Fenceport Rights Proceeding S CI 2011 6777**

<b>Affidavit</b>	<b>Date</b>	<b>Paragraph Reference</b>
Affidavit of Celia Jane Armstrong (including confidential exhibits CJA-1, CJA-2 and CJA-3)	30 August 2012	5, 6, 7
Fourth Affidavit of Celia Jane Armstrong (including exhibit CJA-11)	25 September 2012	Paragraphs 25 – 29 in exhibit CJA-11

#### **Liparoo and Yungera Rights Proceeding S CI 2011 6604**

<b>Affidavit</b>	<b>Date</b>	<b>Paragraph Reference</b>
Affidavit of Celia Jane Armstrong (including confidential exhibits CJA-1, CJA-2 and CJA-3)	30 August 2012	5, 6, 7

#### **Solara Rights Proceeding S CI 2011 6606**

<b>Affidavit</b>	<b>Date</b>	<b>Paragraph Reference</b>
Affidavit of Celia Jane Armstrong (including confidential exhibits CJA-1, CJA-2 and CJA-3)	30 August 2012	5, 6, 7
Fourth Affidavit of Celia Jane Armstrong (including exhibits CJA-11 to CJA-30)	25 September 2012	25 - 29

