

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

**CERTIFICATE IDENTIFYING EXHIBIT**

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


Prepared by:  
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Lucy Kirwan [lkirwan@abl.com.au](mailto:lkirwan@abl.com.au))

This is the exhibit marked '**MAK-39**' now produced and shown to MARK ANTHONY  
KORDA at the time of swearing this affidavit on 3 March 2010.

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

**Exhibit 'MAK-39'**

**Copy of Almond Agreement  
Deed of Covenant**



**Deacons**

TIMBERCORP

672452/3

Dated 26 September 2006

## **Almond Agreement Deed of Covenant**

### **Parties**

#### **The Growers**

**Australia and New Zealand Banking Group Limited**  
ABN 11 005 357 522

**Timbercorp Securities Limited**  
ABN 12 092 311 469

**Almond Management Pty Ltd**  
ABN 71 094 468 845

### **Contact**

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Our ref: 256353

**Deed** dated *26 September 2006*

**By** **Australia and New Zealand Banking Group Limited**  
ABN 11 005 357 522  
of Level 10, 53-0 Collins Street, Melbourne, Victoria, 3000  
(Lender)

**In Favour of**

**The Growers**

**Timbercorp Securities Limited** ABN 12 092 311 469 (on behalf  
of the Growers for which it acts as Responsible Entity under any  
Project) of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000

**Almond Management Pty Ltd** ABN 71 094 468 845 (on behalf of  
the Growers for whom it acts as a representative under any  
Project)  
of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000

**Recitals**

- A.** The Borrower and Lender have agreed to enter into the Facility Agreement to provide funding in relation to the Timbercorp 2005 Almond Project and Timbercorp 2006 Almond Project.
- B.** As security for the Facility Agreement the Borrower has agreed to grant to the Lender the Security.
- C.** The Lender has agreed to take the Security subject to the rights of the Growers in accordance with the terms of this Deed.

## **It is agreed**

### **1. Interpretation**

#### **1.1 Definition**

In this document:

**Facility Agreement** means the Facility Agreement dated on or around the date of this Deed between Almond Land Pty Ltd and the Lender as may be amended from time to time.

**Growers' Rights** means:

- (1) In respect of existing Growers, all of their present rights and interest under the Project Documents and any other rights and interests under the Project Documents which are on terms consented to in writing by the Lender; and
- (2) in respect of future Growers, all of their rights and interests which are on the same terms as the rights and interest of Growers under the Project Documents as at the date of this document and any other rights and interests under the Project Documents which are on terms consented to by the Lender in writing,

in each case to the extent that those rights are affected by the Security.

#### **1.2 Terms used**

Terms used but not defined in this document have the meaning given to them in the Facility Agreement.

### **2. Covenants by the Lender**

- (1) The Lender acknowledges, covenants and agrees that:
  - (a) it takes the Security, and is and will be only entitled to exercise its rights under the Security, subject to all of the Growers' Rights;
  - (b) if the Lender enforces any of its Security then if the Lender, or any Controller appointed by the Lender to any party who has granted a Security, decides (in its absolute discretion) to adopt any or all of the Project Documents, then the Lender will ensure that the Lender or the Controller (as the case may be) complies with, observes and performs the obligations of the relevant Borrower or Security Provider (as the case may be) under each Project Document which has been adopted;

(c) If a Project Document adopted by the Lender or any Controller includes an agreement under or in respect of which Management Fees are payable by a Grower ("Management Agreement"), then the Lender or the Controller (as the case may be), in their absolute discretion (but without limiting their respective obligations under paragraph (b)), must first make any Management Fees received during or after the enforcement of any Security available to either:

(i) the relevant Timbercorp manager to the extent reasonably required to satisfy or perform (or procure the satisfaction or performance of) that manager's obligations under the relevant Management Agreement (after which any surplus remaining may be applied in or towards payment of the Amount Owed); or

(ii) the Growers who paid them; and

(d) If, during or after the enforcement of any Security, the Lender or any Controller receives Management Fees relating to a Management Agreement that it has not adopted, it must repay those fees (or procure their repayment) to the Growers who paid them.

(2) Nothing in this Deed requires the Lender or any Controller appointed by the Lender to pay money to any Grower, except to the extent required under any Project Document adopted pursuant to clause 2(1)(b) or clause 2(1)(c).

### **3. Governing Law**


This document is governed by the law in force in Victoria.


Executed as a Deed Poll in Melbourne

Signed for and on behalf of **Australia  
and New Zealand Banking Group  
Limited** ABN 11 005 357 522 by a  
duly appointed attorney in the  
presence of:

  
\_\_\_\_\_  
Signature of Witness

  
\_\_\_\_\_  
Name of Witness (please print)

  
\_\_\_\_\_  
Signature of Attorney (I have no  
notice of revocation of the power of  
attorney under which I sign this  
document)

  
\_\_\_\_\_  
Name of Attorney (please print)