

**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:  
**ARNOLD BLOCH LEIBLER**  
Lawyers and Advisers  
Level 21  
333 Collins Street  
MELBOURNE 3000

Solicitor's Code: 54  
DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900

Ref: [ ]  
(Leon Zwier [lwier@abl.com.au](mailto:lwier@abl.com.au)/  
Lucy Kirwan [lkirwan@abl.com.au](mailto:lkirwan@abl.com.au))

This is the exhibit marked '**MAK-40**' 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-40'**

**Copy of Tripartite Deed**



**Deacons**

TIMBERCORP

672431/3

Dated 26 September 2006

## **Tripartite Deed Almond Projects 2005/2006**

### **Parties**

**Almond Land Pty Ltd**  
ABN 66 091 460 392

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

**Almond Management Pty Ltd**  
ABN 71 094 466 845

**Australia and New Zealand Banking Group Limited**  
ABN 11 006 357 522

### **Contact**

**Gillad Dalal**

**Partner**

**RACV Tower, 485 Bourke Street, Melbourne Vic 3000**

**Telephone: 03 8686 6368**

**Email: gillad.dalal@deacons.com.au**

**Website: www.deacons.com.au**

**Our ref: 2587458**

## Contents

1.	Interpretation .....	1
2.	Acknowledgement of Security and Internal Security .....	2
3.	Covenants by the Borrower .....	3
4.	Leases.....	3
5.	Priorities .....	4
6.	Notices .....	4
7.	Governing law, jurisdiction and service of process.....	5
8.	Counterparts.....	5

**Deed** dated *26 September 2006*

**Parties**

**Almond Land Pty Ltd** ABN 65 091 460 392  
c/- Timbercorp Limited, Level 8, 461 Bourke Street, Melbourne,  
Victoria 3000  
(Borrower)

**Timbercorp Securities Limited** 12 092 311 469  
c/- Timbercorp Limited, Level 8, 461 Bourke Street, Melbourne,  
Victoria 3000  
(TSL)

**Almond Management Pty Ltd** ABN 71 094 468 845  
c/- Timbercorp Limited, Level 8, 461 Bourke Street, Melbourne,  
Victoria 3000  
(Manager)

**Australia and New Zealand Banking Group Limited**  
ABN 11 005 357 522  
of Level 10, 530 Collins Street, Melbourne, Victoria 3000  
(Lender)

## **Introduction**

- A.** The Lender will enter into the Facility Agreement with the Borrower.
- B.** The Borrower, TSL and the Manager have provided certain securities to the Lender.
- C.** The Borrower is the registered proprietor of Nenandle Property.
- D.** TSL is the tenant of the Nenandle Property pursuant to the Head Lease.
- E.** TSL has granted the Borrower the Internal Security.

## **It is agreed**

### **1. Interpretation**

- 1.1** Terms used but not defined in this deed have the meaning given to them in the Facility Agreement. Otherwise the following words have these meanings in this deed unless the contrary intention appears.

**Facility Agreement** means the \$45,000,000 Facility Agreement between the Borrower, TSL and the Lender dated on or around the date of this Deed.

- 1.2 Clause 1.2 of the Facility Agreement shall apply to this Deed mutatis mutandis.

**2. Acknowledgement of Security and Internal Security**

Each of the parties other than the Lender acknowledge, consent and covenant in favour of the Lender that:

- (1) the Borrower's right title and interest in the Nenandie Property, Head Leases and the Internal Security (whether such right, title and interest is present or future, actual or contingent or whether direct or indirect, consequential or economic) are charged to the Lender under the Securities to secure the Borrower's obligations to the Lender under the Finance Documents;
- (2) TSL's right, title and interest in the Sub-leases located in Victoria, Australian Capital Territory and Northern Territory (whether such right, title and interest is present or future, actual or contingent or whether direct or indirect, compensated or economic) are charged to the Lender under the Security to secure the Borrower's obligations to the Lender under the Finance Documents.
- (3) the Lender or a Controller appointed by the Lender may, pursuant to a Security, enter into possession of the assets held by the Borrower, including the Nenandie Property, and enforce the Borrower's rights under the Head Leases and the Internal Security (whether such right, title and interest is present or future, actual or contingent or whether direct or indirect, consequential or economic);
- (4) a reference in the Internal Security to the Borrower includes a reference to the Lender or its Controllers in the event that the Lender or its Controllers enforce their rights under a Security and the Internal Security is also enforced;
- (5) TSL consents to the Borrower granting the Security over the Head Lease and the Internal Security to the Lender. The Borrower consents to TSL granting the Security over the Sub-lease to the Lender.
- (6) the only leases that affect the Nenandie Property are described in the definition of "Leases" in the Facility Agreement;
- (7) no party to this Deed will provide security over its rights to or over the Internal Security or the Leases without first obtaining the written consent of the Lender;

- (8) In the event that the Lender is enforcing its rights under the Security that each party shall provide all reasonable assistance, and, if required by the Lender, provide any covenants, waivers or agreements that facilitate the Lender's enforcement of the Security; and
- (9) notwithstanding anything contained in the Head Lease, the Sub-leases or the Project Documents, the appointment by the Lender of a Controller, receiver or manager to any assets of the Borrower or the entry into of possession of the Nenandie Property (or any one of the Nenandie Property) or other assets held by the Borrower by an agent or Controller of the Lender shall not in such case of itself determine or provide the basis for termination of the Head Lease or Sub-lease by any of the parties.

### **3. Covenants by the Borrower**

- 3.1 The Borrower hereby covenants that it will not exercise its right to enforce any provision of the Internal Security without the prior written consent of the Lender and, to the extent required by the Lender, it will exercise any of the rights which it has under the Head Lease or the Internal Security to enable the Lender to enforce its rights under the Security.
- 3.2 The Borrower hereby covenants that, in the event that the Lender is enforcing its rights under the Security, it will provide any consent, waiver or agreement required to be given by it pursuant to the Head Lease if requested to do so by the Lender.

### **4. Leases**

- (1) The Borrower or TSL will not terminate the Leases without the prior written consent of the Lender.
- (2) The Borrower and TSL hereby represent and warrant to the Lender that:
  - (a) the Leases and the Internal Security constitute legal, valid and binding obligations enforceable against each party to them in accordance with its terms;
  - (b) the parties to the Internal Security are not restricted in any way from entering into the Internal Security.
- (3) Unless the Lender otherwise agrees in writing, the Borrower and TSL each must:
  - (a) ensure that any rights of the Borrower under the Internal Security or the Leases are not varied, assigned, transferred or terminated at any time;

- (b) notify the Lender of an event of default (however described) under the Leases or the Internal Security; and
- (c) enforce its rights under the Leases and the Internal Security diligently and to the satisfaction of the Lender.

## **5. Priorities**

The parties agree that the Internal Security and the Security provided by TSL to the Lender cover different property. To the extent that any property the subject of the Security provided by TSL to the Lender is also subject to the Internal Security all parties agree that the Security in favour of the Lender is first ranking and has first priority for all moneys and liabilities secured by that security.

## **6. Notices**

### **6.1 Requirements**

All notices must be:

- (1) in legible writing and in English;
- (2) addressed to the recipient at the address or facsimile number set out below or to any other address or facsimile number that a party may notify to the other.

to the Borrower, TSL or the Manager:

Address: Level 8, 461 Bourke Street  
Melbourne Vic 3000  
Attention: Company Secretary  
Facsimile No: (03) 9670 4271

to the Lender:

Address: Australia and New Zealand Banking Group Limited  
Level 17, 530 Collins Street  
Melbourne VIC 3000  
Attention: Manager, Corporate & Structured Finance  
Facsimile No: (03) 9273 3161

- (3) signed by the party or, where the sender is a company, by an Authorised Officer or under the common seal of the sender; and
- (4) sent to the recipient by hand, prepaid post (airmail if to or from a place outside Australia) or facsimile.

## **6.2 Receipt**

Without limiting any other means by which a party may be able to prove that a notice has been received by the other party, a notice will be considered to have been received:

- (1) if sent by hand, when left at the address of the recipient;
- (2) if sent by pre-paid post, 3 days (if posted within Australia to an address in Australia) or 10 days (if posted from one country to another) after the date of posting; or
- (3) if sent by facsimile, on receipt by the sender of an acknowledgment or transmission report generated by the sender's machine indicating that the whole facsimile was sent to the recipient's facsimile number;

but if a notice is served by hand, or is received by the recipient's facsimile on a day that is not a Business Day, or after 5:00 pm (recipient's local time) on a Business Day, the notice will be considered to have been received by the recipient at 9:00 am on the next Business Day.

## **7. Governing law, jurisdiction and service of process**

### **7.1 Governing law**

This Deed is governed by the laws of Victoria.

### **7.2 Jurisdiction**

The Borrower irrevocably and unconditionally:

- (1) submits to the non-exclusive jurisdiction of the courts of Victoria; and
- (2) waives, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum.

## **8. Counterparts**

This deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

**Executed as a deed**

Signed by Almond Land Pty Ltd  
ABN 65 091 460 392 by a duly  
appointed attorney in the presence of:

\_\_\_\_\_  
Signature of witness

John Stuart Murray

\_\_\_\_\_  
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)

Signed by Timbercorp Securities  
Limited ABN 12 092 311 469 by a  
duly appointed attorney in the  
presence of:

\_\_\_\_\_  
Signature of witness

John Stuart Murray

\_\_\_\_\_  
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)

Signed by Almond Management Pty  
Ltd ABN 71 094 468 845 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)

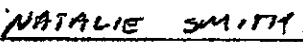
\_\_\_\_\_  
Name of Attorney (please print)

Signed by Australia and New  
Zealand Banking Group Limited  
ABN 11 006 357 522 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)