

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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This is the exhibit marked 'MAK-41' 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  
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An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

**Exhibit 'MAK-41'**

**Copy of Deed of Covenant**

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## Contents

1	Interpretation	1
1.1	Definitions	1
1.2	Terms used	2
1.3	Construction	2
2	Covenants by the Security Trustees	3
3	General	4
3.1	Governing law and jurisdiction	4
3.2	Security Trustee's role	4

BWA Custodians Limited

The Beneficiaries

# Deed of Covenant

Date 28 FEBRUARY 2007

## Parties

BWA Custodians Limited ABN 63 009 413 852 of Level 27, 45 Clarence Street, Sydney, NSW 2000 (Security Trustee)

## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

In this document:

**Beneficiaries** means:

- (a) each Grower; and
- (b) Timbercorp Securities Limited ABN 12 082 311 468 on behalf of the Growers for which it acts as responsible entity under any Project.

**Borrower** means Timbercorp Limited ABN 87 055 185 087.

**Controller** has the meaning given in the *Corporations Act 2001*.

**Guarantor** means each person (other than the Borrower, the Security Trustee or a related body corporate of the Security Trustee) who has provided a Security.

**Grower** means each person who has participated in any Project by acquiring an interest (as that term is defined in the *Corporations Act 2001*) in that Project.

**Growers' Rights** means:

- (a) 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; and
- (b) 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.

In each case to the extent that those rights are in respect of the Secured Property.

**Project** means each managed investment scheme conducted by any of Timbercorp Limited ABN 87 055 185 087 or any of its related bodies corporate (as that term is defined in the *Corporations Act 2001*).

**Project Documents** means in respect of each Project, the documents constituting the Project which are on terms consented to from time to time by the Security Trustee. It includes the relevant constitution and any management agreement, joint venture licence or lease agreement referred to in the constitution or otherwise connected with the Project.

**Security** means any Security Interest granted to the Security Trustee to secure the obligations of the Borrower under the Syndicated Loan Agreement (and includes any rights of set off, lien over funds or combination).

**Security Interest** means any interest or right which secures the payment of a debt or other monetary obligation or the compliance with any other obligation. It includes any retention of title to any property and any right to set-off, combine or withhold payment of any deposit or other money.

**Secured Property** means any property subject to a Security.

**Syndicated Loan Agreement** means the loan agreement between the Security Trustee, the Borrower and others, dated 16 December 2006.

#### 1.2 Terms used

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

#### 1.3 Construction

Unless expressed to the contrary, in this document:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (c) "includes" means includes without limitation;
- (d) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (e) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
- (f) headings do not affect the interpretation of this document.

## 2 Covenants by the Security Trustee

- (a) The Security Trustee acknowledges, covenants and agrees in favour of all of the Beneficiaries that:
- (i) notwithstanding any other provisions of this document, the Transaction Documents or any Project Document, it takes the Security, and is and will be only entitled to exercise its rights under the Security in respect of the Secured Property, subject to all of the Growers' Rights;
  - (ii) if the Security Trustee enforces any of its Security in respect of the Secured Property and the Security Trustee, or any Controller appointed by the Security Trustee to any party who has granted a Security, decides (in its absolute discretion) to adopt any or all of the Project Documents, then the Security Trustee will ensure that it or the Controller (as the case may be) complies with, observes and performs the obligations of the relevant Borrower or Guarantor (as the case may be) under each Project Document which has been adopted;
  - (iii) if a Project Document adopted by the Security Trustee or any Controller includes an agreement under or in respect of which management fees are payable by a Grower (Management Agreement), then the Security Trustee or the Controller (as the case may be), in their absolute discretion (but without limiting their respective obligations under paragraph (ii)), must first make any management fees received during or after the enforcement of any Security available to either:
    - (A) 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 Principal Outstanding); or
    - (B) the Growers who paid them if required under the Management Agreement; and
  - (iv) if, during or after the enforcement of any Security, the Security Trustee 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.
- (b) Nothing in this document requires the Security Trustee or any Controller appointed by the Security Trustee to pay money to any Grower, except to the extent required under any Project Document adopted pursuant to clause 2(a)(ii) or clause 2(a)(iii).

## 3 General

### 3.1 Governing law and jurisdiction

- (a) This document is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

### 3.2 Security Trustee's role

- (a) The Security Trustee enters into this document, and acts and incurs liabilities in connection with this document, only in its capacity as trustee of the Security Trust. Despite any other provision of this document:
  - (i) the Security Trustee is not liable to any party to this document or any person claiming through such a person for, and
  - (ii) no party to this document or any person claiming through such a person has any recourse to the Security Trustee for, any amount that would otherwise be payable by the Security Trustee under, or as a result of a breach of, this document, except to the extent that:
    - (iii) the Security Trustee obtains final reimbursement from the assets held by it in its capacity as security trustee (the Trust Fund) for the amount; or
    - (iv) the amount is payable as a result of the Security Trustee's fraud, wilful default or gross negligence.
- (b) Subject to paragraph (a), no party to this document (or claiming through such a person) may take any step to recover an amount that is payable under, or as a result of a breach of, this Deed by or from the Security Trustee, its directors, officers, authorised representatives, employees, agents and/or attorneys, including by taking any step to:
  - (i) have an administrator appointed to the Security Trustee;
  - (ii) have a receiver or receiver and administrator appointed to the Security Trustee or any of its property, except in relation to the Trust Fund;
  - (iii) have the Security Trustee wound up, or to prove in the winding up of the Security Trustee;
  - (iv) carry out any distress or execution on any property of the Security Trustee, other than the Trust Fund; or
  - (v) exercise any:
    - (A) right of set-off;
    - (B) right to combine or consolidate accounts; or

(C) banker's lien

against the Security Trustee or any of its property, except in relation to the Trust Fund.

(c) Paragraph (b) does not affect a party's rights to:

- (i) take steps to recover amounts from the Security Trustee for which the Security Trustee is liable under paragraph (a); or
- (ii) obtain an injunction, restraining order or declaration concerning the Security Trust, the Trust Fund or the Security Trustee's obligations under this deed.

(d) If the Security Trustee is replaced as trustee under the Security Trust deed:

- (i) this deed is to be construed and is to take effect from the date on which the Security Trustee was so replaced as if the replacement Security Trustee had executed this document, and any reference to the Security Trustee in this deed will be from that date a reference to the replacement Security Trustee to the exclusion of the party which has been replaced; and
- (ii) the parties must enter into such documentation, and take such other steps, as any party reasonably requires to give full effect to this.

Executed as a deed.

SIGNED, SEALED and DELIVERED for  
BWA CUSTODIANS LTD under power of  
attorney in the presence of:

Signature of attorney

Signature of witness

SARA LYNCH  
Name

MARTIN COLEMAN

Name

14 DECEMBER 2006  
Date of power of attorney