

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

S CI 2011

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED  
(IN LIQUIDATION) (ACN 092 311 469)**

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)  
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE 2004 TIMBERCORP CITRUS  
PROJECT (ARSN 108 887 538) AND THE 2005 TIMBERCORP CITRUS PROJECT (ARSN  
114 091 299) AND ORS ACCORDING TO THE SCHEDULE**  
Plaintiffs

**CERTIFICATE IDENTIFYING EXHIBIT**

Date of document: 28 February 2011  
Filed on behalf of: the Plaintiffs

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: 011572335  
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "MAK-3" now produced and shown to **MARK ANTHONY KORDA**  
at the time of swearing his affidavit on 28 February 2011.

**MEAGAN LOUISE GROSE**  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000  
An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

Before me: 

**Exhibit "MAK-3"**  
**ASIC notice to Timbercorp Securities Limited  
of cancellation of Australian financial services  
licence dated 2 August 2010**

Filed on behalf of the Plaintiffs  
**ARNOLD BLOCH LEIBLER**  
Lawyers and Advisers  
Level 21  
333 Collins Street  
Melbourne 3000

DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: 011572335  
(Leon Zwier)

MAK-3



**ASIC**

Australian Securities & Investments Commission

100 Pirie Street, Adelaide  
GPO Box 9827 Adelaide SA 5001

Telephone: (08) 8202 8400  
Facsimile: (08) 8202 8410

2 August 2010

Timbercorp Securities Limited (in liquidation)  
c/- Mark Korda and Leanne Chesser  
KordaMentha  
Level 24  
333 Collins Street  
Melbourne Vic 3000

RECEIVED

11 AUG 2010

STF

Dear Sir and Madam

**Notice of Cancellation of Australian Financial Services Licence**

As delegate of the Australian Securities & Investments Commission, I have decided that Australian financial services licence number 235653 (the AFS licence) held by Timbercorp Securities Limited (in liquidation) be cancelled under s915B(3)(b) of the *Corporations Act 2001*.

I enclose by way of service, a written notice of the cancellation of the AFS licence dated 2 August 2010. The cancellation of the AFS licence takes effect when the written notice is given to you.

I also enclose a statement of reasons for cancelling the AFS licence.

You have certain rights in respect of this decision. Information on your rights is set out in the enclosed information sheet – "ASIC decisions - your rights".

Yours faithfully

Valdemar Malinaric  
Delegate of the Australian Securities & Investments Commission

**Australian Securities & Investments Commission  
Corporations Act 2001 section 915B**

**Notice of Cancellation of Australian Financial Services Licence**

To: Timbercorp Securities Limited ACN 092 311 469 (in liquidation)  
Level 8  
461 Bourke Street  
Melbourne Vic 3000

TAKE NOTICE that under s915B(3)(b) of the *Corporations Act 2001* (the Act), the Australian Securities & Investments Commission (ASIC) hereby cancels Australian financial services licence number 235653 held by Timbercorp Securities Limited ACN 092 311 469 (in liquidation) (the Licensee).

Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the cancellation had not happened for the purposes of the provisions of the Act specified in Schedule B in relation to the matters specified in Schedule A.

**Schedule A**

The provision by the Licensee until 30 June 2011 of financial services that are reasonably necessary for or incidental to the transfer to a new responsible entity or winding up of:

- 2001 Timbercorp Eucalypts Project ARSN 094 382 000
- 2001 Timbercorp Olive Project ARSN 094 382 082
- 2001 Timbercorp Almond Project ARSN 095 649 746
- 2002 Timbercorp Eucalypts Project ARSN 098 233 571
- 2002 Timbercorp Olive Project ARSN 098 233 455
- 2002 Timbercorp Almond Project ARSN 099 611 935
- 2003 Timbercorp Almond Project ARSN 103 197 299
- 2003 Timbercorp Eucalypts Project ARSN 103 183 446
- 2003 Timbercorp Olive Project ARSN 104 648 473
- 2004 Timbercorp Eucalypts Project ARSN 108 099 645
- 2004 Timbercorp (Single Payment) Timberlot Project ARSN 108 336 830
- 2004 Timbercorp Almond Project ARSN 108 336 670
- 1999 Timbercorp Eucalypts Project ARSN 085 827 872
- 2000 Timbercorp Eucalypts Project ARSN 091 172 093
- 2004 Timbercorp Table Grape Project ARSN 108 648 086
- 2004 Timbercorp Olive Project ARSN 108 744 378
- 2004 Timbercorp Citrus Project ARSN 108 887 538
- 2005 Timbercorp (Single Payment) Timberlot Project ARSN 111 683 491

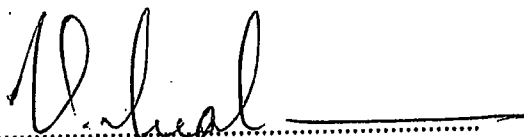
- 1998 Timbercorp Eucalypts Project ARSN 112 309 216
- 1997 Timbercorp Eucalypts Project ARSN 112 309 234
- 2005 Timbercorp Almond Project ARSN 112 935 092
- 2005 Timbercorp Table Grape Project ARSN 113 512 226
- 2005 Timbercorp Citrus Project ARSN 114 091 299
- 2006 Timbercorp Almond Project ARSN 118 387 974
- 2006 Timbercorp Olive Project ARSN 119 182 179
- 2007/2008 Timbercorp (Single Payment) Timberlot Project ARSN 122 510 981
- 2007 Timbercorp Almond Project ARSN 122 511 040
- 2007 Timbercorp Olive Project ARSN 123 155 715
- 2008 Timbercorp Olive Project ARSN 129 307 722
- 2009 Timbercorp Forestry Project ARSN 133 818 149; and

#### **Schedule B**

- (a) Section 601FA of the Act; and
- (b) The provisions of Chapter 7 of the Act, other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5.

Dated this 2<sup>nd</sup> day of August 2010

Signed .....



Valdemar Malinaric, a delegate of the Australian Securities & Investments Commission

## AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

**In the matter of s915B of the Corporations Act 2001 and  
Timbercorp Securities Limited (in liquidation)**

**Date of decision: 2 August 2010**

### **Decision**

**That Australian financial services licence number 235653 held by Timbercorp Securities Limited ACN 092 311 469 (in liquidation) be cancelled under s915B(3)(b) of the Corporations Act 2001.**

### **STATEMENT OF REASONS**

#### **Introduction**

1. Paragraph 915B(3)(b) of the Corporations Act 2001 (the Act) provides that the Australian Securities & Investments Commission (ASIC) may suspend or cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if the body becomes an externally-administered body corporate.
2. Section 9 of the Act relevantly provides:  
*"externally-administered body corporate means a body corporate:*  
(a) that is being wound up; or  
...".
3. Section 915H of the Act provides that:  
*"In the written notice of suspension or cancellation that ASIC gives to the licensee, ASIC may specify that the licence continues in effect as though the suspension or cancellation had not happened for the purposes of specified provisions of this Act in relation to specified matters, a specified period or both."*
4. I am a delegate of ASIC for the purpose of making a decision under s915B of the Act.

#### **Background**

5. On 12 January 2004, ASIC granted Timbercorp Securities Limited ACN 092 311 469 (Timbercorp) an AFS licence number 235653 (the AFS licence) under s913B of the Act.

6. In summary, the AFS licence authorises Timbercorp to carry on a financial services business to deal in certain financial products and to operate a number of managed investment schemes:

- 6.1 2001 Timbercorp Eucalypts Project ARSN 094 382 000
- 6.2 2001 Timbercorp Olive Project ARSN 094 382 082
- 6.3 2001 Timbercorp Almond Project ARSN 095 649 746
- 6.4 2002 Timbercorp Eucalypts Project ARSN 098 233 571
- 6.5 2002 Timbercorp Olive Project ARSN 098 233 455
- 6.6 2002 Timbercorp Almond Project ARSN 099 611 935
- 6.7 2003 Timbercorp Almond Project ARSN 103 197 299
- 6.8 2003 Timbercorp Eucalypts Project ARSN 103 183 446
- 6.9 2003 Timbercorp Olive Project ARSN 104 648 473
- 6.10 2004 Timbercorp Eucalypts Project ARSN 108 099 645
- 6.11 2004 Timbercorp (Single Payment) Timberlot Project ARSN 108 336 830
- 6.12 2004 Timbercorp Almond Project ARSN 108 336 670
- 6.13 1999 Timbercorp Eucalypts Project ARSN 085 827 872
- 6.14 2000 Timbercorp Eucalypts Project ARSN 091 172 093
- 6.15 2004 Timbercorp Table Grape Project ARSN 108 648 086
- 6.16 2004 Timbercorp Olive Project ARSN 108 744 378
- 6.17 2004 Timbercorp Citrus Project ARSN 108 887 538
- 6.18 2005 Timbercorp (Single Payment) Timberlot Project ARSN 111 683 491
- 6.19 1998 Timbercorp Eucalypts Project ARSN 112 309 216
- 6.20 1997 Timbercorp Eucalypts Project ARSN 112 309 234
- 6.21 2005 Timbercorp Almond Project ARSN 112 935 092
- 6.22 2005 Timbercorp Table Grape Project ARSN 113 512 226
- 6.23 2005 Timbercorp Citrus Project ARSN 114 091 299
- 6.24 2006 Timbercorp Almond Project ARSN 118 387 974
- 6.25 2006 Timbercorp Olive Project ARSN 119 182 179
- 6.26 2007/2008 Timbercorp (Single Payment) Timberlot Project ARSN 121 510 981
- 6.27 2007 Timbercorp Almond Project ARSN 122 511 040
- 6.28 2007 Timbercorp Olive Project ARSN 123 155 715
- 6.29 2008 Timbercorp Olive Project ARSN 129 307 722
- 6.30 2009 Timbercorp Forestry Project ARSN 133 818 149

(the Schemes).

- 7. Timbercorp is the responsible entity of each of the Schemes.
- 8. On 29 June 2009 the creditors of Timbercorp (then under administration) resolved that the company be wound up under s439C(c) of the Act. Mark Korda and Leanne Chesser were appointed liquidators (the Liquidators).
- 9. Accordingly, section 915B(3)(b) of the Act is satisfied as Timbercorp is being wound up and ASIC may suspend or cancel the AFS licence.

### Exercise of discretion

10. Suspension or cancellation of an AFS licence is not automatic when a body corporate becomes an externally-administered body corporate. ASIC has a discretion whether or not to suspend or cancel the licence.
11. In *Sovereign Capital Ltd v Australian Securities and Investments Commission*<sup>1</sup> the Administrative Appeals Tribunal said at [81] that the power to suspend or cancel an AFS licence “must be exercised having regard to the purposes of the regulatory regime”.
12. Although the Tribunal’s decision dealt with ASIC’s power under s915C of the Act to suspend or cancel a licence, it is appropriate to apply a similar approach to a decision under s915B of the Act.
13. In considering the regulatory regime and the objects of the legislative scheme, it is significant that s915B of the Act provides for ASIC to suspend or cancel an AFS licence where the licensee is insolvent.<sup>2</sup> Parliament has decided that as a matter of public policy, an insolvent licensee is liable to have their AFS licence suspended or cancelled – nothing more is required. It is also significant that the power can be exercised without affording the licensee a hearing.
14. Although ASIC’s Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98) does not deal specifically with factors that ASIC will take into account in making a decision whether to suspend or cancel an AFS licence under s915B of the Act, section 2 sets out ASIC’s general approach to when it will take administrative action.

### Submissions

15. Although ASIC is not required to give a financial services licensee an opportunity to appear at a hearing and to make submissions to ASIC before an AFS licence is suspended or cancelled under s915B(3) of the Act, ASIC has nevertheless written to the Liquidators indicating that it was proposing to exercise its power to cancel the AFS licence under s915B(3) of the Act subject to a specification under s915H of the Act that the AFS licence continue in effect for the purposes of Ch 5C and Ch 7 of the Act in relation to the provision of financial services in preparation for or in connection with the transfer or winding up of the Schemes for a period of three months from the date of cancellation. The Liquidators were asked to advise ASIC:
  - 15.1 The steps taken so far to transfer or wind up the Schemes;
  - 15.2 Whether there was any reason why ASIC should not exercise its power under s915B(3); and

<sup>1</sup> [2008] AATA 901

<sup>2</sup> See subs (1)(b), (2)(b), (3)(b), (4)(b)(i)

- 15.3 Whether the proposed three month timeframe was sufficient to transfer the Schemes to another responsible entity or formally finalise winding up the Schemes.
16. By letter dated 22 March 2010, the Liquidators' solicitors, Arnold Bloch Leibler, responded as follows.
- 16.1 The Liquidators have sold the assets forming part of or used in the timber schemes and obtained Court approval for the apportionment of the proceeds of that sale. The Liquidators are currently distributing the sale proceeds to growers in these schemes however, \$30 million retained under the asset sale agreement subject to certain conditions being met will not be available for distribution for some time.
- 16.2 The Liquidators have sold the assets forming part of or used in the almond schemes. The Liquidators are currently preparing for an apportionment hearing in respect of the distribution of the proceeds in relation to the sale of certain of the assets and there will be separate proceedings in respect of the distribution of the proceeds of the sale of the remaining assets.
- 16.3 The Liquidators have sold the assets forming part of or used in the olive schemes. An apportionment application to the Court in respect of some of these schemes has been made and it is expected that an application will be made in respect of the other olive schemes.
- 16.4 The sale process for the assets forming part of or used in the citrus and table grape schemes is currently being conducted by the receivers and managers of the landlord of the properties involved in these schemes. The sale process was expected to be completed by the middle of 2010, after which an apportionment application will be made to the Court.
- 16.5 The Liquidators intend to proceed with the winding up applications following the various apportionment proceedings.
- 16.6 The Liquidators requested ASIC not to exercise its power under s915B(3) of the Act until June 2011.
- 16.7 The Liquidators are concerned that a change in the status of Timbercorp's AFS licence will lead to confusion among growers and that growers may not appreciate that the change of status will not affect Timbercorp's ability to finalise the realisation of the Schemes. The Liquidators are concerned that any such confusion will lead to increased grower enquiries and therefore increased costs.
- 16.8 The Liquidators are also concerned that some of the financial advisers acting for growers may seek to promote the change of status as a reason for changing the responsible entity of the schemes and that such a change would involve additional costs for growers, for the reasons set out in the letter.



- 16.9 Most of the 2009 crops from the horticultural schemes were sold prior to the sale of scheme assets, however, for some of the crops (particularly almonds and oil) the processing and sale of the crop can take up to 18 months post harvest.
- 16.10 If Timbercorp's AFS licence is to be cancelled, the Liquidators request that the AFS licence continue in effect until June 2011, for the reasons given in the letter.
17. By email dated 31 May 2010, the Liquidators' solicitors advised ASIC that cancellation of the AFS licence would not affect any insurance currently held by Timbercorp as responsible entity.

#### *Assessment*

18. I am of the view that having regard to the purposes of the regulatory regime and the objects of the legislative scheme as set out above, the appropriate course is to cancel Timbercorp's AFS licence.
19. Notwithstanding the cancellation of the AFS licence, Timbercorp remains the responsible entity of the Schemes, and in that capacity Timbercorp is required to comply with all the obligations imposed on a responsible entity by Chapter 5C of the Act until the Schemes are wound up.
20. To ensure that Timbercorp does not contravene the licensing provisions of the Act pending the winding up of the Schemes or transfer of any of the Schemes to a new responsible entity and to facilitate the Liquidators completing the winding up of the Schemes, it is appropriate to include a specification under s915H of the Act.
21. I am not persuaded that cancelling Timbercorp's AFS licence subject to a specification under s915H of the Act will lead to any or any significant confusion among growers or that they will not appreciate that cancellation on such terms will not affect Timbercorp's ability to wind up the Schemes. A public statement by the Liquidators (and possibly also ASIC) to that effect would sufficiently reassure growers.
22. Growers may at any time seek the appointment of another responsible entity for any of the Schemes and that remains so irrespective of whether or not Timbercorp's AFS licence is cancelled in the terms indicated above. Should growers seek to do so in respect of any of the Schemes they could be informed of the matters that are said would result in additional costs to growers and it would be for growers to determine whether, in all of the circumstances, it is in their best interests to appoint another responsible entity.

#### *Conclusion*

23. In all the circumstances I am satisfied that it is appropriate to cancel the AFS licence. The notice of cancellation will be subject to a specification under s915H of the Act that the AFS licence continue in effect as if the licence had not been cancelled for the purposes of s601FA of the Act and of the provisions

of Chapter 7 of the Act, other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5, in relation to the provision by Timbercorp until 30 June 2011 of financial services that are reasonably necessary for or incidental to the transfer to a new responsible entity or winding up of the Schemes.

Valdemar Malinaric  
Delegate of the Australian Securities & Investments Commission



**ASIC**

Australian Securities & Investments Commission

[About ASIC](#) > [Dealing with ASIC](#) > ASIC decisions - your rights

## ASIC decisions - your rights

ASIC makes many decisions about corporations, securities and financial products and services provided to consumers. If we have made a decision that directly affects you, you may have rights connected with the decision. This information sheet sets out an overview of your rights and how to exercise them. You may have other rights in addition to those discussed here.

### What can you find out from us?

#### Talk to us about the decision

**ASIC decision maker**—If you need to clarify anything relating to the decision, you may find it helpful to discuss it with the ASIC staff member who made the decision.

**Administrative Law Coordinator**—You can contact the Administrative Law Coordinator in the ASIC office you have been dealing with. He or she can explain how to exercise the rights set out in this information sheet. It would be best to do this promptly because there is a 28-day time limit on some applications.

#### Get our reasons in writing

If we have not told you why we made the decision when we notified you about it, you may be entitled to ask for a written statement of reasons.

#### How to apply

You must write to the person who made the decision within 28 days of being told about the decision.

#### Ask for access to other documents

You may seek access to documents about the decision under the *Freedom of Information Act 1982*.

#### How to apply

You must apply to ASIC in writing:

- stating which documents you want to obtain.
- addressing the letter to the Administrative Law Coordinator in the ASIC office with which you have been dealing.
- enclosing the \$30.00 application fee with your application.

Please note that as well as the initial application fee, there may be other charges. For more information contact the **Administrative Law Coordinator in the ASIC office with which you have been dealing**.

We have also published **Regulatory Guide 57 Notification of rights of review** which gives more detail about your rights of review.

### Can you get an independent review?

You may have a right to seek review of the decision by the Administrative Appeals Tribunal (AAT). The AAT is an independent body which can review some of ASIC's decisions. The AAT can, among other things:

- confirm ASIC's decision;

- vary our decision; or
- set our decision aside and replace it with its own decision.

## How to apply to the AAT

<b>In writing</b>	You must apply to the AAT for review in writing. The AAT has a form for this purpose which you can use if you prefer.
<b>In time</b>	You must apply for the review within 28 days of being told why the decision was made.
<b>Pay the fee</b>	You must enclose the \$777.00 application fee with your application. If you want to apply for the application fee to be waived you can obtain the application form for this from the AAT.

The AAT website has more information at [www.aat.gov.au](http://www.aat.gov.au). If you have any questions about the AAT's procedures and requirements, please contact the AAT. You can call the AAT on 1300 366 700 for the cost of a local call. The postal address for the AAT is GPO Box 9955 in each capital city.

## If you are unhappy with how we handled your matter

<b>Talk to us</b>	If you have a complaint about the way ASIC handled a matter, you may wish to bring your concerns to the attention of a more senior ASIC staff member than the officer with whom you have been dealing.
<b>Take it further</b>	You may also have the right to complain to the Commonwealth Ombudsman. However, the Ombudsman usually prefers you to discuss your complaint with ASIC first. There is an office of the Ombudsman in each capital city. You can contact the Ombudsman on 1300 362 072. The street address of the nearest office can be found in the White Pages of your telephone book or you can look on the Ombudsman website at <a href="http://www.comb.gov.au">www.comb.gov.au</a> .

This is **Information Sheet 9 (INFO 9)**. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

ASIC Website: Printed 02/08/2010