

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL & EQUITY DIVISION
COMMERCIAL COURT**

LIST B

No of 2009

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

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092311469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1 AND IN ITS OWN
CAPACITY AND ORS ACCORDING TO THE SCHEDULE**

First Plaintiff

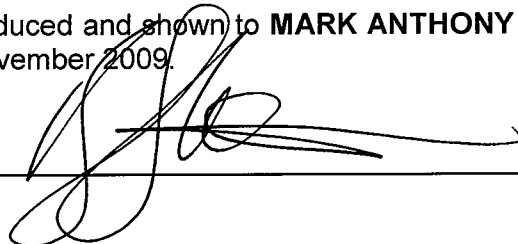
CERTIFICATE OF EXHIBIT

Date of document: 19 November 2009
Filed on behalf of: the Plaintiffs
Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000
(Leon Zwier lzwier@abl.com.au)

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1499489

This is the exhibit marked "**MAK-5**" now produced and shown to **MARK ANTHONY KORDA**
at the time of swearing his affidavit on 19 November 2009.

Before me: _____



BRIDGET ELLEN SLOOM
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-5"
Amended Statement of Claim in Proceeding 8870-of 2009

"MAK-5"

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

No 8870 of 2009

List B

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

First Plaintiff

and

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469

Second Plaintiff

and

PLANTATION LAND LIMITED
ACN 090 443 333

Defendant

AMENDED STATEMENT OF CLAIM
(PURSUANT TO LEAVE GRANTED BY JUDD J ON 2 OCTOBER 2009)
(Amendments Not Marked-Up)

Date of document: 5 October 2009
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: 01-1499489
Leon Zwier: lzwier@abl.com.au

-
- 1 The first plaintiff (**Timbercorp**) and the second plaintiff (**TSL**) are and were at all material times both companies duly incorporated in accordance with the laws of Victoria.
 - 2 Timbercorp and TSL are in liquidation and the liquidators are Mark Anthony Korda and Leanne Kylie Chesser of KordaMentha Pty Ltd ACN 100 169 391 (**Liquidators**).

- 3 The Defendant (**PLL**) is and was at all material times a company duly incorporated in accordance with the laws of Victoria and a trading corporation within the meaning of the *Trade Practices Act 1974* (Cth).

The Leases

- 4 On or about the dates specified in Schedule 1, PLL leased to Timbercorp or TSL, the land as described in Schedule 1 (**Premises**) for the terms commencing on the dates specified in Schedule 1 (**Leases**).
- 5 All of the Premises are located in the State of Victoria.
- 6 Each of the Leases for each of the Premises contain the same substantive terms, the full terms and effect of which will be referred to at trial. An example of one of the Leases is attached as Schedule 2 to this statement of claim.
- 7 The Premises are leased for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees (**Plantations**).
- 8 The Leases include the following covenants regarding the ownership and use of the Plantations relevant to these proceedings, the full terms and effect of which will be referred to at trial: clause 1 (definitions), clause 2, clause 4, clause 5, clause 6, clause 9, clause 10, clause 11 and clause 13.
- 9 The Leases include the following covenants on the part of Timbercorp or TSL, regarding payment of rent, relevant to these proceedings:
- (a) Timbercorp or TSL will pay PLL the annual rent in advance in equal successive quarterly instalments on or before 30 June, 30 September, 31 December and 31 March (Clause 3.1).
 - (b) PLL may terminate the Leases with immediate effect if Timbercorp or TSL is in arrears in respect of one quarterly instalment of annual rent and such arrears are not paid in full within one month after PLL has served a written notice on Timbercorp or TSL requesting payment (Clause 8.1).
 - (c) Except as expressly provided in clause 8 of the Lease, neither TSL, Timbercorp or PLL are entitled to terminate or rescind the Leases and PLL is not entitled to re-enter the Premises or forfeit the Lease at any time prior to the expiration of the term (as extended or renewed) (Clause 8.5).

- (d) Termination of the whole or any part of the Leases in accordance with clause 8 will be without prejudice to any rights or obligations which may have accrued prior to the date of termination (Clause 8.4).

Non-Payment of the July Quarter Instalment and Termination Notices

- 10 On or about 23 April 2009, the Liquidators were appointed as voluntary administrators of Timbercorp and TSL.
- 11 On or about 29 June 2009 the creditors of Timbercorp and TSL resolved to liquidate Timbercorp and TSL.
- 12 On or before 30 June 2009, Timbercorp and TSL failed to pay the annual rental instalments of \$341,098.53 due on that date as pleaded at paragraph 9(a) above (**July Quarter Instalment**).
- 13 On or about 21 July 2009, PLL issued notices to Timbercorp and TSL requiring payment of the July Quarter Instalment within one month from service of the notices for each of the Premises (**Notices**).
- 14 On or about 31 July 2009 the Liquidators sought expressions of interest in the sale or recapitalisation of the Forestry Schemes' assets, including the Leases (**Timbercorp Sale Process**).
- 15 Final bids for the Timbercorp Sale Process closed on 18 September 2009.
- 16 The Timbercorp Sale Process was completed on 30 September 2009, when a confidential contract was entered into with the successful bidder, which is scheduled to settle on 2 November 2009 (**Sale Contract**).

PARTICULARS

The confidential Sale Contract is in writing, and a copy is in the possession of the Plaintiffs' solicitors. Subject to the receipt of appropriate agreed or ordered undertakings as to confidentiality, relevant parts of the sale contract are available for limited inspection by counsel for the Defendant.

- 17 The assets the subject of the Sale Contract include the Leases.

- 18 From on or before 17 July 2009, TSL and Timbercorp had multiple communications with PLL in respect of the Leases.

PARTICULARS

- (a) The communications were both written and oral and included telephone messages, e-mail correspondence and letters.
- (b) The communications were between Bryan Webster, Executive Director of KordaMentha (Liquidators) on behalf of Timbercorp and TSL and Alan Fisher (Director of PLL), Mark Pryn (Company Secretary of PLL), Philip Jones and Jonathan Ambler (Solicitors for PLL).
- (c) One of the purposes of the communications was to address the Notices and also to inform PLL of the Timbercorp Sale Process. The purpose was referred to in an email of 29 July 2009 that was forwarded to PLL's Alan Fisher by Mark Pryn, a copy of which is in the possession of the plaintiffs' solicitors and may be inspected by appointment.
- (d) On 30 July 2009, during a telephone conversation, Bryan Webster spoke to Alan Fisher, a director of PLL, about the sale process and the interest in the forestry assets. During that conversation Webster said words to the effect that final bids were due on 18 September 2009 and the sale needed to be done by 30 September 2009 and that all arrears would be paid. Webster said that he was aware default notices had been issued and that he was concerned because he (Fisher) had not been talking. Fisher said words to the effect that the notices were issued as a matter of process. Webster said words to the effect that he understood that PLL could terminate in about a month's time so he wanted to get him comfortable with the sale process. Fisher said in response words to the effect that it was all OK, that there was no need to panic about this and that PLL would let Timbercorp and TSL know before PLL did anything.

- 19 On 30 July 2009 PLL represented to Timbercorp and TSL that, notwithstanding the Notices, PLL would not terminate the Leases without first giving Timbercorp and TSL prior notice of its intention to do so (**Representation**).

PARTICULARS

The Representation was partly oral and partly to be implied. Insofar as it was oral, Timbercorp and TSL rely upon the conversation referred to in paragraph (d) of the particulars to paragraph 18. Insofar as it was implied, it was implied from the terms of the communications referred to and PLL's silence thereafter.

- 20 The Representation was a continuing representation and continued from 30 July 2009 until 24 August 2009 when the Termination Notices (as described in paragraph 23 below) were served (**Continuing Representation**).
- 21 PLL knew or intended that Timbercorp and TSL would rely on the Representation and the Continuing Representation.

PARTICULARS

PLL's knowledge and intention is to be inferred from, inter alia, its knowledge of the Leases and the Notices; the terms of an email dated 29 July 2009 from Bryan Webster forwarded to Alan Fisher by Mark Pryn at about 9.40 am on 30 July 2009 regarding the sale process and which stated (in part) that he "... would like Allen to consensually agree to either cancelling those default notices or extend the effective date of 30 to 90 days ie putting them in line with many of the other default notices received..."; and the matters referred to in the particulars to paragraphs 18 and 19 above. A copy of the email is available for inspection by appointment.

- 22 Relying on the Representation and the Continuing Representation and induced thereby Timbercorp and TSL assumed that PLL would not terminate the Leases without first giving them prior notice of its intention to do so and each of Timbercorp and TSL thereafter acted to its detriment.

PARTICULARS

Timbercorp and TSL did not take any further steps to address or comply with the Notices prior to receipt of the Termination Notices, which it would have taken had it received notification.

- 23 On or about 24 August 2009, but without first giving prior notice to Timbercorp or TSL, PLL served notices purporting to terminate the Leases (**Termination Notices**) based on Timbercorp's and TSL's non-compliance with the Notices.

PARTICULARS

The purported termination was communicated by way of written notices addressed to Timbercorp and TSL dated 24 August 2009 and sent under cover of letter from PLL's solicitors to the Liquidators on, or about 24 August 2009. A copy is available for inspection by appointment.

- 24 Insofar as the Termination Notices related to the Milltown Lease it was ineffective because it purported to terminate a lease that had previously been surrendered.

PARTICULARS

PLL granted a lease in favour of TSL on 30 June 2002. That lease was surrendered. PLL subsequently granted a further lease in respect of the same land in favour of Timbercorp on 10 March 2008. The Termination Notice referred to the 30 June 2002 lease, and the 10 March 2008 lease has not been the subject of a valid demand for rent or a termination notice.

- 25 Timbercorp and TSL tendered payment of the July Quarter Instalment on 18 September 2009 and tendered payment of the July Quarter Instalment and the quarterly instalment due on or before 30 September 2009 (**October Quarter Instalment**) on 30 September 2009, but PLL rejected both tenders.

PARTICULARS

On 18 September 2009 at 11am Timbercorp and TSL tendered to Mr Fisher at the offices of PLL a bank cheque in the amount of \$891,512.46 comprising payment for the July Quarter Instalment.

On 30 September 2009 at 12pm Timbercorp and TSL tendered to Mr Fisher at the offices of PLL a bank cheque in the amount of \$1,783,024.92 comprising two payments of \$891,512.46 for the July Quarter Instalment and the October Quarter Instalment.

Copies of the bank cheques are available for inspection by appointment.

26. By sending the Termination Notices without first giving Timbercorp and TSL prior notice and by continuing to seek to rely upon the Termination Notices, PLL seeks unconscionably to depart from the Representation and the Continuing Representation.
27. By reason of the matters set out in paragraphs 18 to 26 above, PLL is estopped from:
 - (a) relying upon the Termination Notices;
 - (b) contending that the Termination Notices operate so as to terminate the Leases;
 - (c) denying that the Leases remain on foot; and /or
 - (d) seeking to terminate the Leases based on any non-compliance with the Notices.
28. Further or alternatively, by reason of the matters referred to in paragraphs 18 to 26 above, PLL waived any right it had to serve and /or rely upon the Termination Notices without first giving Timbercorp and TSL prior notice of its intention to do so.
29. Further, insofar as the Representation and the Continuing Representation related to future matters, Timbercorp and TSL rely on s 51A of the *Trade Practices Act 1974* (Cth) and/or s 4 of the *Fair Trading Act 1999* (Vic).
30. Insofar as each of the Representation and the Continuing Representation was as to matters of existing fact it was false from the time when PLL decided to serve, alternatively served, the Termination Notices without first giving Timbercorp and TSL prior notice of its intention to do so.
31. By reason of the matters referred to in paragraphs 18 to 30 above PLL engaged, in trade or commerce, in conduct which was misleading or deceptive or was likely to

mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth) and/or s 9 of the *Fair Trading Act 1999* (Vic).

32 By reason of the matters set out in paragraph 31 above Timbercorp and TSL:

- (a) have suffered, alternatively are likely to suffer loss and damage;
- (b) seek and are entitled to an order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) and/or s 158 of the *Fair Trading Act 1999* (Vic) that the Termination Notices be set aside and are of no effect.

PARTICULARS

If the Leases are terminated (which is denied) and not transferred under the Sale Contract, the purchase price payable under the Sale Contract will be substantially reduced.

Relief From Forfeiture

- 33 Prior to 1 July 2009, Timbercorp and TSL paid the annual rent by quarterly instalments in accordance with the terms of the Leases and PLL accepted the same.
- 34 The failure of Timbercorp and TSL to pay the July Quarter Instalment on time was due to the insolvency of Timbercorp and TSL and Timbercorp and TSL subsequently tendered the July Quarter Instalment and the October Quarter Instalment as alleged above.
- 35 Timbercorp and TSL remain ready, willing and able to pay PLL the outstanding rent (the July Quarter Instalment and the October Quarter Instalment) and other amounts properly due and payable under the Leases.
- 36 Alternatively to paragraphs 27 to 32 above, if the Termination Notices operated so as to forfeit the Leases, Timbercorp and TSL seek relief from forfeiture of the Leases and it is just and equitable to grant such relief in the circumstances.

PARTICULARS

Timbercorp and TSL rely on, inter alia, the matters referred to in paragraphs 10 to 35 above; the terms of the Leases; the fact that the forfeiture in respect of which relief is sought is a forfeiture for non-payment of rent; the limited right

of termination expressly provided for in clause 8.5 of the Leases; the entitlement of Timbercorp and TSL under clause 11 of the Leases to assign or transfer the Leases with the consent of the PLL which must not be unreasonably withheld; the terms of the Sale Contract and, in particular, those parts that relate to transfer of the Leases; the consequences under the Sale Contract if relief is not granted; PLL's contention that it will be entitled to the Plantations if the Leases have been validly terminated and Timbercorp and TLS are not entitled to relief from forfeiture; the fact that following the settlement of the Sale Contract, a new tenant will be responsible for paying ongoing rent and performing the other covenants under the Leases.

Independent Right

- 37 Further or alternatively, by reason of the terms of the Leases set out in paragraph 8 above (the full terms of which will be referred to at trial), the Leases confer upon Timbercorp and TSL an independent and severable proprietary interest in the Premises, in the nature of a profit-à-prendre and/or a licence coupled with an interest in the nature of a profit-à-prendre, that survives termination of the Leases and which includes a right to enter onto the Premises as and when necessary to tend, manage, harvest and remove the Plantations.
- 38 Further or alternatively, by reason of the terms of the Leases set out in paragraph 8 above (the full terms of which will be referred to at trial), each Lease constitutes a forest property agreement within the meaning of that expression as used in the *Forestry Rights Act 1996* (Vic) (each, a **Forest Property Agreement**).
- 39 To date a number of the Forest Property Agreements have been registered under s 8 of the *Forestry Rights Act 1996* (Vic).

PARTICULARS

Particulars of the forest property agreements that have been registered to date will be provided shortly.

- 40 By reason of the matters set out in paragraphs 38 and 39 above and s 9 of the *Forestry Rights Act 1996* (Vic):
- (a) the burden of the covenants in the registered Forest Property Agreements runs with the Premises; and

- (b) Timbercorp and TSL as the forest property owners (within the meaning of that expression as used in the *Forestry Rights Act 1996* (Vic)) may enforce the covenants against any person who derives title from PLL (as the person who entered into the covenants) as if they were restrictive covenants.

41 Alternatively to paragraphs 37 to 40 above, the Plantations are:

- (a) chattels which are owned by Timbercorp and TSL;
- (b) alternatively, tenants' fixtures installed on the Premises by Timbercorp and TSL which may be removed by them within a reasonable time after the termination of the Leases.

42 Alternatively to paragraphs 37 to 41 above, the Leases confer upon Timbercorp and TSL a contractual licence that survives termination of the Leases and includes a right to enter onto the Premises as and when necessary to tend, manage, harvest and remove the Plantations.

AND THE PLAINTIFFS CLAIM:

1 Declarations:

- (a) that the defendant is estopped from:
 - (i) relying on the defendant's notices dated 24 August 2009 (**Termination Notices**) or contending that the Termination Notices operate so as to terminate the Leases or any of them;
 - (ii) contending that the Termination Notices operate so as to terminate the Leases;
 - (iii) denying that the Leases remain on foot;
 - (iv) seeking to terminate any of the Leases based on any non-compliance with the defendant's notices dated 21 July 2009 (**Notices**);

- (b) further or alternatively, that the defendant irrevocably waived any right it had to serve and / or rely upon the Termination Notices without first giving the plaintiffs prior notice;
 - (c) further, that the Leases have not been terminated.
- 2 An order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) and/or s 158 of the *Fair Trading Act 1999* (Vic) that the Termination Notices be set aside and are of no effect.
- 3 An injunction restraining the defendant from taking any steps to terminate the Leases on the grounds that the plaintiffs failed to comply with the Notices or to take possession of the Premises or otherwise from interfering with the plaintiffs' quiet enjoyment thereof.
- 4 Alternatively, relief from forfeiture of the Leases on such conditions as the Court determines.
- 5 Further or alternatively, a declaration that the Leases confer upon the plaintiffs an independent and severable proprietary interest, in the nature of a profit-à-prendre and/or a licence coupled with an interest in the nature of a profit-à-prendre, that survives termination of the Leases and which includes a right to enter onto the Premises as and when necessary to tend, manage, harvest and remove the Plantations.
- 6 Alternatively, declarations that:
 - (a) the Leases constitute forest property agreements within the meaning of that expression as used in the *Forestry Rights Act 1996* (Vic);
 - (b) in respect of the Leases which constitute forest property agreements which are registered under s 8 of the *Forestry Rights Act 1996* (Vic), the burden of the covenants in the forest property agreements runs with the Premises, and the plaintiffs may enforce the covenants against any person who derives title from the defendant as if they were restrictive covenants;
 - (c) alternatively, the Plantations are chattels which are owned by the Plaintiffs;

(d) alternatively, the Plantations are tenants' fixtures installed on the Premises by the Plaintiffs which may be removed by them within a reasonable time after the termination of the Leases;

(e) alternatively, the Leases confer upon the Plaintiffs a contractual licence that survives termination of the Leases and includes a right to enter onto the Premises as and when necessary to tend, manage, harvest and remove the Plantations.

7 Further or alternatively, damages.

8 Such costs orders as are appropriate.

9 Such further or other order as the Court considers appropriate.

DATED: 5 October 2009

AMENDED M Connock

O Bigos

ARNOLD BLOCH LEIBLER

SCHEDULE 1 - LEASES

Land Description	Date of lease	Commencement date	Timbercorp entity	Rent owing on 30 June 2009	Scheme
Branton 47	15/04/00	25/02/00	TL	\$23,205.28	1999
Broers 51	31/05/00	8/05/00	TL	\$19,157.30	2000
Broers 52 *	31/05/00	8/05/00	TL	**	1999
Calvert 65	30/06/02	30/06/02	TSL	\$10,564.17	2002
Chick 79	31/05/00	30/03/00	TL	\$5,477.05	2000
Fridays 184	30/03/01	30/03/00	TSL	\$15,345.39	2001
Fullertons 518	31/05/00	18/04/00	TL	\$13,112.48	2000
Hawker 214	15/04/00	14/01/00	TL	\$59,572.43	1999
Laurie 272	31/05/00	14/03/00	TL	\$34,155.39	2000
Merna 311	30/03/01	21/03/00	TSL	\$20,783.54	2001
Milltown 314	10/03/08	12/03/02	TSL	\$37,706.67	2002
Nigel 339	31/05/00	6/04/00	TL	\$23,317.06	2000
Settlers 401	31/05/00	31/03/00	TL	\$10,821.17	2000
Sharrock 405	31/05/00	12/04/00	TL	\$8,612.73	2000
Stribling 430	30/06/02	30/06/02	TSL	\$7,735.01	2002
Warrabkook 474	31/05/00	27/03/00	TL	\$6,776.96	2000
Zum Park 516	10/03/08	12/03/02	TL	\$4,757.75	(Not allocated)
Stephens 429	10/03/08	12/03/02	TL	\$15,423.05	(Not allocated)
Merna 312	10/03/08	12/03/02	TL	\$547.18	(Not allocated)
Caulfield 72	10/03/08	12/03/02	TL	\$24,027.92	(Not allocated)
TOTAL				\$341,098.53	

* Broers 51 and 52 are under the same lease, subdivided and subject to variation of lease

** PLL served one default notice for "Broers", covers both 51 and 52

SCHEDULE 2 - SAMPLE LEASE

2009

2009 Pro forma 1.0

LEASE
and
FOREST PROPERTY AGREEMENT
Timbercorp Eucalypts Project

BETWEEN

Owner: PLANTATION LAND LIMITED (ACN 090 443 333)

Owner's address: Level 5, 95 Queen Street, Melbourne 3000

AND

Lessee: TIMBERCORP LIMITED (A.C.N. 055 185 067)
of Level 5, 95 Queen Street, Melbourne

THIS LEASE is (in respect of each Leased Area) made on the date specified in the attached Schedules (as defined):

BETWEEN:

PLANTATION LAND LIMITED (A.C.N. 090 443 333) of 5th Floor, 95 Queen Street, Melbourne, Victoria
("Owner")

AND

TIMBERCORP LIMITED (A.C.N. 055 185 067) of 5th Floor, 95 Queen Street, Melbourne, Victoria
("Lessee")

RECITALS:

- A** The Owner is the proprietor of each piece of land described in each Schedule to this lease (each referred to as a "Leased Area").
- B** The Owner has agreed to lease each Leased Area described in each Schedule to the Lessee for the Annual Rent and Term described in that Schedule on the terms and conditions contained in this Lease.
- C** This document is intended to operate as a master lease containing the terms and conditions that are to apply in respect of each Leased Area that the Lessor has agreed and will in future agree to lease to the Lessee from time to time. A new Schedule is to be prepared and annexed to this lease in respect of each new Leased Area and the parties must initial the Schedule.

OPERATIVE PROVISIONS:

1. DEFINITIONS AND INTERPRETATION

1.1. Definitions

In this Lease, the following words and expressions have the following meanings:

"Annual Rent" means the rent specified in item 2 of the Schedule as reviewed from time to time in accordance with clause 3.2.

"Carbon Credits" means any tradeable credits or rights associated with the trees resulting from the ability of the trees to absorb green house gases.

"Commencement Date" means the date set out in item 3 of the Schedule.

"Further Term" means the period for which this Lease may be extended pursuant to clause 7.1.

"GST" means GST within the meaning of A New Tax System (Goods and Services Tax) Act 1999 (as amended)

"Leased Area" means the land described in item 1 of the Schedule.

"month" means calendar month.

"Plantation Crop" means the crop or crops of eucalyptus trees planted and tended or to be planted and tended on the Leased Area by the Lessee.

"Rent Payment Dates" means each 30 June, 30 September, 31 December and 31 March during the Term.

"Review Dates" means the dates referred to in clause 3.2.

"Schedule" means each several schedule attached at the back of this Lease from time to time.

"Term" means the term specified in Item 3 of the Schedule and, where the context permits, includes any extension or renewal of that term, but subject to any variation or termination of the Term in accordance with this Lease.

1.2. Interpretation

In this Lease unless the context otherwise requires:

- (a) the singular number includes the plural and vice versa and a word denoting one gender includes each of the other genders;
- (b) "person" includes a firm, a corporation and any incorporated body;
- (c) headings are for convenience only and do not affect the interpretation of this Lease;
- (d) a reference to an Act of Parliament shall be read as a reference to that Act as amended, modified or replaced from time to time and includes any regulations, by-laws, orders, ordinances or rules made under that Act;
- (e) a reference to a party to this Lease includes that party's successors and permitted assigns;
- (f) if any party comprises more than one person, the provisions of this Lease binds all of them jointly and each of them severally;
- (g) if the Lessee or any of the persons comprising the Lessee is a trustee, this Lease binds that person in its capacity as trustee and personally; and
- (h) where the word "include" or "includes" is used, it is to be read as if the expression "(but is not limited to)" immediately followed such word and where the word "including" is used, it is to be read as if the expression "(but not limited to)" immediately followed such word.

2. GRANT OF LEASE

The Owner leases to the Lessee the Leased Area for the Term for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees.

3. RENT

3.1. Payment of rent

The Lessee will pay to the Owner the Annual Rent in advance in equal successive quarterly instalments on or before the Rent Payment Dates with the first instalment of rent being due on the Commencement Date. If the Commencement Date is not a Rent Payment Date, the Lessee will pay proportionate instalments of rent on the Commencement Date (for the period from the Commencement Date until the next Rent Payment Date) and on the last Rent Payment Date.

3.2. Rent reviews

The Annual Rent will be reviewed on 30 June 2008 and each subsequent 30 June during the Term (as extended or renewed) ("Review Dates"). Subject to clause 7.2, the Annual Rent payable from any Review Date can not be less than the Annual Rent payable immediately prior to that Review Date and will be calculated in accordance with the following formula:

$$NR = R \times \frac{NCPI}{CPI}$$

Where:

NR is the Annual Rent payable from the relevant Review Date.

R is the Annual Rent payable immediately prior to the relevant Review Date.

NCPI is the Consumer Price Index (All Groups) for the Weighted Average of Eight Capital Cities as last published by the Australian Bureau of Statistics prior to the relevant Review Date.

CPI is the Consumer Price Index (All Groups) for the Weighted Average of Eight Capital Cities as last published by the Australian Bureau of Statistics prior to the immediately preceding Review Date or, in the case of the first review, as last published by the Australian Bureau of Statistics prior to the date of execution of this Lease.

3.3. Discontinuation or suspension of CPI

If the Consumer Price Index (All Groups) for the Weighted Average of Eight Capital Cities is discontinued or suspended, the method of review set out in clause 3.2 will cease to apply and will be replaced with such alternative method as is mutually agreed between the Owner and the Lessee or, if the parties fail to agree, such alternative method, as in the opinion of an expert appointed by the President for the time being of the Institute of Chartered Accountants (Victorian Division) at the request of either party most closely reflects changes in the cost of living for the Weighted Average of Eight Capital Cities. The cost of any expert determination carried out under this clause will be borne equally between the parties.

4. THE LESSEE'S OBLIGATIONS

The Lessee agrees with the Owner that the Lessee will at the Lessee's expense during the Term:

4.1. Permitted use

Use the Leased Area for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees and deal with the Plantation Crop as the Lessee sees fit.

4.2. Forestry practice

Comply with sound silvicultural and environmental practices adopted within the forestry industry.

4.3. Comply with laws

Comply with all laws, by-laws and regulations relating to the use and occupancy of the Leased Area.

4.4. Repairs

Promptly repair any damage caused by the Lessee to any roads, tracks or fences on the Leased Area.

4.5. Chemicals and dangerous substances

Not store or use any chemical, inflammable, noxious or dangerous substances in a manner which is likely to result in damage to vegetation, livestock, crops or water reserves on any neighbouring land owned or occupied by the Owner.

4.6. Native vegetation

Not cut down, damage or destroy any native vegetation on the Leased Area without the prior written consent of the Owner.

4.7. Buildings

Not erect any buildings, structures or dwellings or use any caravans on the Leased Area for accommodation purposes.

4.8. Permit Owner to enter

Permit the Owner to enter upon the Leased Area from time to time with or without equipment for the purpose of performing the Owner's obligations under this Lease and for accessing neighbouring land owned or occupied by the Owner.

4.9. Indemnity

Indemnify the Owner from and against all claims, demands, proceedings, judgments, damages, costs and losses of any nature which the Owner may suffer or incur in connection with the loss of life and/or personal injury to any person or damage to any property wheresoever occurring arising from an occurrence at the Leased Area or the use by the Lessee of the Leased Area during the Term except where the loss of life and/or personal injury or damage to property is the result of an act of default or neglect by the Owner or the Owner's invitees.

5. OWNER'S OBLIGATIONS

The Owner agrees with the Lessee that the Owner will at the Owner's expense during the Term:

- (a) **Quiet enjoyment**
Allow the Lessee to peaceably and quietly hold and enjoy the Leased Area without any interruption by the Owner or any person claiming through or under the Owner.
- (b) **Rates and taxes**
Duly and punctually pay or cause to be paid all rates, taxes and other charges levied by any government or other authority in respect of the Leased Area.
- (c) **Comply with laws**
Comply with all laws, by-laws and regulations relating to the use and occupancy of any neighbouring land occupied by the Owner.
- (d) **Comply with mortgages, etc**
Comply with the provisions of all mortgages, leases, licenses and charges relating to the Leased Area.
- (e) **Chemicals and dangerous substances**
Not store or use any chemical, inflammable, noxious or dangerous substances in a manner which is likely to result in damage to the Plantation Crop.
- (f) **Control of fires**
Take all necessary measures to ensure that any fires which may occur or be lit on any neighbouring land owned or occupied by the Owner are properly controlled and supervised.
- (g) **Lighting of fires**
Not without the prior written approval of the Lessee light any fires on the Leased Area.
- (h) **Notification of fires**
Where reasonably practical, promptly notify the Lessee or its named contractor (if any) named on the entrance to the Leased Area of:
 - (i) any fire in the vicinity of the Leased Area which may threaten the Plantation Crop; and
 - (ii) any notice or notification received by the Owner from the owner or occupier of any adjoining land pursuant to any Act of Parliament or regulation relating to bush fires.

6. THE LESSEE'S RIGHTS

6.1. General

The Owner hereby grants to the Lessee the rights set out in this part to be exercised by the Lessee during the Term.

6.2. Harvest

The Lessee will be entitled to harvest the Plantation Crop and to remove and sell or otherwise deal in the products and any rights, benefits and credits derived from the Plantation Crop and to retain all income from such sale or dealing.

6.3. Access

The Lessee will be entitled to full and free access with or without vehicles to the Leased Area along any road or track on any neighbouring land in respect of which the Owner has similar rights and which gives access to the Leased Area from a public road.

6.4. Construct roads and tracks

The Lessee may with the prior written consent of the Owner (which consent must not be unreasonably withheld) construct and maintain such roads and tracks (including, if necessary, bridges and culverts) on the Leased Area or on any neighbouring land in respect of which the Owner has similar rights, as are reasonably required by the Lessee to provide access to the Leased Area from a public road.

6.5. Use of sand and gravel

For the purposes of constructing and maintaining the roads and tracks referred to in clause 6.4 the Lessee may take and use sand, gravel and other material available from a place approved by the Owner (which approval must not be unreasonably withheld) on either the Leased Area, or any neighbouring land in respect of which the Owner has similar rights, in such quantities as the Lessee reasonably requires. If the Lessee exercises its rights under this clause, the Lessee must rehabilitate the surface of the land to an appearance as near as possible to the appearance of the surface of the surrounding land.

6.6. Graze livestock

The Owner may graze livestock on the Leased Area at such times and under such conditions as are acceptable to the Lessee. If the Owner does not wish to graze livestock under those conditions, the Lessee may do so and retain any income derived therefrom.

6.7. Security

Subject to clause 4.8, the Lessee may at its own expense padlock any gates on roads or tracks entering the Leased Area and take such other measures to exclude trespassers as the Lessee reasonably considers appropriate.

6.8. Signs

The Lessee may at its own expense erect and maintain a sign or signs on the Leased Area detailing such matters as the Lessee reasonably considers appropriate.

7. EXTENSION OF TERM

7.1. Lessee may extend Term

The Lessee may by giving written notice to the Owner not less than three (3) months prior to the expiration of the Term, elect to extend the Term for the purpose of growing, tending and harvesting a further rotation of the Plantation Crop (whether by way of coppice or replant) in respect of the whole or any part of the Leased Area (as nominated by the Lessee in such notice) for the period commencing immediately upon expiry of the Term and expiring on the earliest of:

- (a) 12 years after the commencement of the Further Term; and
- (b) the date harvesting of the Plantation Crop is completed for the second time.

7.2. Extension for late harvesting

If the Lessee is prevented from:

- (a) harvesting the Plantation Crop;

- (b) removing from the Leased Area the products derived from the Plantation Crop; or
- (c) processing the products derived from the Plantation Crop,

due to an event of Force Majeure, but continues to pay instalments of Annual Rent, the Lessee may by giving written notice to the Owner elect to extend the Term (on the terms and conditions of this Lease) for a period of time equal to the duration of the event of Force Majeure.

7.3. Definition of Force Majeure

In clause 7.2, "Force Majeure" means:

- (a) Act of God, fire, explosion, earthquake, landslide, flood, wash-out, lightning, storm or tempest;
- (b) strikes, lockouts, stoppages, restraints of labour or other industrial disturbances;
- (c) war, acts of public enemies, riot, civil commotion or sabotage;
- (d) breakdown of or accident to plant, machinery or equipment (excluding a breakdown caused by any failure of the Lessee to maintain plant, machinery or equipment in a proper manner);
- (e) restraints, embargoes or other unforeseeable actions by the government of Victoria or the government of the Commonwealth of Australia; or
- (f) any Act of Parliament, regulation, by-law, order, ordinance or rule.

8. TERMINATION

8.1. Non payment of Annual Rent

The Owner may terminate this Lease with immediate effect if the Lessee is in arrears in respect of one quarterly instalment of Annual Rent and such arrears are not paid in full within one month after the Owner has served a written notice on the Lessee requesting payment.

8.2. Termination upon Harvest

- (a) Until such time as the Term is extended under clause 7.1, the Lessee may terminate this Lease at any time after completion of the first harvest of the Plantation Crop by giving not less than three (3) months prior notice in writing to the Owner.
- (b) In the event that the Term is extended under clause 7.1 for the purpose of growing, tending and harvesting a further rotation of the Plantation Crop, the Lessee may terminate this Lease at any time after completion of the second harvest of the Plantation Crop by giving not less than three (3) months prior notice in writing to the Owner.

8.3. Material breach

The Lessee may terminate this Lease with immediate effect if the Owner commits a material breach of this Lease and fails to remedy the breach or make reasonable compensation in money within one month after the Lessee has served a written notice on the Owner requiring the Owner to remedy the breach.

8.4. Effect of termination

Termination of the whole or any part of this Lease under this Part 8 will be without prejudice to any rights or obligations which may have accrued prior to the date of termination.

8.5. Limited right of termination

Except as expressly provided in this Part 8, neither Party is entitled to terminate or rescind this Lease and the Owner will is not entitled to re-enter the Leased Area or forfeit this Lease at any time prior to the expiration of the Term (as extended or renewed).

9. RIGHTS AND OBLIGATIONS ON EXPIRATION OR TERMINATION

9.1. Removal of stumps, roads and tracks

The Lessee acknowledges and agrees with the Owner that at the expiration or earlier termination of this Lease, the Lessee will not (subject to this lease) remove or authorise the removal of:

- (a) any stumps or debris from the Leased Area; or
- (b) any roads or tracks constructed on the Leased Area or on any neighbouring land under clause 6.4,

and that any crop which subsequently grows from the stumps will be the property of the Owner.

9.2. Removal of products and equipment

The Lessee will remove all plant, equipment, implements or other things brought onto the Leased Area by or on behalf of the Lessee during the Term within three (3) months after the expiration or earlier termination of this Lease.

9.3. Products and equipment left by the Lessee

Subject to Part 11, any plant, equipment, implements or other things brought onto the Leased Area by or on behalf of the Lessee, which are not removed by the Lessee within the three (3) month period referred to in clause 9.2 and any part of the Plantation Crop not harvested by the Lessee during the Term (as extended) will be the property of the Owner.

10. OWNERSHIP OF THE PLANTATION CROP AND CARBON CREDITS

10.1. Ownership

The Owner acknowledges and agrees with the Lessee that for so long as this Lease has not been terminated for non-payment of Annual Rent under clause 8.1 and the Lessee continues to pay the instalments of Annual Rent, the Plantation Crop and any Carbon Credits will be and will remain the property of the Lessee (or any other person or entity deriving title to the Plantation Crop through the Lessee) for the period referred to in clause 10.3.

10.2. Additional rights

The Owner hereby transfers and grants to the Lessee the following rights in addition to the other rights granted to the Lessee under this Lease:

- (a) to establish, tend and manage the Plantation Crop;
- (b) to enter upon the Leased Area with or without vehicles and, to the exclusion of the Owner and all other persons, to harvest the Plantation Crop and remove and sell the products and any rights, benefits and credits derived from the Plantation Crop; and
- (c) to exercise and enjoy such of the rights and powers granted to the Lessee under this Lease as may be necessary to enable the Lessee to exercise the rights referred to in paragraphs (a) and (b) above.

10.3. Independent proprietary interest

- (a) The rights and interests granted to the Lessee under clauses 10.1 and 10.2 constitute an independent and severable grant of a proprietary interest in the Leased Area by the Owner to the Lessee.

- (b) In the event that the Term or the leasehold interest of the Lessee under this Lease:

- (i) ends; or
- (ii) is terminated (other than by effluxion of time or other than by the operation of Parts 7 or 8); or
- (iii) becomes void whether by reason of some act or default of the Owner or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Owner, or for any other reason whatsoever,

the rights and interests granted to the Lessee under clauses 10.1 and 10.2, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended) would have ended by effluxion of time.

10.4. Forest Property Agreement

For the purposes of the Forestry Rights Act 1996, each clause of this document, including this clause 10 is deemed to be repeated and separately constitutes a forest property agreement in addition to a lease in respect of the Leased Area ("Forest Property Agreement").

11. DEALINGS

11.1. By the Owner

(a) The Owner may sell, transfer, assign, lease, licence, charge or otherwise dispose of or part with possession of or encumber the whole or any part of the Leased Area or the Owner's interest in the Leased Area or agree to do the same PROVIDED THAT in respect of any such sale, transfer, assignment, lease or licence by the Owner, the Owner first arranges (at the Owner's cost) for the other party or parties to the transaction to enter into a deed of covenant with the Lessee under which such party or parties agree to comply with and be bound by the provisions of this Lease as if such party or parties were named in this Lease in place of the Owner.

(b) Encumbrances

The Owner agrees with the Lessee that the Owner will not create any encumbrances over the Leased Area or any part thereof ranking in priority to the interests of the Lessee under this Lease.

11.2. By the Lessee

(a) Grants of sub-lease or licence

The Lessee may:

- (i) sub-lease or grant a licence to occupy the whole or any part of the Leased Area; or
- (ii) assign, transfer or deal with all or part of the Plantation Crop and all products, rights, benefits and credits derived from the Plantation Crop or its rights under the Forest Property Agreement constituted under clause 10.4,

on such terms and conditions as the Lessee deems fit without having to obtain the consent of the Owner but no such sub-lease, licence or other dealing relieves the Lessee from any obligations under this Lease.

(b) Assignment or transfer

Subject to clauses 11.2(a) and 11.2(c), the Lessee may with the consent of the Owner (which consent must not be unreasonably withheld) assign or transfer this Lease upon the Lessee arranging (at the Lessee's cost) for the assignee to enter into a deed of covenant with the Owner under which the assignee agrees to comply with and be bound by the provisions of this Lease as if the assignee were named in this Lease in the place of the Lessee.

(c) Ceasing to be project manager

The Owner covenants and agrees that, notwithstanding anything to the contrary express or implied in this Lease, if for any reason whatsoever the Lessee ceases to be the project manager under the Project Deed constituting any of the Timbercorp Eucalypts Projects (as amended from time to time) ("the Project Deed") the Owner will consent to the assignment of this Lease to any person fulfilling the position of project manager under the Project Deed for the time being, subject to the proposed assignee assuming all of the obligations of the Lessee under this Lease.

12. MINING AND PETROLEUM ACTIVITIES

12.1. Definitions

In this part, the following expressions have the following meanings:

"Mining Activities" means all activities that may be carried out pursuant to a Mining Tenement.

"Mining Tenement" means any right or title available under the Mineral Resources Development Act 1990 and includes a permit to enter on private land.

"Petroleum Activities" means all activities that may be carried out pursuant to a Petroleum Title.

"Petroleum Title" means any right or title available under the Petroleum Act 1958 and includes a permit to enter on private land.

12.2. Application for Mining Tenement or Petroleum Title

If any person applies for a Mining Tenement or a Petroleum Title over any part of the Leased Area, then the following provisions apply:

- (a) The Owner must promptly notify the Lessee.
- (b) Neither the Owner nor the Lessee may consent to the application or do any act or thing that may assist the grant of the application without the prior written consent of the other Party.
- (c) The Lessee will be entitled to object to or resist the application or to restrict the scope of the rights to be obtained by virtue of the grant of the application, to the fullest extent permitted by law.
- (d) For the purpose of giving full effect to paragraph (c) above, the Owner must sign such documents as the Lessee may require, and the Lessee will be entitled to take such proceedings in the name of the Owner as the Lessee considers appropriate.
- (e) The Owner appoints the Lessee its lawful attorney to execute the documents and to do the things referred to in paragraph (d) above.

12.3. Grant of Mining Tenement or Petroleum Title

If a Mining Tenement or a Petroleum Title is granted over any part of the Leased Area, then the following provisions apply:

- (a) The Owner must keep the Lessee informed as to the Mining Activities or Petroleum Activities carried out upon the Leased Area, and must forward copies of all communications with the persons carrying out or proposing to carry out such activities.
- (b) The Owner must not consent to any use of water, felling of trees, stripping of bark or cutting of timber on the Leased Area.
- (c) If any compensation becomes payable by virtue of or in respect of Mining Activities or Petroleum Activities on the Leased Area, then the Owner and the Lessee will be entitled to compensation according to their respective interests in the area affected by those activities. The Owner and the Lessee will each be responsible for negotiating and recovering such compensation.

13. GENERAL

13.1. Warranties

The Owner represents and warrants that it is the registered proprietor of the Leased Area and that it is entitled to grant this Lease to the Lessee.

13.2. Costs

- (a) Each party must pay its own costs of and incidental to the preparation and service of any notice requiring the other party to remedy a default under this Lease.
- (b) The Lessee agrees to pay all stamp duty and registration fees payable on this Lease.

13.3. Caveats

- (a) The Lessee may lodge a caveat in respect of its interest under this Lease.
- (b) The Owner agrees to provide to the Lessee any plans and other details as are reasonably necessary to enable the Lessee to lodge a caveat.
- (c) Upon the expiration or earlier termination of this Lease, the Lessee must promptly withdraw at its own expense any caveat lodged under this clause.

13.4. Further assurances

Each party agrees to sign such documents and do all such acts, matters and things as may be reasonably required by the other party to give effect to this Lease.

13.5. Voiding insurances

Each party agrees that it will not do or permit or suffer to be done any act, matter or thing which it knows or reasonably should know may prejudice or render void or voidable any insurances in respect of the Leased Area or the Plantation Crop or result in the premiums for such insurances being increased.

13.6. Transfer of Land Act

To the extent permitted by law, all provisions implied in leases by the Transfer of Land Act 1958 are expressly excluded from this Lease.

13.7. Property Law Act

The provisions of section 144(1) of the Property Law Act 1958 do not apply to this lease.

13.8. No partnership

Nothing contained in this Lease constitutes any party the partner or agent of any other party and each party agrees that it will not hold itself out as the partner or agent of the other party. Subject to clause 11.2, this Lease is not for the benefit of any person not a party to this Lease and will not be deemed to give any right or remedy to any such person.

13.9. Waivers

No waiver by a party of any breach of this Lease will be deemed a waiver of any preceding or succeeding breach of this Lease.

13.10. Proper law

This Lease is governed by and is to be construed in accordance with the laws of the State of Victoria and the parties submit to the jurisdiction of the courts of that State.

13.11. Severability

If any provision or part of a provision of this Lease is or becomes void or unenforceable, that provision or part of a provision will be severed from this Lease to the intent that the remaining provisions of this Lease will continue in full force and effect.

13.12. Parties may act through agents

All rights granted to a party and all obligations imposed on a party under this Lease may be enjoyed or performed (as the case may be) by that party's employees, agents and contractors.

13.13. Goods and Services Tax

- (a) If any supply made by a party ('Supplier') to the other ('Recipient') under this Agreement is a taxable supply (according to GST law) so that the Supplier is liable to GST, the parties agree that the consideration payable for that taxable supply represents the value of the taxable supply (that is, the GST exclusive amount) and not the price for that taxable supply.
- (b) The price for any taxable supply made by the Supplier under this Agreement is the GST inclusive amount which is determined by increasing the consideration payable by an

amount equal to the GST exclusive amount multiplied by the GST rate in force from time to time.

- (c) GST payable under paragraph (b) will be payable by the Recipient without deduction or set-off of any other amount, at the same time and on the same basis as the GST exclusive amount is payable by the Recipient.
- (d) The Supplier must, in respect of a taxable supply made by it under this Agreement, issue to the Recipient a valid tax invoice in the prescribed form for the amount of GST referable to that taxable supply, before the due date of payment for the taxable supply by the Recipient.
- (e) The Recipient's obligation to make payment in respect of a taxable supply under this Agreement is subject to the Supplier complying with its obligation in paragraph (d) above and the Recipient may defer payment of that amount until the Supplier has discharged its obligation to the Recipient's reasonable satisfaction.

14. NOTICES

All notices, consents, approvals and other communications required or authorised to be given under this Lease ("Notices") must be in writing and may be personally delivered or sent by pre-paid post or facsimile to the addressee's address specified in this Lease or such other address as the addressee may have notified from time to time. A notice will be deemed to be received:

- (a) if personally delivered, upon receipt;
- (b) if sent by pre-paid post within Australia, on the third day after posting;
- (c) if sent by pre-paid post outside Australia, on the seventh day after posting; and
- (d) if sent by facsimile, upon production of a successful transmission report by the sender's facsimile machine.