

OUTLINE OF SUBMISSIONS OF

First and Second Defendants in Proceeding S CI 2011 6604 (Liparoo & Yungera Rights Proceeding)

First Defendant in Proceeding S CI 2011 6606 (Solara Rights Proceeding)

Date: 28 September 2012

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1. The First and Second Defendants in the Liparoo & Yungera Rights Proceeding, and the First Defendant in the Solara Rights Proceeding (collectively, the **First and Second Defendants**), refer to and adopt the joint submissions, filed on behalf of, among others, Australia New Zealand Banking Group (**ANZ**) dated 28 September 2012, insofar as those submissions relate to the Solara and Liparoo & Yungera Rights Proceedings. They make the further submissions below in relation to the application for approval of their entry into the Deeds of Compromise the subject of each of the Solara and Liparoo & Yungera Rights Proceedings, in their capacity as trustees, pursuant to Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic).

A. The First and Second Defendants

2. The first defendant to the Liparoo & Yungera Rights Proceeding, OIM#2 Pty Ltd (Receivers and Managers Appointed) (ACN 112 691 997) (**OIM#2**), is the trustee of the Timbercorp Orchard Trust #3 (**TOT#3**). It was the registered proprietor of the Liparoo property, before the sale of that property, and held the assets of TOT#3 for the benefit of the unit holders.¹

¹ Affidavit of Alan David Fisher (*Liparoo & Yungera*) (**Fisher Affidavit (Liparoo & Yungera)**) sworn 20 September 2012 at [7], [15].

3. The second defendant to the Liparoo & Yungera Rights Proceeding, OIM#5 Pty Ltd (Receivers and Managers Appointed) (ACN 112 691 997) (**OIM#5**), is the trustee of the Timbercorp Orchard Trust #5 (**TOT#5**). The registered proprietor of the Yungera property, before it was sold, was Trust Company Ltd (ACN 004 027 749), in its capacity as custodian of the assets of TOT#5. Trust Company Ltd was required to hold the Yungera property for the benefit of OIM#5 in its capacity as trustee, and to act on the instructions of OIM#5.²
4. OIM#2 is also the First Defendant in the Solora Rights Proceeding, in its capacity as the trustee of the Timbercorp Orchard Trust #2 (**TOT#2**). It was the registered proprietor of the Solora property, before the sale of that property, and held the assets of TOT#2 for the benefit of the unit holders.³
5. TOT#2, TOT#3 and TOT#5 are wholly owned sub-trusts of the Timbercorp Primary Infrastructure Fund (ARSN 116 024 830) (**TPIF**), which was formerly known as the Timbercorp Agribusiness Trust.⁴
6. TPIF is a property trust. The responsible entity of TPIF is Align Funds Management Pty Ltd (formerly known as Orchard Investments Management Ltd).⁵
7. Prior to settlement of the sale of the properties referred to in paragraphs 2, 3 and 4 above, the properties were each subject to securities granted in favour of ANZ.⁶ ANZ appointed Receivers and Managers of the charged assets of OIM#2 (including the Liparoo property and the Solora property) and of OIM#5 (including the Yungera property) on 16 and 15 September 2009 respectively.⁷
8. OIM#2 and OIM#5 have a possible entitlement to any balance of the net sale proceeds of the sale of the properties in the event that the ANZ's secured debt is paid in full.

² Fisher Affidavit (*Liparoo & Yungera*) at [8], [15].

³ Affidavit of Alan David Fisher (*Solora*) sworn 20 September 2010 (**Fisher Affidavit (Solora)**) at [7], [14].

⁴ Fisher Affidavit (*Liparoo & Yungera*) at [9]; Fisher Affidavit (*Solora*) at [8].

⁵ Fisher Affidavit (*Liparoo & Yungera*) at [10]; Fisher Affidavit (*Solora*) at [9].

⁶ Second Affidavit of Clinton Charles Hinchin (*Liparoo & Yungera*) sworn 19 September 2012 (**Second Hinchin Affidavit (Liparoo & Yungera)**) at [31];

Second Affidavit of Clinton Charles Hinchin (*Solora*) sworn 19 September 2012 (**Second Hinchin Affidavit (Liparoo & Yungera)**) at [27].

⁷ Second Hinchin Affidavit (*Liparoo & Yungera*) at [23] and [24]; Second Hinchin Affidavit (*Solora*) at [21].

9. For the purposes of both the Liparoo & Yungera Rights Proceeding and the Solora Rights Proceeding, OIM#2 and OIM#5 are represented by their directors, and not by the Receivers and Managers.⁸

B. Court's power to give directions to trustees

10. Pursuant to Rule 54.02, and the general principles of equity⁹, a trustee may seek specific directions from the Court as to how they should administer an estate or execute a trust.
11. Rule 54.02 provides, relevantly, as follows:

54.02 Relief without general administration

- (1) *A proceeding may be brought for any relief which could be granted in an administration proceeding and a claim need not be made for the administration or execution under the direction of the Court of the estate or trust in respect of which the relief is sought.*
- (2) *Without limiting paragraph (1), a proceeding may be brought for—*
- (a) *the determination of any question which could be determined in an administration proceeding, including any question—*
- (i) *arising in the administration of an estate or in the execution of a trust;*
- (ii) *as to the composition of any class of persons having a claim against an estate or a beneficial interest in an estate or in property subject to a trust; or*
- (iii) *as to the rights or interests of a person claiming to be a creditor of an estate or to be entitled under the will or on the intestacy of a deceased person or to be beneficially entitled under a trust;*
- (b) *an order directing an executor, administrator or trustee to—*

⁸ Fisher Affidavit (*Liparoo & Yungera*) at [3]; Fisher Affidavit (*Solora*) at [3].

⁹ *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547 at 548.

- (i) *furnish and, if necessary, verify accounts;*
- (ii) *pay funds of the estate or trust into court; or*
- (iii) *do or abstain from doing any act;*
- (c) *an order:*
 - (i) *approving any sale, purchase, compromise or other transaction by an executor, administrator or trustee; or*
 - (ii) *directing any act to be done in the administration of an estate or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed under the direction of the Court.*

...

12. The Court has a broad jurisdiction and power under Rule 54.02 to advise and direct trustees in relation to the performance of their trusts and, where appropriate, to approve their entry into and performance of any transaction pursuant to Rule 54.02(2)(c)(i).¹⁰
13. When considering an application for approval of the compromise of a proceeding, the Court's role is primarily to consider the propriety of the application for approval, rather than the wisdom of the specific transaction. This involves considering whether:
 - (a) the trustee's decision to agree to the compromise was within power;
 - (b) there was any impropriety in the trustee's decision;
 - (c) the trustee exercised its discretion in good faith; and
 - (d) the trustee gave fair consideration to the relevant issues.¹¹

¹⁰ *Hornsby v Playoust (No 2)* [2005] VSC 125 at [10].

¹¹ *ExxonMobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* [2010] VSC 357, at [87].

C. Outcome for unit holders / beneficiaries and other stakeholders

14. Following performance of the Deeds of Compromise¹², assuming that the Receivers and Managers of each of OIM#2 and OIM#5 are removed following repayment of the Secured Debt, any funds received by OIM#2 or OIM#5 in their capacity as trustees of TOT#2, TOT#3 and TOT#5 will first be used to pay the creditors of TOT#2, TOT#3 and TOT#5 respectively.¹³
15. Any assets remaining to TOT#2, TOT#3 or TOT#5 following payments to creditors will be distributed to TPIF and paid to TPIF's secured creditors.¹⁴
16. Irrespective of the outcome of the present applications and the other Timbercorp approval applications, TPIF will not have sufficient funds to make full payment to its secured creditors.¹⁵
17. Accordingly, on any analysis, unit holders in TPIF will not receive any of the net sale proceeds, regardless of the outcome of the present proceedings.¹⁶

D. Deed of Compromise

18. OIM#2 and OIM#5, in their capacity as the trustees of TOT#3 and TOT#5 respectively, participated in the settlement negotiations regarding a compromise of the Liparoo & Yungera Rights Proceeding, and entered into a Deed of Compromise concerning that proceeding.¹⁷
19. OIM#2, in its capacity as the trustee of TOT#2, also participated in the settlement negotiations regarding a compromise of the Solora Rights Proceeding, and entered into a Deed of Compromise concerning that proceeding.¹⁸
20. The compromise proposed by each Deed is subject to certain conditions, including approval of the compromise by the Court.

¹² Exhibit CCH-2 to the Second Hinchin Affidavit (*Liparoo & Yungera*) and Exhibit CCH-2 to the Second Hinchin Affidavit (*Solara*).

¹³ Fisher Affidavit (*Liparoo & Yungera*) at [22]; Fisher Affidavit (*Solara*) at [21].

¹⁴ Fisher Affidavit (*Liparoo & Yungera*) at [23]; Fisher Affidavit (*Solara*) at [22].

¹⁵ Fisher Affidavit (*Liparoo & Yungera*) at [24], see also Exhibit ADF-6; Fisher Affidavit (*Solara*) at [23], see also Exhibit ADF-5.

¹⁶ Fisher Affidavit (*Liparoo & Yungera*) at [24]; Fisher Affidavit (*Solara*) at [23].

¹⁷ Fisher Affidavit (*Liparoo & Yungera*) at [20].

¹⁸ Fisher Affidavit (*Solara*) at [19].

21. Before entry into the Deeds of Compromise, the directors of OIM#2 and OIM#5 took into account all the relevant matters appropriate to be considered by a trustee in respect of each Deed of Compromise, including (but not limited to):
- (a) the issues set out, respectively, in paragraphs 54 to 95 of the Second Hinchin Affidavit (*Liparoo & Yungera*) and paragraphs 46 to 69 of the Second Hinchin Affidavit (*Solara*), including the issues to be determined in the Liparoo & Yungera Rights Proceeding and the Solara Rights Proceeding respectively, and the matters concerning the Almond Land Rights Proceeding;
 - (b) the continuing erosion of any potential surplus funds (which was to the extent of approximately \$590,000 per month) from the net sale proceeds of the Liparoo, Yungera and Solara land after repayment of the Plaintiff's Secured Debt (referred to at paragraphs 17 to 19 of the Fisher Affidavit (*Liparoo & Yungera*) and at paragraphs 16 to 18 of the Fisher Affidavit (*Solara*));
 - (c) advice received from their solicitors.¹⁹
22. Having regard to the matters referred to, each of OIM#2 and OIM#5 considered that:
- (a) they had the power to enter into the Deeds of Compromise pursuant to clause 16.1 in respectively the TOT#2 Constitution, the TOT#3 Constitution and the TOT#5 Constitution;²⁰ and
 - (b) it was in the best interests of all TPIF stakeholders that they execute each of the Deeds of Compromise in their respective capacities as trustees of TOT#2 and TOT#3, and TOT#5.²¹
23. Since the execution of the Deeds of Compromise on 25 July 2012, the solicitors for ANZ have informed and communicated with ASIC concerning the nature and progress of the compromise, with the authority of the parties to the Deed, including OIM#2 and OIM#5 in their respective

¹⁹ Fisher Affidavit (*Liparoo & Yungera*) at [20]; Fisher Affidavit (*Solara*) at [19].

²⁰ Fisher Affidavit (*Liparoo & Yungera*) at [20(d)]; Fisher Affidavit (*Solara*) at [19(d)].

capacities as trustees of TOT#2 and TOT#3, and TOT#5. The solicitors for ANZ have provided ASIC with copies of each of the Deeds of Compromise, information concerning the steps taken to effect the compromise and an opportunity to participate, if it saw fit, in the present process of seeking approval for each of the Deeds of Compromise from this Court.²²

24. The circumstances warrant the exercise of this Honourable Court's discretion to approve the compromises proposed as recorded in the relevant Deed of Compromise in each of the Liparoo & Yungera Rights Proceeding and the Solora Rights Proceeding.

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²¹ Fisher Affidavit (*Liparoo & Yungera*) at [21]; Fisher Affidavit (*Solora*) at [20].

²² Second Hinchey Affidavit (*Liparoo & Yungera*) at [104]-[110]; Second Hinchey Affidavit (*Solora*) at [78].