



20 July 2009

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Update for Investors in Timbercorp and Great Southern MIS Projects

We provide this update as a service to our clients. It will cover frequently asked questions and give further insights and reassurance to each of our clients.

Part A covers Timbercorp and Part B covers Great Southern.

Clients who are investors in Great Southern projects are encouraged to read our report concerning Timbercorp as well because many of the issues are expected to play out in a similar way for them.

A. Timbercorp

Almonds and Olives Projects: Future presently being determined

- Today is day 4 of a hearing which will significantly affect the future of 14 Almonds and Olives projects. KordaMentha has continued pressing for the schemes to be wound up. Grower committee representatives continue pressing for the future of the projects to be decided by a vote to be taken by the affected investors
- It is good to see that ASIC is taking an active role in the case so as to assist the court reach a proper determination. We have read a copy of ASIC's written submissions and can provide a copy to anyone who would like one. Much of the submissions focus upon the availability of a temporary responsible entity to step in to replace Timbercorp Securities Limited in respect of these projects
- We expect the court judgment would be delivered relatively quickly, but not necessarily today

Professional Indemnity Insurance Policy

- With the future of most projects still uncertain and with the companies in the Timbercorp Group being "hopelessly insolvent", the prospects of investors having their compensation claims paid out is very much dependent on the existence of insurance cover
- We expect Timbercorp Securities Limited and its directors held insurance cover

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- It was (and still is) a condition of the company's Financial Services Licence that insurance is maintained for professional indemnity claims. The insurance needs to be "adequate" for the Timbercorp MIS operations. The relevant licence condition places "adequate" alongside the expression "*having regard to the nature of the activities carried out by the licensee under the licence*"
 - We have not been provided with a copy of any Timbercorp insurance policy. However, among the things normally covered under such policies are:

"Errors, omissions, misleading statements, neglect, breach of duty or breach of trust by a trustee, director or officer of a Responsible Entity or Investment Management Company".

New projects sold by Timbercorp in 2008: Almonds, Olives and Trees

- Many investors in those projects have already instructed us to pursue claims against Messrs Sol Rabinowicz, Robert Hance, Gary Liddell and John Vaughan personally
- If you are an investor in any of those projects sold to you in 2008 and you would like to join in that claim you should notify Katrina Slifka of our office on (03) 9794 2620 or by email: katrina.slifka@mk.com.au. She will provide you with some information on what is required from you

Evidence of Timbercorp's non-disclosure of information relevant for investors

- Macpherson + Kelley already holds a significant amount of evidence which supports the case for investors that Timbercorp failed to disclose critical information to investors concerning the company's being on the verge of collapse at a stage much earlier than the date KordaMentha took the reins as voluntary administrators on 23 April 2009
- There is, however, further critical information we have sought from KordaMentha to help us properly identify when it was that Timbercorp might already have been on the verge of collapse. The first batch of our letters on behalf of investor clients was delivered on 27 May 2009
- We still have not been provided with copies of the requested information. This is despite the fact that as at 14 June 2009 there had been 29 members of KordaMentha's staff working on the administration of Timbercorp Securities Limited, comprising 5 Partners, 3 Directors, 4 Associate Directors, 1 Manager, 2 Executive Analysts, 3 Senior Business Analysts, 5 Business Analysts and 6 Administration Staff. In addition, they have retained the services of Mills Oakley Lawyers to handle the matters concerning the loans made by Timbercorp Finance Pty Ltd
- In the fullness of time we expect to obtain the information we still need to see. It includes documentation which identifies:
 - (a) the date or dates Goldman Sachs JB Were was appointed to undertake the tender process to sell forestry land and horticultural assets;
 - (b) the date on which the Timbercorp Group's financiers agreed to a debt reduction schedule; and

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(c) details of any breach of bank covenants as at 30 September 2007.

- For most investors their cases will not be able to be resolved until such information is produced to us by Timbercorp's Liquidators

Intimidatory tactics of Timbercorp Finance Pty Ltd

- Recently Writs were filed against 20 investors who allegedly defaulted under loan agreements entered into with Timbercorp Finance Pty Ltd
- Some of those Writs are against clients of M+K. The claims made against those clients will be strenuously defended
- Further, as the Court proceedings have been commenced by a company supposedly "hopelessly insolvent" we will be pressing for Timbercorp Finance Pty Ltd to put up some security for our clients' costs of having to defend the proceedings. This would ensure that there is money available to meet a costs order when our clients successfully defend those claims
- We expect pressure would have been applied by ANZ Bank for Timbercorp Finance Pty Ltd to instigate the Court actions. We understand ANZ Bank holds security over the majority of Timbercorp's loan book. This means that when KordaMentha collects money on behalf of Timbercorp Finance Pty Ltd the majority of that money is paid across to ANZ Bank as secured creditor
- This is consistent with what has already been shown in appendix 18 to KordaMentha's report to creditors dated 18 June 2009. In respect of Timbercorp Finance Pty Ltd, \$3,379,864.76 was paid across to ANZ Bank as secured creditor by 31 May 2009, representing 88% of money distributed from collections by KordaMentha to various secured creditors. The other secured creditors who received only modest distributions were Perpetual and Trust Company

"Final Demands" now calling for Timbercorp loans to be paid out in full

- Many borrowers have already received formal documents with a letter from Mills Oakley Lawyers, described as "Final Demands" calling for loans to be paid out in full. There is a threat of legal proceedings being commenced if the demands are not satisfied
- So far as Timbercorp Finance Pty Ltd is concerned, KordaMentha has missed a critical point. They still fail to recognise that the subject loan agreements made between the investors and Timbercorp Finance Pty Ltd are liable to be set aside as invalid
- The intimidatory "Final Demands" cannot themselves be regarded as valid if the underlying loan agreements themselves are invalid
- We will be writing letters on behalf of each M+K client to re-state our clients' position that the subject loan agreements are invalid and unenforceable. Our next letter will also call upon Timbercorp Finance Pty Ltd to withdraw the "Final Demands" or to agree not to take any further step in reliance on them until such time as a definitive Court ruling is obtained

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- Anyone who receives from Mills Oakley Lawyers a "Final Demand" should immediately forward a copy to our office
 - There is also another legal point available to aid the cause of investors now that Timbercorp Finance Pty Ltd is in liquidation. The point arises from a little-known provision in the *Corporations Act* (Section 553C)
 - That section allows for offsets to be made in situations such as this where there have been mutual dealings between the company now in liquidation and any person who presses a claim against the company. As already noted above, M+K needs more information to be produced to us by Timbercorp's Liquidators. When that information is made available we will be in a position to work through the offsetting exercise which should be of some benefit to investors/borrowers

Investors need to resist the Liquidator's "divide and conquer" tactics

- The fact that KordaMentha has not provided any substantive response at all to the hundreds upon hundreds of letters M+K has sent to Timbercorp on behalf of clients around Australia suggests just one thing - their strategy is to keep intimidating investors/borrowers with a view to destabilise the group and "pick off" the vulnerable people who do not have the stomach for asserting their legal rights and remedies
- M+K is determined to resist KordaMentha's "divide and conquer" tactics
- We continue to believe our clients' best interests will be served by being able to draw on the strength and protection available through collective group action where the group is bound together by common objectives and robust legal representation
- M+K continues to press for justice and fairness for its investor clients. Our aim is to achieve a practical and commercial solution for all investors, both borrowers and non-borrowers

The signal to move to second base

- We now know the response of Timbercorp to our initial letters. Through the Liquidators it has commenced Court action against some people and is threatening Court action against many others
- Formal steps now need to be taken on behalf of all M+K clients to stop the Liquidator's premature Court proceedings and eliminate the threat of further individual Court actions against investor/borrowers
- The time has come to commence a representative proceeding/class action in the Federal Court of Australia so that all investors' interests can be protected
- Such proceedings will encompass claims against the Timbercorp directors as well. They will deal with loan enforceability issues as well as compensation issues
- Our expectation is that at a relatively early stage of a Federal Court proceeding the presiding judge will direct that settlement discussions take place through a series of mediations. This would be an outcome we desire because it will

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enable us to work towards achieving a practical and commercial solution for all of our investor clients

Alternative ways to fund legal costs to handle claims

- We will shortly be writing to all M+K clients concerning anticipated legal costs to take claims to second base, which will be an expected mediation (to occur by Court order)
- As was the case for our taking investors to first base, we expect to be able to keep clients' legal costs to a minimum due to the large number of clients in the group being represented by M+K
- If people were to pay for their own individual case on the traditional hourly rate billing basis the legal costs per person would be prohibitive. While it is theoretically possible for the hourly rate basis to be used to conduct clients' cases it is not a method we would recommend for investors here
- From feedback we have already received from numerous investors we believe the vast majority of them would prefer that ongoing work be charged for on a fixed fee basis per investor. The fixed fee will be at a fraction of what each investor's legal costs would be under an hourly rates method of billing
- Another alternative would be for a litigation funder to become involved so that all legal costs are borne by such funder pending the reaching of a case conclusion. There would be a fee payable to the funder if this was put in place. There would also need to be an agreement entered into between the relevant client and the litigation funding company
- Already, two litigation funding companies have approached M+K expressing keen interest in becoming involved in the cases on behalf of investors
- Those expressions of interest will only progress to further talks if any particular M+K clients would prefer to avail themselves of external legal costs funding in preference to self-funding their costs on a shared basis with all other M+K clients

For investors who are not yet clients of M+K

- If you would like further information on how to be counted in with the group which will be pressing claims in relation to Timbercorp please call Katrina Slifka on (03) 9794 2620 or email katrina.slifka@mk.com.au

B. Great Southern

Administrators from Ferrier Hodgson have responded to our initial letters

- In respect of the first batch of letters sent on 3 July 2009 to the Administrators a partial response has been received by M+K. Ferrier Hodgson has indicated that claims have been notified to the insurers for the relevant Great Southern companies

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- However, as happened with the Timbercorp matter, the Administrators have failed to provide to us information we specifically requested, which is important information affecting the size of our clients' aggregate claims

Professional Indemnity Insurance Policy

- Great Southern Managers Australia Ltd holds an Australian Financial Services Licence. An important provision in the Licence is condition 15 which requires the company to maintain an insurance policy covering professional indemnity *"that is adequate having regard to the nature of the activities carried out by the licensee under the licence"*
- We have not been provided with a copy of any Great Southern insurance policy. However, among the things normally covered under such policies are:

"Errors, omissions, misleading statements, neglect, breach of duty or breach of trust by a trustee, director or officer of a Responsible Entity or Investment Management Company"

Evidence of Great Southern's non-disclosure of information relevant for investors

- M+ K already has a substantial body of evidence to support investors' claims that Great Southern failed to disclose key information to investors about the imminent collapse of the group of companies
- There still is significant further information required before all claims of investors can be fully assessed
- Among the items of extra information we have called for are:
 - (a) details of the group of investors who by 31 March 2008 no longer did business with Great Southern, along with details of the circumstances which led to a provision of \$36.4m being made in the company's accounts for doubtful debts at that time;
 - (b) details of the manner in which our clients' loan applications were assessed;
 - (c) copies of the documents concerning the arrangements made for loans to be managed by companies other than the original lender; and
 - (d) documents relevant to any commission or other allowance paid by Bendigo and Adelaide Bank to Great Southern Finance Pty Ltd in connection with the arrangement of any loans for investors in Great Southern projects.
- M+K will continue to press for the Administrators to provide the required information
- Meanwhile, we take encouragement from Great Southern's annual report for the year ended 30 September 2008 which shows on a consolidated basis that by that date the allowance for doubtful debts had grown to \$55.6m. Amazingly, that figure comprised some 46% of the total "term trade receivables" (which seem to refer to investor loans)

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- Other evidence can be sourced from ASIC in due course, particularly written records of examinations of witnesses who give evidence for an ASIC investigation
- Some fascinating and valuable information is likely to come out of ASIC's recent examinations of the former Great Southern chairman, Peter Patrikeos and a former non-executive director, Jeffrey Mews. A front page article in the *Australian Financial Review* on 2 July 2009 reported that in a recent Senate Inquiry in Perth Mr Mews' *"most compelling testimony focused on the company's failure to disclose losses from its 1994 Forestry Project which were known to management when Mr Young sold his shares as part of a \$140million capital raising by Great Southern"*

Parliamentary Joint Committee-Inquiry into agribusiness Managed Investment Schemes

- M+ K has researched some of the submissions made to the current parliamentary joint committee. Further investigation is now being conducted by M+K, especially in respect of one snippet we have found among the submissions. It concerns John Young's promotion of an even earlier timber project which apparently failed.
- It was a project in which growers invested in 1991, called Australian Blue Gum Trust No. 1
- Additionally, there was another plantation in respect of which other companies associated with John Young were reportedly sued in the Federal Court many years ago (involving a pine forest plantation in New South Wales)

Great Southern's non-disclosure of imminent collapse extends back over many years

- From documentation we have examined and from instructions received from many of our clients, we believed earlier on that new investments and new Great Southern loans entered into in 2007 and 2008 could be challenged in terms of validity or enforceability
- Now, our thoughts are that earlier years also come into play in respect of potentially challenging the validity of certain transactions entered into between investors and Great Southern (or other companies or lenders on whose behalf Great Southern acted). We believe that people who invested in new projects as far back as 2005 and 2006 may also be able to press claims similar to those being pressed by people who invested in 2007 and 2008
- Great Southern investors who have been standing by may now wish to consider having M+K act on their behalf even in respect of Great Southern investments (or loans) entered into in 2005 or 2006. The argument would still be that disclosure of the true financial position of Great Southern was not made to investors or potential investors back then. There is likely to be a serious

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challenge made to the manner in which the Responsible Entity's financial position was portrayed at all relevant times to investors in Great Southern projects who invested from 2005 onwards

Bendigo and Adelaide Bank

- Aside from writing to the Administrators of the Great Southern companies (Ferrier Hodgson) we are also writing to Bendigo and Adelaide Bank Ltd, care of its solicitors Allens Arthur Robinson
- We are yet to receive a substantive response to the letters we have written to Bendigo and Adelaide Bank
- Meanwhile, if any M+K clients receive ongoing communications from the bank calling for loan payments to be brought up to date the caller should be told simply that your matter is being handled by Macpherson + Kelley
- If, as has happened with Timbercorp, investors/borrowers receive "Final Demands" for payout of loans the same situation as applied for Timbercorp will apply in the Great Southern case. That is, a demand is only as good as the underlying loan agreement on which it is based. The demand will be worthless (and unenforceable) if the underlying loan agreement is found to be invalid or unenforceable
- Our lengthy letters to Bendigo and Adelaide Bank and to Ferrier Hodgson as Administrators of the relevant Great Southern companies set out extensive grounds as to why we believe the underlying subject loans are invalid or unenforceable

For investors who are not yet clients of M+K

- If you would like more information on how to join the group of Great Southern clients being represented by M+K, you should call Tonya McDougal of (03) 9794 2690 or email tonya.mcdougal@mk.com.au

Yours faithfully



Macpherson + Kelley

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