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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**

Today the much anticipated class action Writ has been filed.

- Our clients will be pleased to know that today we have filed the Writ which commences the class action against the responsible entity Timbercorp Securities Limited (in liquidation), the financier, Timbercorp Finance Pty Ltd (in liquidation) and the directors, Robert Hance, Sol Rabinowicz and Gary Liddell.
- The case is brought in the name of Allen Rodney Woodcroft-Brown on behalf of himself and those who, like him, entered into fresh financial commitments in 2007 and 2008 in respect of new projects (timber or horticulture) or the annual October invoices in respect of horticultural projects. The case covers those whose commitments were made via a loan agreement with Timbercorp Finance Pty Ltd as well as those who paid the 2007 or 2008 entry fees, or annual invoices, directly by cash.
- Remedies being sought in the case include declarations that the affected loan agreements are void or unenforceable. They also include claims for compensation or damages.
- On Friday of this week we expect the Court to set a timetable for the taking of certain steps in the case. One such step will be for us to obtain the Court's permission to proceed against the companies in liquidation. After that we will be pressing for orders which will allow us to access all the relevant books and records of the Timbercorp companies and the directors. We will keep our clients updated as to progress.

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Last Friday, 23 October 2009 M+K addressed a Senate Select Committee on behalf of our Timbercorp clients.

- At the invitation of Senator Bill Heffernan, Chair of a Senate Select Committee currently investigating Timbercorp and its role in the agricultural sector, Ron Willemsen of Macpherson + Kelley gave evidence in Melbourne on 23 October 2009 to a group of Commonwealth Senators.

This was done on behalf of all our clients who invested in Timbercorp projects. Among the key topics Ron addressed at the hearing were:

- (a) The fact (published in Timbercorp's 2008 Annual Report) that as at 30 September 2008 and continuing until late November 2008 Timbercorp was in breach of its bank covenants.
- (b) That fact was not made known to investors in any of the Timbercorp MIS projects.
- (c) Financial reports which had been sent to investors in respect of each project around September 2008 contained a directors' declaration that the project was able to meet its debts as and when they fell due.
- (d) Shortly after those financial reports were sent to investors, Timbercorp Securities Limited issued its annual October invoices and Timbercorp Finance entered into loan agreements with those investors who wanted to borrow money to meet those invoices.
- (e) At the time there was serious doubt about the Timbercorp Group's ability to survive which was especially problematic because all the projects it operated for MIS investors were supposed to be long-term projects.
- (f) On 23 April 2009 the Timbercorp companies were placed into voluntary administration.
- (g) On 23 April 2009 in the estimation of the directors, Timbercorp Finance Pty Ltd was expected to recover only 54 cents in the dollar on the face value of the loans it had made to investors in MIS projects. That low realisation rate was on the record even before Macpherson + Kelley began challenging the validity of any loans.
- (h) 2004 Table Grapes Project cash flow forecasts prepared by Timbercorp were handed up to the Senators by way of illustration of the "investment-worthiness" of that project. These forecasts were pivotal to Timbercorp's sales campaign for new projects at the time. This particular one showed that according to Timbercorp the "guideline" long-term project return to investors was anticipated to be 7.41% for cash investors and higher for borrower investors.
- (i) 2008 Olives Project cash flow forecasts prepared by Timbercorp were also handed up by way of further illustration. These showed that according to Timbercorp the "guideline" long-term project return to investors was anticipated to be 10% after tax for cash investors and 12.48% after tax for borrower investors. Less than a year later the

Timbercorp companies were placed into voluntary administration and KordaMentha immediately announced all the projects were "hopelessly insolvent". The 2008 Olive project was sold to investors on the basis it would run for 24 years.

- (j) The situation of KordaMentha being the liquidators of every company within the Timbercorp Group was also raised. There is an irreconcilable conflict in our opinion in KordaMentha acting as liquidator for the responsible entity (with primary responsibility to the MIS investors) while at the same time acting as liquidator of Timbercorp Finance Pty Ltd and, in that role, looking to force investors to pay out loans taken in a finance package. If there are, as we say, strong grounds to challenge the validity of the later years' loans, why is the liquidator fighting against the investor borrowers? Shouldn't he be on the growers' side instead of the side of the ANZ Bank? The ANZ has security over the majority of the Timbercorp Finance loan book.
- (k) Questions were also asked about the role of ASIC. Coverage of that appears in a newspaper article published in today's edition of *The Weekly Times* on page 2. A copy of that article is attached for your reference.

#### 2005 + 2006 Mango Projects - Many clients are seeking to exit those Projects

- We have received many enquiries from investors who bought into the 2005 or 2006 Mango projects sold by Timbercorp. Those projects have this year been taken over by Huntley Management Limited as the replacement Responsible Entity.
- Some clients have expressed concern to us that the ongoing cost to them of remaining in the project does not seem justified when compared with anticipated returns. They therefore have expressed a wish to terminate their involvement in those projects.
- M+K believes there may be a legal basis to exit those projects even though the projects are now controlled by the replacement Responsible Entity, Huntley Management Limited. This conclusion has been reached only after intensive analysis of a large volume of relevant documentation. If you would like further information about this matter, you should contact one of our lawyers to discuss your situation. Call either:

Libby Goad on (03) 9794 2629 or email at [libby.goad@mk.com.au](mailto:libby.goad@mk.com.au); or

Ben Saunders on (03) 9794 2624 or [ben.saunders@mk.com.au](mailto:ben.saunders@mk.com.au).

#### Avocados in W.A. - What went on?

- We are progressing our investigations of the way Timbercorp went about things in establishing new projects through the years. We have some information already which suggests that at least some projects were sold by Timbercorp on the strength of unrealistic top line figures regarding expected revenues from crops.

- An interesting find was this evidence given by George Ipsen to a Senate Select Committee in Perth on 1 July 2009. Mr Ipsen is "a farmer from the Manjimup-Pemberton area in south-west Western Australia. [He is] one of the larger avocado growers in Western Australia". He had this to say to the Senators about events in 2005:

*"[Timbercorp] came to my property and said 'We want your property to grow avocados'. I said 'It's not on the market'. They said to me, 'Everything's on the market'. I said 'Okay'. So I put this not on the market price on it and they came back and agreed it was not on the market. They then went to Busselton and planted 200 hectares down there in the sand plain on a flat. There is a young industry over here. We understand the parameters for growing avocados and they are very site specific - water specific and location specific. They just found a great big flat bit of land with a heap of water underneath it and did an MIS on it. I can tell you they will be stuffed in five years."*

- In the transcript of the evidence, a couple of pages later, the following exchange is reported:

*"Senator STERLE - Is the Western Australian avocado industry under threat because of MISs?"*

*Mr Ipsen - Timbercorp planted 200 hectares in Busselton four years ago, which is about 50 per cent of the Western Australian production in one hit. They raised that money overnight.*

*Senator STERLE - Is that productive?"*

*Mr Ipsen - It hasn't come into production yet. As I said before, it is in poor soil types, wrong location.*

*Senator STERLE - You said that it is going to end in tears.*

*Mr Ipsen - It is likely to because it is not market driven; it is tax scheme driven."*

- One of the things M+K will be doing is consulting with agricultural experts to determine whether particular projects were likely ever to be viable. Depending on the strength of evidence we gather it might yet be the case that we can assist Timbercorp investors to an even greater extent than what we initially thought. As with all legal cases, evidence is critical and we need to be thorough in our investigations. We will keep our clients informed of significant developments.

#### Information available from M+K to meet the needs of its clients

- For our clients who have questions about the class action or the opportunity to be represented in any negotiations that will come to be scheduled, please contact any of our Timbercorp coordinators or our 15 lawyers who have been working on the case. Our coordinators will direct inquiries to the applicable team member. The coordinators are:

Katrina Slifka: Ph (03) 9794 2620 or e-mail [katrina.slifka@mk.com.au](mailto:katrina.slifka@mk.com.au)

Stacey Hudson: Ph (03) 9794 2539 or e-mail [stacey.hudson@mk.com.au](mailto:stacey.hudson@mk.com.au)

## **B. Great Southern**

### M+K has caused Javelin Asset Management to hastily retreat

- Last week a significant thing happened which can only be good news for Great Southern investors who this year were told that Javelin Asset Management Pty Ltd had taken over loans and borrowers now needed to pay that company. M+K had mounted a serious challenge to the validity of those loans and the transfer of those loans from Great Southern Finance Pty Ltd to Javelin Asset Management Pty Ltd.
- One of our clients has now been formally notified that Javelin is no longer in the picture and that the loan has been transferred back to Great Southern Finance Pty Ltd. Sounds like a capitulation to us. We are yet to receive confirmation that this applies to all people who have had an involuntary association with Javelin. We do expect, however, that the likelihood is all Javelin loans would have been recently re-assigned back to Great Southern Finance Pty Ltd.

### M+K clients need not be spooked by Bendigo and Adelaide Bank

- It appears Bendigo and Adelaide Bank are going to extraordinary lengths to scare the living daylights out of people who are now in arrears for loans taken out in connection with Great Southern investments. We believe it is bordering on harassment, especially as concerns continuous sending of threatening letters to people known to the Bank to be M+K clients. In an effort to stop what we see as intimidation tactics, we are notifying the ACCC of the Bank's ongoing communication with our clients concerning loans the Bank well knows to be the subject of serious legal challenge.
- On behalf of our clients, our complaint to the ACCC about Bendigo and Adelaide Bank's ongoing threats draws attention to relevant provisions within the code of conduct for debt collection. Hopefully such complaint will ensure the Bank does not breach the Debt Collection Guidelines published jointly by the ACCC and the ASIC. The Bank ought to come into line and direct their communications to M+K for all M+K clients.

### Meanwhile, we continue preparation of claims to be filed in a class action for Great Southern investors

- To our knowledge, Bendigo and Adelaide Bank has not sued any of our clients. They may well do so against someone soon enough, at which time we will expect to be able to counter with a defence and the class action which is being prepared for the benefit of all of our clients who invested in Great Southern projects.

Information about what M+K needs from its clients

- For our clients who have not yet received an information pack about the proposed class action or for people who have questions about it, please contact any of our Great Southern coordinators or our 15 lawyers who have been working on the case. Our coordinators will direct inquiries to the applicable team member. The coordinators are:

Tonya McDougal: Ph (03) 9794 2690 or e-mail [tonya.mcdougal@mk.com.au](mailto:tonya.mcdougal@mk.com.au)

Leanne Currie: Ph (03) 9794 2522 or e-mail [leanne.currie@mk.com.au](mailto:leanne.currie@mk.com.au)

Yours faithfully



**Macpherson + Kelley**

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Enclosure

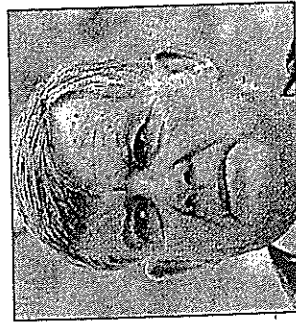
# ASIC 'failed' MIS investors

By DAVID MCKENZIE

AUSTRALIA'S investment watchdog should have done more to protect investors in failed managed investment schemes, a Senate inquiry has heard.

Lawyer Ron Willemssen said the Australian Securities and Investments Commission should have intervened early to head off the investor losses caused by the collapse of MIS giant, Timbercorp.

Mr Willemssen, who is rep-



Bill Heffernan

resenting more than 1900 investors in a class action against

Timbercorp, also said a lot of investors had taken "comfort" their investments were safe because of ASIC's licensing and monitoring role.

Speaking at the Senate inquiry into food production last week, Mr Willemssen — a principal at McPherson and Kelly law firm — said ASIC should have taken a more aggressive stance and made Timbercorp directors responsible for their actions. "These directors seem to have got away with murder," he said.

**Should ASIC have done more to protect MIS investors?**  
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"If ASIC had stepped in earlier, or kept a better eye on the space, some problems could have been resolved," Mr Willemssen said.

Inquiry chairman Senator Bill Heffernan also told the inquiry that MIS investors felt "com-

pletely betrayed" by ASIC.

He said ASIC appeared "powerless to act" where MIS schemes published so-called independent expert advice recommending that people invest.

ASIC representatives told the inquiry it was not ASIC's role to advise people on investments.

"We're not a prudential authority," ASIC commissioner Greg Medcraft said.

"We have an oversight and monitoring function. We often arrive after an accident occurs."

He said ASIC issued licences,

registered MIS schemes and monitored disclosure statements.

But there was an onus on the industry to self regulate and report breaches of the law, he said.

ASIC investment chief Pamela Hanrahan told the inquiry the primary responsibility rested with those who prepared investment documents.

She said investors could take civil action if they believed they had been deceived by an MIS product disclosure statement.

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