Level 24
333 Collins Street
Melbourne Vic 3000

GPO Box 2985
Melbourne Vic 3001

+61 3 8623 3333
info@kordamentha.com

kordamentha.com

Dr Kathleen Dermody
Committee Secretary
Senate Economics Reference Committee
PO Box 6100
Parliament House
Canberra ACT 2600

4 December 2014

By email: economics.sen@aph.gov.au

Dear Dr Dermody

Inquiry into Forestry Managed Investments Schemes ('Inquiry')

1. Thank you for your letter dated 4 November 2014 inviting us to respond to a number of submissions received by the Inquiry.
2. This submission includes:
   - Background information in relation to the collapse and liquidation of the Timbercorp Group relevant to the deliberations of Inquiry committee members
   - A number of observations and recommendations drawing on our experience as external Administrators of a number of insolvent entities that formed part of MIS operating groups (e.g. Enviroinvest, Timbercorp, Willmott, FEA and Gunns), and
   - Additional information and facts relating to the liquidation of the Timbercorp Group in response to a number of the submissions made to the inquiry.
3. We have no objection to this response being made public.
4. This submission is made on behalf of the Timbercorp Group excluding Timbercorp Finance Pty Ltd (In Liquidation), which has made a separate submission (refer Appendix C) including that:
   - Loans owing to Timbercorp Finance by Borrowers are due and payable
   - Interest on outstanding loan balances has increased because Borrowers ceased making loan repayments
   - The Liquidators have a statutory duty to secure, preserve and recover Timbercorp Finance's assets for the benefit of all its creditors
   - Borrowers have not mortgaged their homes to Timbercorp Finance
   - Timbercorp Finance remains ready, willing and able to settle Borrowers' loans
   - The majority of defaulting Borrowers can afford to repay their loans
   - Specific processes are in place to assist borrowers experiencing financial hardship
   - Group settlement proposals do not assist those Borrowers who truly cannot afford to pay

KordaMentha Pty Ltd | ACN 100 169 391 | Liability limited by a scheme approved under Professional Standards Legislation

Background

5. We were appointed Administrators of 41 Timbercorp Group Companies including the responsible entity ("RE"), Timbercorp Securities Ltd (In Liquidation) ('TSL'), on 23 April 2009 and subsequently appointed Liquidators on 29 June 2009.
6. Primarily via TSL, the Group had issued 33 managed investment schemes ("MIS") and three private offer schemes in relation to forestry and horticulture assets, including approximately 100 million blue gum trees, nearly 3 million almond trees and over 2 million olive trees.
7. The liquidation has been one of Australia's most complex. To date, receipts have been in excess of $1.0 billion which after costs, continue to be distributed to secured creditors, Growers and other creditors.

Insolvent RE unable to fund working capital

8. Historically the Timbercorp Group had financed its operations by:
    - Accessing the capital markets for debt and equity,
    - Realising assets, particularly land and water, it had previously acquired as part of the development of earlier schemes, and
    - Through the sale of MIS interests to Grower investors.
9. The impact of the GFC on Timbercorp was to severely limit the availability of funding from the capital markets on which the group had come to rely as it sought to develop its predominantly immature MIS assets to the point where they would be cashflow positive.
10. In addition, increases in the cost of acquiring permanent and temporary water rights due to ongoing drought conditions, placed additional demands on the group
11. These factors (the impact of the GFC and higher than expected operating costs) were significant contributors to the working capital shortfall that we faced on appointment. TSL did not have the working capital required to meet:
    - The urgent need for electricity, water and other operational necessities to avoid asset wastage in the horticultural schemes, and
    - Payments to forestry landlords for leases of approximately $27 million per annum. If the leases were not paid, the Growers could have been required to surrender their trees to the landlords for $nil value.
12. In relation to the horticultural Schemes, approximately $387.7 million was required for operations, rental and other expenditure ("opex") for the 2010 crop management and harvest. TSL did not have $387.7 million in available funds. Under the Scheme constitutions, TSL was not permitted to borrow $387.7 million, or any funds. TSL was to invoice Growers $387.7 million for the 2010 crop management and harvest.
13. Having regard to the financial position of TSL, the $387.7 million cash requirement to complete the management and harvest of the 2010 horticultural crops, the likelihood of Grower defaults and the insolvency of the Timbercorp Group of Companies, we did not believe it was in the best interests of Growers to raise invoices requesting the Growers to pay the $387.7 million, on an accelerated basis, or at all.
14. However, a number of steps were taken to protect the value of the assets for all stakeholders in the early stages of the liquidation including:
    - Entering into crop sale agreements with the farm managers. Under these arrangements the third party farm managers (such as Boundary Bend for the olive schemes and Select Harvest for the almond schemes) met, at their own risk, the working capital commitments necessary to undertake harvesting activity and recovered their costs from the proceeds of selling the resultant crop. Any surplus remaining after these costs was distributed to the relevant Growers.
    - Seeking export woodchip customers for the output of the forestry schemes.

- Obtaining a declaration from the Federal Court that the rent that fell due under the forestry leases during the liquidation was not an expense incurred in the liquidation. This declaration provided additional time to seek potential replacement RE's and conduct an orderly sale process for the assets.

15. Appendix A provides additional background information on the circumstances of the group as at the date of our appointment.

Robust sale processes subject to Court oversight

16. Given the large sums of money required to keep the schemes going and the fact that money was unavailable, we concluded well resourced operators were required to continue the businesses. We then conducted, or were parties to, seven sale processes that included the sale of Grower interests. Each sale process was structured to ensure that all stakeholders were able to have their voice heard, principally in applications heard by the Supreme Court of Victoria (Court), as the assets were realised and the proceeds from sale distributed.
17. While the circumstances of each asset sale varied to some degree there was a consistent approach taken to realising the assets that included:
    - TSL, subject to the oversight of the courts, varying the constitutions of the relevant MIS to allow a sale process to occur on a basis that would achieve the best possible outcome for stakeholders as a whole.
    - The Liquidator or Receiver over the land and permanent water rights (PWR) schemes conducting a robust sale process and agreeing the terms of a sale and purchase deed with the successful bidder.
    - Seeking orders from the Court that the Liquidators were justified in causing the RE to surrender Grower interests in the MIS and sell the assets. In each instance, after TSL had placed all relevant facts before the Court and other stakeholders had had the opportunity to make their own representations about the orders sought, the orders allowing the various sales to complete were provided.
    - For each sale of horticulture MIS-related assets, and after a 12 day trial had been held in relation to the relative entitlements of the Growers and secured creditors in the case of the sale of Timbercorp's almond assets, a compromise was agreed between the parties and subsequently approved by the Court that allowed some of the sale proceeds to be distributed to the Growers.
    - The distribution to forestry Growers was agreed consensually between the parties.
18. Appendix B provides additional detail of the asset sale and proceed apportionment processes, including the significant involvement of the Court.

Substantially all forestry and horticulture business continue as going concerns

19. While the Timbercorp MIS did not continue, the sale of the assets to well resourced operators was ultimately to the benefit of the industries and communities of which they were a part.
20. As was noted by Boundary Bend Limited in a previous submission to a Senate Economics Committee[1] the steps taken by the Liquidators, with court oversight, to protect and realise the assets "did result in the restructure of the olive assets and the safeguarding of hundreds of jobs in and around Robinvale and Boort in rural Victoria. The loss of this number of jobs in a rural environment would have had a significantly detrimental impact on the local economy and community".
21. Similar results occurred with the sale of the assets relating to the forestry, almond, citrus and table grape MIS to operators with the financial capacity to properly maintain and harvest the crops, and provide employment opportunities in rural communities, into the future.

[1]Submission dated 11 February 2010 to inquiry into the "Role of Liquidators and administrators, their fees and their practices, and the involvement and activities of ASIC prior to and following the collapse of a business"

Insolvent trading claims investigated by Liquidators and tested in Grower class action

22. Liquidators have obligations under Section 533 of the Corporations Act (2001) ('the Act') to report to the Australian Securities and Investments Commission ('ASIC') if, in the course of winding up a company, they become aware that certain individuals may have been guilty of an offence.
23. On 15 June 2010, we lodged initial reports with ASIC pursuant to Section 533 of the Act. On 25 June 2010, a supplementary report in respect of Timbercorp Limited was lodged with ASIC.
24. In addition to the Section 533 reports, ASIC has served 10 official notices as part of 16 requests for the production of documents and information. We have fully complied with these notices.
25. The conduct of the Timbercorp Group and the directors was the subject of intensive scrutiny in the Class Action brought by Macpherson & Kelley Lawyers. At trial there was no finding of misleading and deceptive conduct or indicators that the Timbercorp Group traded whilst insolvent. This judgement was subject to appeal which was heard between 3 and 6 June 2013 and the appeal dismissed. A subsequent application for leave to appeal to the High Court of Australia was rejected.

Date of insolvency

26. The class action brought on behalf of Grower Investors with loans resulted in a significant volume of evidence being produced and extensive cross examination of key directors. In relation to insolvent trading, the judgment handed down by the Hon. Justice Judd agreed with the three independent experts that as long as the Timbercorp Group's financiers continued to support their operations, there was no significant risk that the Group would not have the financial capacity to manage any of the Schemes through to their contemplated completion. The judgment also noted that there was evidence of the key financiers continuing to support the Timbercorp Group through a number of adverse events which occurred prior to the administration including:
    - The announcement by the Australian Taxation Office that from 1 July 2007 upfront deductions could not be claimed in respect of investments in non-forestry managed investment schemes.
    - The substantial deterioration in credit and financial markets worldwide that commenced in late 2007 and resulted in the collapse of Lehman Brothers in 2008.
    - The discontinuation of negotiations to sell the Boort Olive Grove to MPC on 16 September 2008.
    - The failed sale of the forestry assets to the Harvard Management Company on 24 October 2008.
27. The support of the Timbercorp Group's financiers was only withdrawn following the failure of the Goldman Sachs JB Were forestry asset sale in April 2009 following which Administrators were appointed. Accordingly, it is unlikely that a date of insolvency prior to 23 April 2009 could be sustained in an action against the directors for trading whilst insolvent.

Financial advisors

28. According to TSL's books and records, TSL paid commissions totalling $79.9 million between April 2002 and April 2009 to financial advisors. These commissions were in addition to the commissions paid by Timbercorp Finance to financial advisors. Those commissions are addressed in Timbercorp Finance's submission to the Inquiry (Appendix C).
29. The commissions paid to financial advisors prior to April 2002 by TSL are not readily available. During the period from 1992 to April 2002, Scheme sales totalled approximately $1.2 billion and assuming an average commission rate of say 10%, resulted in commissions of $120 million.

Timbercorp Group response to particular issues raised in submissions to the inquiry

We note the following in relation to the oral testimony of a number of witnesses who gave evidence at the hearing in Melbourne on 12 November 2014.

Mr Andrew Peterson

1. Mr Peterson's oral submissions to the committee included the following:
   a. He was the general manager of distribution at Timbercorp from September 2004 to December 2009.
   b. Mr Peterson is the deputy chairman of the Agricultural Growers Action Group
   c. On 14 February 2007, Timbercorp's loan arrears were $24,500,000
   d. Mr Peterson has loans outstanding to Timbercorp Finance in excess of:

      "*$850,000 and together with the Holt Norman Asher Baker action group was hoping to get a reasonable result that would be fair to everyone*"
2. According to the books and records of Timbercorp:
   a. Mr Peterson's employment commenced on 9 September 2004 with his position as Head of Research (Sales & Marketing Department).
   b. His position description was to oversee the promotion and sales of Timbercorp and its investment products to financial advisors and Growers in the market.
   c. Mr Peterson's written KPI's (performance reviews conducted annually in September):
      i. Sell outs of managed investment scheme products for the financial year
      ii. Post June sales above a certain threshold
      iii. All States to hit sales budgets
      iv. Bring in relationships with Financial Planning Dealer Groups
      v. Cost reductions
      vi. Training and mentoring of sales staff
      vii. Improved delegation
   d. Mr Petersen's employment with Timbercorp ended on 30 November 2009.
3. As part of his evidence Mr Peterson committed to providing support for his claim that the Timbercorp Permanent Water Rights ('PWR') were sold for $12.7 million as part of the olive sale process and subsequently re-sold "*seven months later to an industry superannuation fund for roughly $36 million*". As detailed in Appendix B, Timbercorp's olive assets including land and PWR were sold to Boundary Bend. We note that:
   a. The reasons for judgement of Croft J sets out the key aspects of the process undertaken by the Liquidators in selling the Timbercorp olive assets for total consideration of $59.5 million.
   b. In the sale and purchase deeds entered into by the parties, and subsequently provided to the court, the purchaser allocated a value of $50.8 million to the PWR (as opposed to the $12.7 million asserted by Mr Peterson).
   c. It is our understanding that the PWR the subject of the asset sale were on-sold to an industry superannuation fund (in a back to back transaction) at the same purchase price (i.e. $50.8 million) concurrently with Timbercorp settling the sale with Boundary Bend.

Mr Michael Bryant

4. Mr Bryant's oral submissions to the committee included the following:
   a. He introduced himself as having had a career in banking finance and funds management.
   b. His experience in the managed investment scheme sector started in 2000 and in agri-investments in 2003, and have continued in some form to the present time.

c. He has worked for four of the major participants in the sector being Sylvatech, Great Southern, Timbercorp and ITC-Elders Forestry.

d. With respect to managed investments, Mr Bryant still firmly believes in the model. The corporate structures that became known as Great Southern and Timbercorp grew out of individuals who established business entities to offer the products to the market. It is about the manner in which the products that were sold were offered to the market.

5. According to the books and records of Timbercorp:

a. Mr Bryant's employment commenced on 11 September 2006 with his position as Head of Research (Sales & Marketing Department).

b. His position description was that of a full time researcher; where his role was to manage the relationships and the delivery of research to the Research Houses and the Financial Planning Dealer Groups.

c. Mr Bryant's written KPI's (performance reviews conducted annually in September):

i. To ensure that TIM projects are approved by dealer groups

ii. To work with Business Development Managers to ensure they are well educated on TIM research procedures

iii. To ensure research houses are kept up to date on TIM projects

iv. To continue to expand the quality of TIM technical papers for advisors

d. Mr Bryant's employment with Timbercorp ended on 28 November 2008.

Ms Kerree Bezencon

6. Ms Bezencon's oral submissions to the committee included the following:

a. She spoke on behalf of the Timbercorp Grower's Committee for Almonds, Olives, Avocados and Citrus.

b. Introduced herself as an accountant, adviser, Grower and elected Chair for the Timbercorp Growers' Committee.

c. Submitted documents which were tabled, The Chair of the committee indicated they would be reviewed before being released publically.

7. In response to a question from Senator Heffernan, Ms Bezencon stated that her husband, as an authorised representative of Timbercorp received approximately $80,000 in commissions from selling Timbercorp managed investment schemes to investors, being her clients.

8. Ms Bezencon is a director and Chief Executive Officer of Siger Super Services Pty Ltd ('Siger') and her husband Regis Bezencon is a fellow director[2].

9. Siger referred a number of Grower investors to Timbercorp managed investment schemes and received $894,000 (exclusive of GST) in commissions.

10. We are aware that Edward & Kathleen Cherry ('the Cherry's') issued a writ against Siger in May 2010[3] in relation to amongst other matters, receiving poor financial advice from Siger. Siger settled the claim with the Cherry's.

11. As disclosed to the committee, Ms Bezencon is a Timbercorp Grower in her own right.

Neil White

12. Mr White's oral submission to the committee included the following:

a. He introduced himself as a Melbourne based financial adviser and the Chairman for Agriculture Growers Action Group (AGAG).

b. He has loans totalling $380,000 and has the capacity to repay them.

[2] Historical ASIC Extract of Sieger Super Services Pty Ltd accessed on 14 November 2014
[3] Refer amended statement of claim dated 10 May 2010

c. He represents 1,100 growers and is seeking advice from Pitcher Partners regarding the attitude of the Liquidators. The members he represents are not high worth individuals - they are average investors who believed they were investing in an ASX 200 listed company with a focus on the horticulture industry.

13. According to the books and records of Timbercorp, Mr White's association with the group was:
    a. as an advisor with Consultum Financial Advisers Pty Ltd.
    b. as an advisor with Neil White Referral Group
14. Throughout the period, Consultum Financial Advisers Pty Ltd ('Consultum') referred a number of Grower investors to Timbercorp managed investment schemes and received $1,283,612 (exclusive of GST) in commissions.
15. Throughout the period, Neil White Referral Group referred a number of Grower investors to Timbercorp managed investment schemes and received commissions totalling $130,000 (exclusive of GST).

Observations in relation to the terms of reference for the Inquiry

16. Finally, we make a number of observations that specifically address the terms of reference of the Inquiry that are relevant to our experience as external administrators of a number of MIS related entities (e.g. Enviroinvest, Timbercorp, Willmott, FEA and Gunns).
17. As highlighted in Appendix B, there has been a significant level of court oversight of the processes undertaken by insolvency practitioners as they have sought to navigate the complexities inherent in realising (and distributing the proceeds of) MIS related assets.
18. The material prepared for the courts during these and other MIS related engagments, and the resultant judgements, has provided clarity for stakeholders that will presumably inform the structure of any future projects and bring into sharp focus the risks associated with these types of tax-effective investments where little of a capital nature is acquired by Growers.
19. In addition, the issues faced in realising the assets has highlighted a number of areas of possible regulatory change. In this regard, and as the Committee would be aware, we note the significant amount of work that has been undertaken by the Corporations and Markets Advisory Committee (CAMAC) since the issue of an MIS Discussion Paper in June 2011.
20. There is currently no voluntary administration procedure available for MIS. As noted by CAMAC this appears to be due to the unanticipated "extent to which schemes would continue to develop beyond primarily passive pooled investment vehicles to encompass large business enterprises, adopting the common enterprise scheme structure for taxation and other reasons[4]".
21. We support CAMAC's proposed regulatory changes in relation to the procedures for restructuring financially distressed schemes, and winding up schemes where restructure is not possible, to the extent they will streamline the process and reduce the complexity for stakeholders in distressed MIS. The benefits of any changes of this type would clearly extend to reduce the burden on landowners with distressed MIS plantations on their land and the wider rural communities.

Yours sincerely

Mark Korda
Liquidator

Enc

[4] 1.6.1 of the CAMAC Managed Investments Scheme Report – July 2012

Appendix A - General background to Timbercorp Group

Background of Administration / Liquidation

1. Mark Korda, Mark Mentha, Leanne Chesser, Craig Shepard and Clifford Rocke ("the Liquidators") were appointed as Administrators of the various entities of the Timbercorp Group of Companies ("the Group") on 23 April 2009 pursuant to Section 436A of the *Corporations Act 2001 (Commonwealth)* ("the Act") and subsequently appointed as Liquidators on 29 June 2009.
2. The Group consists of Timbercorp Limited (In Liquidation) and 40 subsidiaries.
3. Primarily via Timbercorp Securities Limited (In Liquidation), the Group had issued 33 managed investment schemes ('MIS') and three private offer schemes (referred to collectively as 'the Schemes' or individually as 'Scheme') in relation to forestry and horticulture assets, including approximately 100 million blue gum trees, nearly 3 million almond trees and over 2 million olive trees.
4. Generally speaking, horticulture operations (maintenance, harvesting and processing) were conducted via third party managers. Forestry assets were maintained and harvested in-house by wholly owned subsidiary, Timbercorp Forestry Pty Ltd (In Liquidation) ('Timbercorp Forestry').
5. On appointment, we assumed control of the Group's operations and assets and communicated with all key stakeholders, including employees, secured creditors, trade creditors and Grower investors.

Immediate Financial Review and Suspension of Operations

6. Following the companies in the Group being placed into administration, we had no option but to immediately suspend all forestry and horticulture operations to enable a financial and operational review of the various entities within the Group.
7. Prior to our appointment, the Group's main operating cash inflows were primarily derived from the following sources:
    a. Annuity income from the Scheme Grower investors for the maintenance and licence fees associated with forestry and horticulture plantations;
    b. The reimbursement of harvesting costs together with a margin on the receipt of proceeds from the sale of forestry and horticulture products;
    c. Establishment fees associated with the issuance of new MIS; and
    d. Principal and interest payments in relation to the loan book.

Horticulture

8. The horticulture operations involved the planting, maintenance and harvesting of almond, olive, mango, avocado, citrus and table grape plantations by third party managers or project partners. Our financial review of each of the horticulture products revealed the following:
    a. In regard to the almond plantations, management projections indicated $252.5 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 harvest;
    b. In regard to the olive plantations, management projections indicated $66.2 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 harvest;
    c. Group management estimated that approximately $14 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 mango harvest;
    d. Group management estimated that approximately $23 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 avocado harvest;

e. Group management estimated that approximately $13 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 table grape harvest; and

f. Group management estimated that approximately $19 million was required for plantation maintenance, overheads, land and equipment rental and capital expenditure in relation to the 2010 citrus harvest.

g. The above amounts exclude any necessary allocation of costs in relation to maintaining the head office function (including Grower management and IT staff) and the employment of twelve remaining horticulture staff.

9. In relation to the horticultural Schemes, approximately $387.7 million was required for operations, rental and other expenditure ('opex') for the 2010 crop management and harvest. TSL did not have $387.7 million in available funds. Under the Scheme constitutions, TSL was not permitted to borrow $387.7 million, or any funds. TSL could invoice Growers for the estimated opex of the 2010 crop management and harvest. Historically, Timbercorp did so in September each year, requiring Growers to pay their proportionate contributions of opex by the end of October of that year. Timbercorp paid for the opex for the months of July, August, September and October, and then collected the estimated opex from Growers for the period July to June at the end of October in each year. In other words, Timbercorp invoiced Growers four months in arrears and eight months in advance.

10. However, even if TSL's Liquidators invoiced the Growers for the opex for the 2010 crop management and harvest, we know that it would not have been paid in full by them. First, Timbercorp Group Companies own (either as joint venture partners or as holder of lots in their own right) a small percentage of the interests in the Schemes and as those companies were insolvent, they could not pay any opex charge levied on them by TSL. Secondly, some Growers had previously been able to borrow contributions from Timbercorp Finance but it too was insolvent and could not make any further advances to Growers who required financial assistance. Thirdly, a percentage of Growers would, in any event, default in making payments.

11. Having regard to the financial position of TSL, the cash requirements to complete the management and harvest of the 2010 horticultural crops, the likelihood of Grower defaults and the insolvency of the Timbercorp Group of Companies, the Liquidators did not believe it was in the best interests of Growers for the Liquidators to raise invoices requesting them to pay the estimated opex for the 2010 financial year of $387.7 million, on an accelerated basis, or at all.

Forestry

12. Unlike the horticulture operations, the Group's forestry operations were performed in-house and included two divisions, being tree farm planting and maintenance and the harvesting operations.

13. Our financial assessment of the forestry operations revealed that the primary cost in relation to the management of the Group's forestry plantations related to land holding costs associated with the 700 plus forestry plantation properties. The quarterly rental cost (payable in advance) associated with the forestry plantation properties was estimated at $8.3 million ($33.2 million per year). Additionally, equipment leases relating to the harvesting and maintenance operations were approximately $1.3 million per quarter.

14. It is noted that prior to our appointment, all rent relating to the forestry plantations had been pre-paid to 30 June 2009.

15. As the forestry business was not required to pay rental costs in June 2009, in order to maintain the value of the entire forestry business and following the negotiation of a further ship to be provided by Japanese trading house, Marubeni in late June 2009, the decision was made to recommence forestry harvesting operations on 5 June 2009.

16. From 1 July 2009, daily lease liabilities accrued at a rate of over $90,000 per day. Accordingly on 15 June 2009, letters were sent to all external forestry land holders requesting that a lease stand-still agreement be entered into for the period from 1 July 2009 to 30 September 2009. Responses to these letters were required by 22 June 2009. Without the land owners'

agreement to these lease stand-still agreements, notification of the intention to no longer utilise these properties in accordance with section 443B of the Act had to be provided to lessors.

17. During mid to late May 2009, invoices for the payment of maintenance in arrears (to 30 June 2009) and rental in advance (for the period 1 July 2009 to 30 June 2010) were sent to all 1998 and 1999 single rotation forestry MIS Grower investors. The total value of the invoices issued was $16.1m, however not all forestry Growers paid their invoices. With the sale of the forestry assets occurring in September 2009, the monies that were contributed by forestry Growers were returned to them by the Liquidators.

Appendix B – Further detail on asset sale and proceed distribution processes

Timbercorp MIS – related asset sales

1. On 4 June 2009 Mark Korda swore an affidavit as part of an application to the Supreme Court of Victoria primarily seeking directions as to whether the Administrators of Timbercorp Securities Ltd (In Administration) ('TSL') as responsible entity ('RE') of the Timbercorp MIS should apply to the Court to wind up each of the Timbercorp Almond and Olive Schemes.
2. Some Scheme members had advised the Administrators that they did not wish for the Schemes to be wound up. However, TSL as the RE was insolvent and could not meet its obligations as they fell due. The olive and almond crops the subject of the Schemes were at risk of wasting if they were not properly cared for and maintained.
3. The Administrators filed the application as TSL, and its Administrators, were under a duty to act in the best interests of the members of the Schemes (s 601 FC of the Corporations Act 2001 (Cth) ('the Act')). This primary duty conflicted with the practical problems arising from the insolvency of TSL.
4. The making of this application for directions allowed interested parties to argue their contrary views in relation to directions for a winding up application.
5. At the conclusion of a number of days of hearings in relation to the application Justice Robson gave orders that the by then Liquidators were to hold concurrent meetings of the members of the Almond Schemes (31 July 2009) and Olives Schemes (17 August 2009) to consider a number of resolutions including any proposals to restructure the schemes and/or replace TSL as the RE for the Schemes.

Almond Land Sale

6. The Almond Scheme meetings were held on 31 July 2009. The discussions at the meeting and the outcome of the resolutions put to the meeting are summarised in an affidavit of Mark Korda dated 17 August 2009.
7. As no party had made unconditional and binding offers to become the replacement RE for the Almond Schemes and given the wasting nature of the assets, the Liquidators renewed the application to wind up the Schemes. At the conclusion of the resultant hearing, the court ordered on 21 August 2009, that the Liquidators of TSL were justified causing TSL to amend the Almond Scheme constitutions to give the RE the power to assign, terminate or surrender Grower interests in the Almond Schemes as part of a sale process for the assets. The Liquidators also gave an undertaking to provide the Timbercorp Growers' group with regular updates in relation to the sale process until it was finalised.
8. Given the opposing views of the stakeholders (principally the secured creditors and the Growers) two partners from PPB Advisory were appointed as Special Purpose Liquidators to assist in facilitating or providing an opinion on the reasonableness of any agreement reached between the parties.
9. At the conclusion of the sale process the Liquidators returned to court seeking directions that they were justified in procuring the relevant Timbercorp entities to enter into a sale and purchase deed with Olam Orchards Australia Pty Limited and Olam International Limited for a sale price of $128 million. Mark Korda's affidavit of 5 October 2009 summarises the sale process and many of the steps discussed above that had led to undertaking the sale process.
10. A further affidavit was filed by Mark Korda on 6 October 2009 that set out the Liquidators' reasons for recommending the offer by the secured creditors of a $6 million payment to Growers to affect an orderly realisation of the assets.
11. The court subsequently made orders that the Timbercorp entities could enter into the sale and purchase deed but that the proceeds should be held on trust pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons (principally the Growers and secured creditors) had any rights to all or any part of the net proceeds.

Other Horticulture Asset Sales

12. The sale of the other horticulture assets (principally land and associated permanent water rights (PWR)) on which the Timbercorp MIS were conducted were undertaken on a similar basis to the process to realise the Almond Land assets.
13. That is, the Liquidators of the relevant Timbercorp entities and the Receivers and Managers of the relevant land and water controlling entities (other almond assets, citrus assets and table grape assets) conducted processes such that:
    a. TSL as RE amended the Scheme constitutions (on the same basis as the amendments made to the Almond Schemes) to allow the sale process to take place in circumstances where the interested parties could have confidence that the successful bidder would be able to acquire the assets on an unencumbered basis.
    b. The assets were advertised for sale as part of a robust sale process leading to agreement on the terms of a sale and purchase deed with the preferred bidder.
    c. Caused TSL (as RE for the relevant Schemes) to obtain orders that it was justified in surrendering Grower interests in the Schemes in return for the sale proceeds being held on trust until a hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons (principally the Growers and secured creditors) had any rights to all or any part of the net proceeds.
14. The sale of the olive assets was conducted principally by the Liquidators of two Timbercorp entities (Olivecorp Land Pty Ltd (In Liquidation) and B. B. Olives Pty Ltd (In Liquidation)). The assets (land and PWR) were sold to Boundary Bend. The reasons for judgement of Croft J sets out the key aspects of the process undertaken by the Liquidators in preparing for sale, and realising, the Timbercorp olive assets for total consideration of $59.5 million.
15. In addition to the land and PWR the subject of the Almond Land sale, Almond Schemes were also operated on land owned by the Timbercorp Primary Industry Infrastructure Fund ('TPIF') through two of its wholly owned sub trusts, Timbercorp Orchard Trust #3 ('TOT#3') and Timbercorp Orchard Trust #5 ('TOT#5'). The Receivers and Managers of the charged assets of TOT#3 and TOT#5 conducted a sale process and entered into contracts ('the Receivers' sale contracts') for the sale of the land and infrastructure and other assets used by the Almond Schemes. The Liquidators of TSL sought, and were granted orders, that they would be justified in effecting the extinguishment of the Growers' rights to enable the completion of the Receivers' sale contracts.
16. Part of the 2005 Timbercorp Citrus scheme was conducted on land owned by TPIF through one of its wholly owned sub trusts, Timbercorp Orchard Trust #2 ('TOT#2'). The Receivers and Managers of the charged assets of TOT#2 conducted a sale process and entered into contracts ('the Receivers' sale contracts') for the sale of the land and infrastructure and other assets used by the 2005 Timbercorp Citrus scheme. The Liquidators of TSL sought, and were granted orders, that they would be justified in effecting the extinguishment of the Growers' rights to enable the completion of the Receivers' sale contracts.
17. The 2004 Timbercorp Citrus scheme and the balance of the 2005 Timbercorp Citrus scheme were conducted on land known as Kangara Estate over which Receivers were appointed by the trustee of secured debenture holders in the Timbercorp Orchard Trust ('TOT'). The Liquidators of TSL sought, and were granted orders, that they would be justified in effecting the extinguishment of the Growers' rights to enable the completion of the Receivers' sale contract for Kangara Estate and associated PWR.
18. The Timbercorp Table Grape schemes were conducted on land known as Bella Vista over which Receivers were appointed by the trustee of secured debenture holders in TOT. The Liquidators of TSL sought, and were granted orders, that they would be justified in effecting the extinguishment of the Growers' rights to enable the completion of the Receivers' sale contract for Bella Vista and associated PWR.

Proceed Distribution - Rights Proceedings and Compromise Deeds

19. All Timbercorp MIS related horticulture assets were sold under court supervision and the proceeds placed on trust pending a determination of the entitlement of Growers and secured creditors to the net proceeds.
20. Solicitors were appointed, and funded from the proceeds of the Almond Land sale, to argue for the rights of Growers to a share of the sale proceeds in a rights proceeding heard by Davies J in the Supreme Court of Victoria.
21. Davies J concluded after 12 days of hearings that the Growers had not established an entitlement to a share of the Almond Land sale proceeds and that the securities held by the lenders entitled them to receive the entire amount of the net proceeds.
22. Solicitors for the Grower group filed a notice of appeal on 11 July 2011.
23. In light of the time and expense that would be involved in:
    a. Preparing and conducting an appeal hearing in relation to the Almond Land sale proceeds, with the possibility of a further appeal to the High Court, and
    b. Conducting the rights proceedings relating to the sale proceeds from the other horticulture asset sales (where these proceedings had been stayed pending the outcome of the Almond Land sale rights proceeding) the stakeholders entered into negotiations about the terms of a possible settlement in relation to the schemes conducted on land owned by the following entities:
        i. in respect of the of the Almond Schemes which were the subject of the Almond Land Rights Appeal Proceeding – Almond Land Pty Ltd (In Liquidation)('Almond Land');
        ii. in respect of the of the Almond Schemes which were the subject of the Liparoo and Yungera Rights Proceeding – OIM#2 Pty Ltd (Receivers and Managers Appointed in its capacity as trustee of Timbercorp Orchard Trust #3 (in respect of the Liparoo Land) and OIM#5 Pty Ltd (Receivers and Managers Appointed in its capacity as trustee of Timbercorp Orchard Trust #5 (in respect of the Yungera Land);
        iii. in respect of the Olive Schemes which were the subject of the BB Olives Rights Proceeding – B.B. Olives Pty Ltd (In Liquidation) ('BB Olives');
        iv. in respect of the Olive Schemes which were the subject of the Fenceport Rights Proceeding – Olivecorp Land Pty Ltd (In Liquidation) ('Olivecorp Land');
        v. in respect of the Citrus Scheme which were the subject of the Solora Proceeding – OIM#2 in its capacity as trustee of Timbercorp Orchard Trust #2 ('Solora Land').
24. On 24 February 2012 a settlement proposal was made by the secured creditor to representative Growers in the Liparoo and Yungera Rights Proceeding and in the Solora Rights Proceeding. Similar offers were then made by the secured creditors in the other proceedings. Negotiations between the parties extended over many months. The Grower representatives had engaged Clarendon Lawyers to act on their behalf, and that firm was eventually engaged by the representative parties appointed in each proceeding. Ultimately, agreement was reached, and five Deeds of Compromise were executed on 25 July 2012.
25. The first Notice to Growers set out amongst other matters, the expected court process seeking approval of the compromise, the background to the dispute and the key details of the compromise.
26. The compromise deeds and notices for the other rights proceedings are in substantially the same form as for the Almond Land deed with all deeds providing for approximately 5% of the gross sale proceeds to be distributed to the relevant Growers.

Deeds of Compromise – Grower entitlements

Sale	Sale Proceeds	Grower entitlements
Almond Land	$128,000,000	$6,000,000
Liparoo and Yungera	$147,529,984	$8,000,000
BB Olives	$23,500,000	$1,185,000
Olivecorp Land	$36,000,000	$1,815,000
Solora Land	$13,327,605	$650,000

27. The application to approve the Deeds of Compromise was heard by Judd J in October 2012. The judgement approving the terms of the Deeds of Compromise was handed down on 12 December 2012.
28. Distributions of the grower entitlements to the relevant Growers were made in accordance with the terms of the Deeds of Compromise in February 2013.
29. Two further Deeds of Compromise were entered into and approved by the Supreme Court of Victoria in relation to the Bella Vista and Kangara Rights Proceedings during the first half of 2014 where the secured interest in the assets the subject of the sales were held by the debenture holders in TOT.
30. As for the earlier compromise agreements the Deeds of Compromise relating to these two sales provided for approximately 5% of the gross sale proceeds to be distributed to the relevant Growers.

Further Deeds of Compromise – Grower entitlements

Sale	Sale Proceeds	Grower entitlements
Bella Vista	$7,696,256	$385,000
Kangara	$20,864,620	$1,043,321

Appendix C - Submission to the Inquiry into Forestry Managed Investment Schemes from Timbercorp Finance Pty Ltd (In Liquidation)

KordaMentha
restructuring

Level 24
333 Collins Street
Melbourne Vic 3000

GPO Box 2985
Melbourne Vic 3001

+61 3 8623 3333
info@kordamentha.com

kordamentha.com

Dr Kathleen Dermody
Committee Secretary
Senate Economics Reference Committee
PO Box 6100
Parliament House
Canberra ACT 2600

4 December 2014

By email: economics.sen@aph.gov.au

Dear Dr Dermody

Inquiry into Forestry Managed Investments Scheme ('Inquiry')

1. We refer to our appointment as Administrators of Timbercorp Finance Pty Ltd (In Liquidation) (**Timbercorp Finance**) on 23 April 2009 and to our subsequent appointment as Liquidators on 29 June 2009.
2. Thank you for your letter dated 4 November 2014 inviting us to respond to a number of submissions received by the Inquiry. Our response contained in this letter is a single response to the submissions submitted to date and should be read as a standalone document.
3. We have no objection to this response being made public.
4. This submission is made on behalf of Timbercorp Finance only. A separate submission has been made by Timbercorp Group (refer Appendix B) including:
    a. the reasons why Timbercorp Securities Limited (In Liquidation) as responsible entity (**TSL**) (**Timbercorp Schemes**) was unable to fund working capital;
    b. the sale of assets utilised in the operations of the Timbercorp Schemes, including water rights;
    c. the solvency of any company other than Timbercorp Finance;
    d. the reasons why the recapitalisation of the Timbercorp Schemes was not a viable option; and
    e. the quantum of commissions paid to financial advisors.
5. We understand the matters set out in paragraph 4 above will be addressed in a separate submission made by Timbercorp Limited and TSL.
6. This submission forms two parts, comprising a general submission responding to themes raised in the Inquiry and specific matters pertaining to submissions made to the Inquiry which are attached at Annexure A.

KordaMentha Pty Ltd | ACN 100 169 391 | Liability limited by a scheme approved under Professional Standards Legislation

7. The key points which we wish to convey to the Inquiry are as follows:

- Loans owing to Timbercorp Finance by Borrowers are due and payable:

  As at 31 October 2014 Timbercorp Finance's loan book stood at $492 million (**Loan Book**).

  The Loan Book is comprised of approximately 2,800 Borrowers with 6,700 loans outstanding. There are currently 2,188 Borrowers in default, most of whom ceased paying their loans to Timbercorp Finance within months of our appointment as administrators in April 2009.

  Between October 2009 and April 2014 Timbercorp Finance defended proceedings commenced against it on behalf of investor Borrowers who sought orders to the effect that the Timbercorp Finance Loan agreements were unenforceable (**Group Proceeding**).

  Throughout the five year duration of the Group Proceeding, Timbercorp Finance did not pursue claims against Borrowers in the Courts.

  Timbercorp Finance was entirely successful:

  a. at the trial of the Group Proceeding;
  b. in the appeal which was determined by the Victorian Court of Appeal;
  c. in opposing the application for special leave which was dismissed by the High Court of Australia.

  Following the final determination of the Group Proceeding in April 2014, Timbercorp Finance has recommenced recovery proceedings against defaulting Borrowers in the Courts.

- Interest on outstanding loan balances has increased because Borrowers ceased making loan repayments

  In or around June 2009 Macpherson & Kelley Lawyers (**M+K**) advised their Borrower clients to stop making loan repayments. Since this time, the vast majority of Borrowers breached their obligations under their loan agreements with Timbercorp Finance and, from that point, interest has accrued at the higher rate of interest in accordance with the terms of the loan agreements, causing loan balances to increase ever since.

  Timbercorp Finance has continued to provide annual loan statements to Borrowers. We submit that insofar as Borrowers have acted on advice to cease making loan repayments and have suffered loss and damage as a result, they should carefully consider claims which may be available to them against those that proffered the advice.

- The Liquidators have a statutory duty to secure, preserve and recover Timbercorp Finance's assets for the benefit of all its creditors

  We were not appointed by the ANZ Bank and do not act as their agents.

  As liquidators, we have duties and obligations to secure, preserve and recover Timbercorp Finance's assets for the benefit of all its creditors. Timbercorp Finance's most significant asset is the Loan Book.

  A number of submissions call for us to 'discount' or compromise Timbercorp Finance's claims against Borrowers. It is important that the Inquiry recognise our primary duty is to creditors of Timbercorp Finance, not debtors (ie Borrowers). We must act in the best interests of Timbercorp Finance's creditors and to do so it is incumbent upon us to maximise the amount recovered from Timbercorp Finance's Loan Book.

- Borrowers have not mortgaged their homes to Timbercorp Finance

  Contrary to a number of statements made during the course of the public hearing of the Inquiry on 12 November 2014 (**Public Hearing**) Timbercorp Finance does not hold mortgages over Borrowers' homes to secure the performance of Borrowers' obligations under their loan agreements with Timbercorp Finance. The only security provided by Borrowers was in respect of their interests in the relevant Timbercorp Scheme/s in which they invested.

  For the avoidance of doubt Timbercorp Finance's rights under the loan agreements do not extend to the right to sell a Borrower's home in the event they fail to make repayments and breach their obligations under the loan agreements.

- Timbercorp Finance remains ready, willing and able to settle Borrowers' loans

  Since 2009 Timbercorp Finance has made four separate offers of settlement to Borrowers. In short, those offers of settlement:

  a. extend the loan term/s by up to two years (and more recently, up to five years);
  b. reduce the interest charged to the lower interest rate from the date the Borrower accepts the offer; and
  c. provide Borrowers a 10% discount on their loan balance in the event they pay 50% of that balance within 180 days or a 15% discount on their loan balance in the event they pay the entire balance within 180 days.

  To date we have:

  a. reached a settlement agreement with Borrowers with loans bearing a total balance of approximately $125 million;
  b. of those Borrowers, loans with a total balance of approximately $30 million are subject to regular monthly repayments of principal and interest in accordance with the terms of the settlement agreement;
  c. Timbercorp Finance has received approximately $8 million of that $30 million to date; and
  d. Borrowers with loans bearing a total balance of approximately $95 million have exercised the 15% option described above; and
  e. Timbercorp Finance has received $89 million comprising the discounted balance of those loans.

- The majority of defaulting Borrowers can afford to repay their loans

  Timbercorp Finance's records reveal that:

  a. 96% of borrowers are in default;
  b. as at September 2014, the average borrower exposure was $73,581; and
  c. 70% of Borrowers enjoyed an annual income in excess of $100,000 at the time they applied for their loans.

  These statistics suggest that most Borrowers have the financial capacity to repay their Timbercorp Finance loans. This is particularly so in circumstances where Timbercorp Finance is now willing to extend the loan term/s by up to five years where appropriate to do so.

- Timbercorp Finance is committed to assisting Borrowers experiencing financial hardship

  The Inquiry has received submissions from a number of Borrowers experiencing financial hardship.

  We have published a hardship policy on our website (http://www.kordamentha.com/creditor-information/australia/51/16/) (**Hardship Policy**). Further, on 20 October 2014 we wrote to all defaulting Borrowers to ensure they were aware of the Hardship Policy.

  The Hardship Policy is designed to assist those Borrowers whose financial circumstances may have changed and who are suffering financial hardship. A number of the Borrowers who have made submissions to the Inquiry have made a hardship application. In cases of financial hardship we are willing to consider a range of options including:

  a. a moratorium on loan repayments;
  b. a reduction in monthly instalments;
  c. an extension of the loan term; and
  d. a compromise of the amount owed to Timbercorp Finance.

- Group settlement proposals do not assist those Borrowers who truly cannot afford to pay

  A number of representatives of grower groups have made submissions to the Inquiry. Some of these groups have approached us wanting heavily discounted settlement terms for their members. We are resolute in our position that such offers of settlement are unacceptable to Timbercorp Finance for various reasons, including that:

  a. they do not cater for individual Borrowers' financial circumstances;
  b. they do not cater for individual Borrowers' capacity to repay their loans;
  c. it may breach our duties and obligations as liquidators to do so; and
  d. a group settlement approach will not assist those Borrowers who are experiencing genuine financial hardship, and serves only to unfairly benefit those Borrowers who are in a position to pay.

- Outcomes of Senate Inquiry

  We are concerned that a number of Borrowers do not understand the terms of reference of the Inquiry. We note that a number of Borrowers have discontinued settlement discussions with Timbercorp Finance on the basis that they consider this Inquiry will relieve them of their liability to pay their outstanding debt to Timbercorp Finance. Quite apart from the fact that this Inquiry will not relieve Borrowers from their obligations we are concerned that insofar as Borrowers continue to delay making payments to Timbercorp Finance, interest will continue to accrue and loan balances will continue to increase.

  We respectfully request that the Inquiry consider releasing a statement which:

  a. refers to Timbercorp Finance's formal hardship process and encourages Borrowers to apply for hardship consideration if they are experiencing financial hardship; and
  b. clarifies that it does not have the authority to relieve Borrowers' obligations under their loan agreements with Timbercorp Finance.

Background

1. Timbercorp Finance was placed into voluntary administration in April 2009 and subsequently liquidation in June 2009.
2. Timbercorp Finance's primary purpose was to provide finance to '**Grower Investors**' who chose to fund their investment in the Timbercorp Schemes by way of a loan. Grower Investors were not obliged to borrow funds from Timbercorp Finance. Many Grower Investors used their own funds to finance their investment, while others borrowed funds from lenders other than Timbercorp Finance.

Key Facts and Figures

3. We set out below a summary of the Loan Book key metrics as at the date of our appointment and currently:

	23 April 2009	October 2014
Opening balance	$477.9 million	$492.1 million
Total arrears	$48.3 million	$472.4 million
Number of borrowers	7,511	2,871
Average borrower exposure	$63,623	$73,581
Number of loans	14,028	6,689
Average value of loan	$34,065	$171,432

4. The borrower profile (data from 2005 – 2008) is detailed below:

	Profile
Average initial investment	$63,000
Average annual wage of the individual borrower	$204,000 - $225,600
Average total assets of the individual borrower	$1.4 million to $1.9 million

5. Timbercorp Finance pro forma loan agreements were updated a number of times over the life of the Company (approximately 32 versions exist).
6. We do not seek to summarise all of the terms of each of the loan agreements in this submission, however copies of the pro-forma loan agreements can be provided to the Inquiry upon request. We do however note the following:
   a. none of Timbercorp Finance's loan agreements were 'non-recourse' loans;
   b. the only security taken by Timbercorp Finance was a security interest in the Grower Investors' interest in the relevant Timbercorp Scheme/s; and
   c. Timbercorp Finance did not enjoy any security interest over Grower Investors' homes or other personal property.

7. The below table provides a summary of the lower interest rate applicable to a Borrower based on the loan terms that apply to each loan in the outstanding Loan Book. This profile assumes no loans are in default and incurring the higher interest rate.

Interest rate band	# of loans	Initial loan ($ million)	October 2014 ($ million)
0%	340	40.2	17.5
6% - 6.99%	38	2.9	1.2
7% - 7.99%	1	0.1	0.0
8% - 8.99%	116	10.3	15.4
9% - 9.99%	1,614	88.8	123.8
10% - 10.99%	3,477	167.6	236.4
11% - 11.99%	1,102	67.7	97.6
12% - 12.99%	1	0.1	0.1
	6,689	377.7	492.1

8. The below table provides a summary of the higher interest rate applicable to a Borrower based on the various loan terms that apply to the outstanding Loan Book. This details the current interest rate being applied to these loans.

Interest rate band	# of loans	Initial loan ($ million)	October 2014 ($ million)
0%	471	28.7	26.2
10% - 10.99%	2	0.1	0.2
11% - 11.99%	1	0.0	0.0
12% - 12.99%	42	4.1	5.8
13% - 13.99%	5,227	280.5	424.4
14%+	8	0.7	0.5
	5,751	314.2	457.2

The Group Proceeding

Summary of Proceeding

9. Shortly after our appointment, we commenced recovery activities, including assessing the Loan Book, issuing demands for payment to defaulting Borrowers and commencing legal proceedings in the Supreme Court of Victoria against a small number of Borrowers.
10. On 28 October 2009 the lead plaintiff in the Group Proceeding served Timbercorp Finance with the writ and statement of claim in that proceeding. The lead plaintiff was represented by M + K. The Borrowers in the Group Proceeding sought orders to the effect that Timbercorp Finance be prevented from enforcing its rights against Borrowers under the loan agreements.
11. On 1 September 2011 His Honour Justice Judd gave judgment in favour of the defendants in the Group Proceeding. That decision was appealed by the lead plaintiff to the Court of Appeal, who dismissed the appeal on all grounds on 10 October 2014. On 5 December 2013, the lead plaintiff filed an application for special leave to appeal to the High Court of Australia. On 11 April 2014 the High Court of Australia refused that application for special leave, thus bringing an end to the Group Proceeding. Throughout the course of the Group Proceeding litigation, Timbercorp Finance was put to significant legal and commercial costs and delay.
12. One of the Borrowers' apparent motives in prosecuting the Group Proceeding was to avoid their obligations to repay their loans to Timbercorp Finance. This is supported by the comments made by the trial judge in his judgment dismissing the Group Members' claims (Woodcroft-Brown v Timbercorp Securities & Ors [2011] VSC 427) at paragraph 3 that:

"One Purpose of this proceeding is an attempt by borrowers to avoid their loan obligations"

13. While the Group Proceeding remained on foot, we took the view that it was inappropriate to commence or continue legal action against defaulting Borrowers. Throughout this period (circa June 2009 to May 2014), the Liquidators continued to provide Borrowers with annual statements confirming their loan balances (which continued to increase in light of the fact that no payments were being made).

Macpherson & Kelley Direction to Borrowers

14. At the time of our appointment, the majority of Borrowers were not in default of their obligations under their loan agreement/s and were making the required payments of principal and interest.
15. At the time of our appointment as administrators in April 2009, the Loan Book comprised some 14,000 loans totalling $478 million. We note that:
    a. Borrowers with 8,471 loans totalling $342 million first defaulted on their payment obligations in the period between 30 April 2009 and 31 October 2009;
    b. during this time, M+K were actively recruiting Borrowers to the Group Proceeding;
    c. in a circular to Borrowers dated 9 June 2009, M+K stated:

       "We maintain that legal grounds exist which justify investors:

       (a) not making any further loan repayments to Timbercorp Finance Pty Ltd, especially for loans obtained in 2008 (and perhaps earlier)..."; and
    d. we wrote to Borrowers in respect of each of the 8,471 loans noted above to inform them that their loan instalment payment had not been received by Timbercorp Finance and that they were in default of their obligations under their loan agreement/s.

Settlement Offers

16. Before the trial of the Group Proceeding commenced, we made an offer of settlement to all Borrowers (**Settlement Offer**). The terms of that Settlement Offer were designed to bring an end to the Group Proceeding and any future litigation and to provide Borrowers with an extension of the term of their loan agreement/s.
17. The Settlement Offers contained:
    a. an early repayment discount (15%) option;
    b. a prepayment discount (10%) option;
    c. an interest rate re-set to the lower rather than higher rate of interest (automatic upon acceptance); and
    d. if a Borrower's loan(s) had expired or were shortly to expire, an extension of the loan term for a period of two years (or up to five years in special circumstances).
18. The Settlement Offer was put to Borrowers on four separate occasions. Despite Timbercorp Finance's success in the Group Proceeding, we have not withdrawn or varied the terms of the Settlement Offer.

Hardship Applications

Timbercorp Financial Hardship Policy

19. We recognise that the financial circumstances of some Borrowers may have changed with the result that they are no longer able to meet their obligations under their loan agreement/s. For this reason, we have published a hardship policy (**Hardship Policy**). The Hardship Policy and hardship application form are available on our website (http://www.kordamentha.com/creditor-information/australia/51/16/) (**Website**).
20. There are a number of outcomes available to us where a Borrower's hardship application is accepted. Those options include:

a. a moratorium on loan repayments;
b. a reduction in monthly instalments;
c. an extension of the loan term; and
d. a compromise of the amount owed to Timbercorp Finance.

21. It is important that Borrowers are aware of Timbercorp Finance's Hardship Policy. On 20 October 2014 we sent a letter to all Borrowers informing them that:
    a. if Borrowers are experiencing difficulty meeting their financial commitments to Timbercorp Finance it was important that they contacted us as soon as possible;
    b. Timbercorp Finance was committed to exploring options for those suffering financial distress and would work with Borrowers through the hardship assistance program;
    c. Borrowers should refer to the Website; and
    d. if any Borrower is in need of financial assistance, they should contact the financial counselling services offered by Financial Counselling Australia
22. As at 28 November, 170 Borrowers (comprising 6.2% of Borrowers by number) have submitted a hardship application. Those applicants represent $47.3 million (comprising 11.9% of the Loan Book by dollar value).
23. Hardship applications as at 28 November 2014:

	Borrowers	% of total	Loans	% of total	Debt $M	% of total
Hardship Applications	170	6.2%	500	7.8%	47.3	11.9%
Completed Statement of Financial Affairs received	90	3.3%	300	4.7%	35.0	8.8%

24. The application for loan relief under the Hardship Policy on the Website also makes reference to the Financial Counselling Australia web link and the Help Line number 1800 007 007. We consider it important that Borrowers who are experiencing difficulty in meeting their commitments to Timbercorp Finance have access to independent Financial Counselling services.
25. Further, we are maintaining an open dialogue with senior representatives from Financial Counselling Australia to seek their feedback and comment in relation to the operation of the Hardship Policy.

Financial Advisors

26. According to Timbercorp Finance's books and records, Timbercorp Finance paid 'Finance Broking' commissions totalling $1,448,035 between November 2006 and April 2009 to financial planners who advised their clients to take out loans with Timbercorp Finance. These commissions were in addition to the commissions paid by TSL to Financial Advisors. We understand those commissions will be addressed in TSL's submission to the Inquiry.
27. Timbercorp Finance paid:
    a. Holt Norman & Co Pty Ltd $248,608, representing 17.2% of 'Finance Broking' commissions paid by Timbercorp Finance; and
    b. Siger Super Solutions Pty Ltd (of which Regis Bezencon is a director) $25,830 representing 1.7% of 'Finance Broking' commissions paid by Timbercorp Finance.

Liquidators' response to Individual Submissions

28. Attached at Annexure A are our responses to Individual written submissions and oral statements at the Committee hearing on Wednesday, 12 November 2014.

Yours sincerely

Craig Shepard
Liquidator