

## KordaMentha Restructuring

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Mr Mark Fitt  
Committee Secretary  
PO Box 6100  
Parliament House  
Canberra ACT 2600

25 May 2017

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

Dear Mr Fitt

### **Timbercorp Finance Pty Ltd (In Liquidation) ('Timbercorp Finance')**

1. We refer to the Senate Economics References Committee's inquiry into consumer protection in the banking, insurance and financial sector ('the Inquiry').
2. Thank you for your letters dated 12 May 2017 inviting us to respond to the submissions made by both the Holt Norman Asher Baker Action Group ('HNAB-AG') ('HNAB-AG Submission') and Ms Naomi Halpern ('Halpern Submission'). Our response contained in this letter is a single response to both submissions.
3. HNAB-AG's submission is voluminous and repeats many sentiments previously aired before the Senate Economics References Committee in its Inquiry into Forestry Managed Investments Schemes ('Forestry Inquiry'). As Liquidators, we provided extensive written submissions to the Forestry Inquiry and Mark Korda attended a public hearing in Melbourne. We can make available a copy of our detailed submissions to the Forestry Inquiry upon request. The key matters that we would like to draw the Committee's attention to are:
  - a. Status of legal proceedings
  - b. Expectation gap of borrowers
  - c. Liquidator duties – power to compromise debts
  - d. Timbercorp Finance is committed to assisting Borrowers experiencing financial hardship
  - e. Engagement with HNAB-AG
  - f. HNAB-AG Settlement deed
  - g. Borrower Assist advocate and Independent lawyer, John Berrill.
4. The HNAB-AG Submission and Halpern Submissions ('Submissions') contain various allegations concerning the Liquidators and the staff of KordaMentha, including but not limited to the truth of evidence given by the Liquidators to the Forestry Inquiry. We reject the allegations and do not propose to respond to each of them at this time. Our response to selected matters raised in the submissions is below.

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5. HNAB-AG and Ms. Halpern variously also make allegations concerning John Berrill, Lawyer, of Berrill & Watson, and Stephen Blyth, the Borrower Assist advocate. Mr. Berrill and Mr. Blyth are independent from us and from Timbercorp Finance and it is appropriate that they be provided with the opportunity to respond independently and in their own right to the allegations made in the HNAB-AG Submissions about them. We trust that the Committee's secretariat will attend to doing so (if that has not occurred already).
6. We do not object to this response being made public.
7. As you are aware, Timbercorp Finance was placed in voluntary administration in April 2009 and subsequently liquidation in June 2009. As at our date of appointment, there were some 7,500 borrowers in default of their obligations. This has now reduced to about 900.
8. Timbercorp Finance's primary purpose within the Timbercorp group of companies was to provide finance to 'Grower Investors' who chose to fund part of their investment in the Timbercorp Schemes by way of an interest bearing loan. Grower Investors were not obliged to borrow funds from Timbercorp Finance in order to invest in any of the Timbercorp Schemes.
9. The Timbercorp Finance committee of inspection is supportive of the Timbercorp Finance Borrower Assist program and how as Liquidators, we are assessing and settling claims.

#### ***Status of legal proceedings***

10. As you are aware, following our appointment as liquidators in 2009, borrowers, through their legal advisors Macpherson + Kelley, instigated both extensive and costly litigation by way of a group proceeding, firstly in the Supreme Court of Victoria then subsequently in the Court of Appeal and finally the High Court (all lost).
11. Following the High Court's decision in the group proceeding, legal proceedings were commenced against defaulting borrowers who had not accepted offers of settlement and who continued to refuse to pay. This was done to ensure that Timbercorp Finance's claims against those borrowers did not become time barred under statutes of limitation.
12. A preliminary issue arose in those proceedings as to the ability of borrowers to raise defences in response to Timbercorp Finance's claims in circumstances where they did not raise or seek to raise those matters as claims in the group proceeding. The High Court delivered its decision, in favour of the borrowers, in 2016.
13. Four test cases, involving issues common to the defence of several hundred borrowers, principally represented by Macpherson + Kelley and Slater & Gordon, were heard over the course of three weeks in the Supreme Court of Victoria.
14. In December 2016, the Supreme Court delivered judgment in the four test cases. The Court held that each borrower in the four test cases are liable to repay their loans with Timbercorp Finance in full, together with all interest on their loan balance from the time they each ceased making repayments.
15. Each of the borrowers in the three test cases who had orders made against them by the Supreme Court have now applied to the Victorian Court of Appeal for leave to appeal. These applications are to be heard in September 2017.
16. We understand that the appeals and the defences in the test cases involving Macpherson + Kelley were funded by several hundred borrowers who have engaged Macpherson + Kelley, and that the defences in the test cases involving Slater & Gordon were funded by a borrower action group known as the Agriculture Growers Action Group ('AGAG') ([www.agag.com.au](http://www.agag.com.au)) which raised a 'fighting fund' from a further group of borrowers.
17. Independently of the leave to appeal applications in the test cases, Timbercorp Finance expects to progress several further cases to trial by the end of 2017. Each of those cases will likely involve issues common to the defences raised by a number of groups of borrowers represented by Macpherson + Kelley and others.
18. The legal recovery process is our least preferred avenue to resolve the borrower loans. Timbercorp Finance remains ready, willing and able to settle borrowers' loans.

19. Defaulting borrowers who can afford to pay, have received four separate formal offers of settlement since 2009. In short, those offers of settlement:
  - a. extended the loan term/s by up to two years (and more recently, up to five years)
  - b. reduced the interest charged to the lower rate from the date the Borrower accepts the offer
  - c. provided Borrowers a 15% discount on their loan balance in the event they pay the entire balance within 180 days.
20. Defaulting borrowers who wish to pay but cannot afford to pay, have been invited to participate in our Borrower Assist program.
21. Defaulting borrowers who do not wish to pay and do not wish to participate in our Borrower Assist Program, continue to defend our claims in the Victorian Court system.

***Expectation gap of borrowers***

22. The primary difference between other hardship programs that exist in Australia and the Timbercorp Finance Borrower Assist program is the presence (perceived or real) of financial or other adviser negligence, misconduct or deceit.
23. As liquidators, with legal duties in relation to the administration of Timbercorp Finance's affairs, we cannot provide compensation or other redress for such grievances, and our Borrower Assist program does not seek to do so.
24. Borrowers affected by such grievances often understandably feel a profound sense of injustice in relation to what has occurred and seek to obtain redress for that when participating in our Borrower Assist program.
25. The Borrower Assist program is about borrower financial hardship in relation to a borrower's ability to repay their Timbercorp Finance loans. It does not provide redress to borrowers for their grievances with their financial or other advisers.
26. Borrowers who have grievances involving their financial or other advisers understandably expect some form of redress for the broader injustice that they feel has occurred when they come to participate in the Borrower Assist program. When we explain to borrowers that the Borrower Assist program cannot provide such redress, or we provide an offer to a borrower that is not referable in their mind to the broader feelings of injustice that they have, a critical expectation gap crystallises. Catriona Lowe, the former independent borrower advocate in our Borrower Assist program noted this in her submission<sup>1</sup> to the Forestry Inquiry.
27. We have been able to put in place mutually acceptable arrangements with many borrowers who have experienced that expectation gap when participating in our Borrower Assist program. We are not always able, however, to find ways to bridge the gap and achieve an outcome with all borrowers. Where that occurs, we give the borrower time and opportunities for further engagement with us and if, after that has occurred, no meaningful progress is achieved towards a mutually satisfactory resolution, it can be appropriate for the borrower's involvement in the program to be brought to an end.

***Liquidator duties – power to compromise debts***

28. The Corporations Act clearly sets out a liquidator's power to compromise debts. Importantly, the liquidator's overriding statutory duty is to deal with the company's assets in such a way as to act in the best interest of the company's creditors and where a surplus exists, for the company's shareholders.
29. What is clear, is that the liquidator owes neither a common law nor statutory duty to the company's debtors, in this case Timbercorp Finance borrowers.
30. That said, Timbercorp Finance continues to take advice from mental health and consumer advocate professionals and recognises the financial hardship and mental wellness challenges that many borrowers are experiencing.

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<sup>1</sup> Submission 200 to the Senate Economics Reference Committee on Forestry Managed Investment Services, paragraphs 21 -25

31. We remain committed to resolving these cases through our Borrower Assist program in the context of our statutory duty as liquidators.
32. A memorandum setting out a liquidator's duties and powers to compromise debts was included at Appendix 2 of our letter to the Chairman, Mr David Coleman, MP, of the Standing Committee on Economics dated 10 October 2016. Please advise if you would like us to provide a copy of this memorandum.

***Timbercorp Finance is committed to assisting Borrowers experiencing financial hardship***

33. Through its Borrower Assist program, Timbercorp Finance works with borrowers experiencing financial distress to resolve Timbercorp Finance's claims. The Borrower Assist program is designed to provide borrowers experiencing financial difficulties or who have other issues that could impact on their ability to settle, with additional time and flexibility to explore their options.
34. Timbercorp Finance remains committed to reaching fair and equitable settlement agreements with borrowers in financial hardship. Timbercorp Finance is committed to treating all borrowers respectfully and in a fair and consistent manner. We strive to provide such support and to consider borrowers' individual needs, to the extent possible, whilst considering our statutory responsibilities as Liquidators.
35. To this end, Kildonan UnitingCare ('Kildonan') was engaged in July 2016 to assist and support both the Timbercorp Finance employees and all KordaMentha employees who have dealings with borrowers in hardship. Amongst other things, Kildonan has and continues to assist us by:
  - a. Providing hardship awareness and respectful communication training
  - b. Conducting call listening and side by side coaching post-training to embed learnings and train team leaders to coach appropriately
  - c. Holding workshops to practice over the phone and face to face negotiations, and
  - d. Reviewing and providing feedback on the appropriateness of written communications to borrowers.

We are committed to a continuous improvement program (including ongoing training) and value how Kildonan are assisting us to achieve best practice.

36. To date we have received some 643 applications from borrowers for assistance:
  - a. 455 applications have settled
  - b. 92 borrowers remain in the program and are actively engaged
  - c. 37 borrowers remain in the program however they are not actively engaging with the liquidators to finalise their request for assistance.
  - d. 59 borrowers were removed from the Borrower Assist program as we were either unable to reach agreement with them or they filed for a debtor's petition bankruptcy as they assessed their financial hardship to be broader than Timbercorp Finance.
37. Recently, a distressed borrower contacted us. Following advice by three separate solicitors, she was terrified of losing her family home and had not applied for assistance through our Borrower Assist program, prolonging her mental fragility.

38. On the verge of a nervous breakdown, she contacted my staff who could explain the process and guide her through it. Her application was finalised and settled within 7 days of the first emotional phone call. Following finalisation of her settlement agreement, she sent the below unsolicited email:

Hi Andrew,

As per our telephone conversation, I confirm that I would be happy to receive phone calls from borrowers that are reluctant to join the borrowers assist program in the hope of helping them feel more assured that it is a genuine program that is aimed to reach a fair settlement based on their circumstances. As I mentioned earlier, I was advised by 3 different solicitors, that I would lose my house if I joined the program and that you would not care about how you got the money, as long as you got it, even if it meant us having to sell our home. Should I have spoken to someone that was in a similar situation to myself, and told that this was not the case, I could have had this rectified a very long time ago. I believe that hearing it from another borrower, would have a much better effect.

I would be happy to help where possible in order for other borrowers to finally put this behind them and move on with their lives.

#### **Engagement with HNAB AG**

39. Since the Forestry Inquiry and in accordance with its recommendations, we have sought to engage with the representatives of HNAB-AG, including through discussions and other communications. That engagement has concerned, among other things, Timbercorp Finance's Borrower Assist program, the support of Timbercorp Finance's creditors of the administration of that program, and the terms of the deeds which record the terms upon which Timbercorp Finance resolves those disputes it has with HNAB-AG members about the monies that they owe to Timbercorp Finance.
40. The engagement that has occurred has included communications directly with HNAB-AG members, HNAB-AG executives, the Timbercorp Borrower Assist advocate and Senator Xenophon and his office.
41. We respect the confidential and without prejudice nature of our discussions with HNAB-AG members, HNAB-AG executives, the Timbercorp Borrower Assist Advocate and Senator Xenophon and his office. As such, we do not consider it appropriate to descend into the details of those communications in this submission.
42. We do wish to note, however, the following outcomes:
- a. Since the Forestry Inquiry, we have:
    - i. Fully resolved and executed deeds of settlement with 39 HNAB-AG members
    - ii. Agreed commercial settlement parameters with 9 HNAB-AG members but have not been able to reach agreement to the terms of a settlement deed as sought by HNAB-AG executives
  - b. Borrower Assist applications by HNAB-AG members are technically on foot – but none of those borrowers have actively engaged with us and are not providing us with the information needed by us to properly assess their applications.
  - c. We have made several amendments to the terms of settlement deeds for HNAB-AG members which are directed to addressing the concerns identified to us held by the HNAB-AG executives said to be peculiar to HNAB-AG members. This has included, but not been limited to:
    - i. recording in the deed recitals that the HNAB-AG members dispute and deny that they were members of Timbercorp Schemes, entered into loans with Timbercorp Finance, defaulted on those loans and owe Timbercorp Finance money under those loans
    - ii. recording in the deed recitals that the HNAB-AG members say that if they were members of Timbercorp Schemes and entered into loans with Timbercorp Finance, it was a result of misleading and/or deceptive conduct on the part of Holt Norman Ashman Baker or one of its related entities

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- iii. altering the language of several clauses to address sensitivities identified by HNAB-AG peculiar to HNAB-AG members
  - iv. inserted clauses to provide that Timbercorp Finance will not make any claim against HNAB-AG members in respect of any amount that they may become entitled to through or under any statutory compensation scheme in respect of any investment entered into by the borrower in Timbercorp Schemes or loan entered into with Timbercorp Finance
  - v. restricting the rights of Timbercorp Finance in relation to HNAB-AG members who breach important terms of their settlement deed
  - vi. providing releases over and above previously included covenants not to sue.
43. Timbercorp Finance is prepared to grandfather the above-mentioned changes that it has offered to make to HNAB-AG, to any of HNAB-AG's members who have already signed settlement deeds that did not include those terms.

***HNAB-AG Settlement deed***

- 44. Much appears to be made by HNAB-AG in its submission about some aspects of Timbercorp Finance's settlement deed terms.
- 45. Please refer to Appendix 1 – Summary of HNAB-AG settlement deed for further specific detail of aspects of the settlement deed that remain unresolved.
- 46. As communicated to HNAB-AG, Timbercorp Finance is prepared to grandfather any future changes to HNAB-AG Settlement deed, to any of HNAB-AG's members who have already signed settlement deeds that did not include any new advantageous terms.

***Borrower Assist advocate and Independent lawyer, John Berrill***

- 47. Statements have been made in the HNAB-AG submission as to the conduct of Stephen Blyth as the Borrower Assist advocate and John Berrill, who is available to provide legal advice on a borrower's rights and obligations pertaining to their settlement deed.
- 48. Whilst the cost of their respective services is borne by the creditors of Timbercorp Finance, their contracts stipulate they are not subject to the direction of Timbercorp Finance and can terminate their agreement with Timbercorp Finance at any time.
- 49. No borrower is required to utilise the services of either Mr Blyth or Mr Berrill. They are a resource that is available to assist a borrower. We encourage borrowers to bring someone with them to calls or meetings for support, if that will assist them.

Thank you for providing us with an opportunity to respond to matters raised by HNAB-AG and Ms Halpern. I trust the above assists you however should you wish for either of us to appear and answer any further questions, we are available.

Yours sincerely

Mark Korda  
Liquidator

Craig Shepārd  
Liquidator

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## **Appendix 1 – Summary of HNAB-AG settlement deed amendments**

### *'Re-opening' cases*

50. One issue raised in HNAB-AG's submission is that the deed allows Timbercorp Finance to reopen cases if the Liquidators consider that there has been a breach of the settlement deed by the HNAB-AG member.
51. It is not correct to say that the mechanisms in the deed allow Timbercorp Finance to 're-open' a case if it merely forms the view that there has been a breach of the deed.
52. The form of deed discussed with HNAB-AG contains terms that fairly and adequately regulate the processes and consequences associated with only two (of many) types of breaches that might occur - payment breaches and confidentiality breaches.
  - a. In the case of payment breaches, Timbercorp Finance is required by the terms of the deed to provide a notice of breach and give the borrower an opportunity to remedy the payment breach. Only if the payment breach has not been remedied, can Timbercorp Finance then issue proceedings in a court for that breach.

Borrowers who find themselves unable to meet a payment obligation under their deed are well advised to contact us in advance of their payment obligation date, and to seek to agree on alternative payment arrangements. We have negotiated many such arrangements with borrowers in this regard.
  - b. In the case of breach of a confidentiality obligation in the deed, Timbercorp Finance is required by the terms of the deed to provide a notice of breach and give the borrower an opportunity to show cause why there is no breach. If the borrower fails to respond to the notice of breach, Timbercorp Finance can take similar steps as when there is a payment default.

We consider that these provisions balance the interests of Timbercorp Finance and the borrower. We have, however, offered to HNAB-AG to include further qualifications on how and when Timbercorp Finance can exercise its rights under the deed in relation to a breach of confidentiality to address HNAB-AG's concerns. These qualifications have included:

    - i. specifying that Timbercorp Finance must consider the borrower's response to a notice of breach of confidentiality before deciding that the borrower has breached its confidentiality obligations
    - ii. requiring that in reaching such a decision, Timbercorp Finance must act reasonably
    - iii. conditioning Timbercorp Finance's right to pursue further remedies provided for in the deed after deciding that a borrower has breached its confidentiality obligations, to instances where the borrower's breach is not so minor as to merit disregard.

### *Free and voluntary*

53. We understand that one of the criticisms levelled by HNAB-AG is that the deed used by Timbercorp Finance in settling disputes with its borrowers, records the borrower as acknowledging that they enter into the deed freely and voluntarily.
54. HNAB-AG has objected to that and other cognate clauses in the deed on the basis that they consider that their members are entering into these deeds other than freely or voluntarily having regard to the fact that their members consider that they are in the position that they are as a result of the alleged wrongdoing of Holt Norman Ashman Baker or its related entities.
55. While we understand the sentiment sitting behind this objection, it is misconceived. We are concerned to ensure no more than that when entering into the deed, HNAB-AG's members record that they do not do so in consequence of any legal duress. Accordingly, to address this concern we have offered alternative forms of words to HNAB-AG.

*Errors in statement of fact*

56. We understand that another one of the criticisms levelled by HNAB-AG is that the deed contains 'errors in statement of fact'.
57. We understand these errors to arise from the fact that the recitals to the deed record that the borrower is a member of a Timbercorp scheme, is a party to a loan agreement with Timbercorp Finance, and is in default of the loan agreement and owes monies under that loan agreement to Timbercorp Finance. We do not consider these to be errors of fact. We understand, however, that HNAB-AG members do.
58. Accordingly, to address HNAB-AG's concerns about this issue, we have (as is noted above in this response) amended the recitals in the HNAB-AG deed to record that the borrower disputes those matters and has alleged that if, which the borrower denies, they became a member of the scheme and/or a party to the loan agreement, they did so as the result of misleading and/or deceptive conduct on the part of Holt Norman Ashman Baker or one of its related entities. We consider that this adequately addresses HNAB-AG's concerns in a fair and sensible way.

*Deed interest*

59. We understand that HNAB-AG considers the interest rate that Timbercorp Finance can levy on monies that become owing under the terms of the deed consequent upon the default mechanisms being followed, is exorbitant. The rate of interest is the rate mandated by the Victorian Parliament, as promulgated by the Governor in Council, under the *Penalty Interest Rates Act 1983* (Vic) ('the Act'). This is the same rate of interest as specified in settlement deeds entered into by Timbercorp Finance with other borrowers.
60. The amount of the rate, as fixed by the Act, is presently 3% less than the higher rate of interest specified in most borrowers' loan agreements.