



# HOLDING REDLICH

LAWYERS AND CONSULTANTS

7 March 2003

Blue gum Investors' Committee  
C/- Mr G Vaughan

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**By e-mail**

Dear Mr Vaughan

## **Australian Blue Gum Trust No. 1**

Further to our letter to you of 4 March, and as agreed, we now provide our preliminary advice as to:

- 1 Relevant facts and documents;
- 2 Potential claims;
- 3 Who to sue; and
- 4 The next steps to take, including procedure, costs and timing.

Our comments in respect to each of these four matters are set out below.

### **1 Relevant facts and documents**

- 1.1 At our meeting on 26 February, you provided us with a number of documents relevant to the background to the investment in the Australian Bluegum Trust No. 1 ("**Trust**").
- 1.2 The primary document is the prospectus for the Trust dated 20 March 1991 ("**Prospectus**"). The Prospectus provides:
  - (a) that the manager of the Trust is Australian Bluegum Managers Limited (ACN 009 346 838) in its capacity as trustee of the ABGM Trust ("**Manager**");
  - (b) that the Trustee of the Trust is Perpetual Trustees WA Ltd (ACN 008 666 886) ("**Trustee**");
  - (c) that the Forester, whose technical report is appended to the Prospectus, is Forestec Pty Ltd (ACN 009 351 651) ("**Foreste c**"); and
  - (d) that the Technical Adviser to the Manager is Independent Forestry Services Pty Ltd (ACN 005 128 629) ("**IFS**").
- 1.3 In summary, the Prospectus offers investors the opportunity to invest in a business growing Eucalyptus globulus (Tasmanian Bluegum) with the aim of producing timber for sale as short fibre woodchip to be used in paper pulp production. An investor wanting to invest in

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the Trust is required to enter into a Lease and Management Agreement, under which the investor leases a specific area of Plantation Land (“**Leased Area**”) which is then planted with *Eucalyptus globulus*. The investor is also obliged to engage the Manager to establish, manage and maintain the Plantation and to market the timber produced from the Leased Area. A total of 1,000 Leased Areas at \$10,000 each were on offer pursuant to the Prospectus.

- 1.4 We have now had the opportunity to read the Prospectus in detail. The Prospectus details the role that each of the entities described in paragraph 1.2 above are to play in respect to the scheme. In respect to the land upon which the *Eucalyptus globulus* trees are to be grown, the Prospectus provides as follows:

*“The Plantation will be developed on land located in the South-West of Western Australia. The Plantation land has been selected applying the following criteria:*

1. *Average annual rainfall to exceed 700mm.*
2. *Soil quality to be suitable for the growing of Eucalyptus globulus trees (as detailed in the Forester’s Report commencing on page 13).*
3. *Location of land not to exceed 150 kilometres from the port of Bunbury or Albany.*
4. *Land to be gently undulating.”*

In addition, it is stated in the Prospectus that:

*“The Manager has taken steps to enhance the prospects for this project by selecting land which should minimise the cost of harvesting the final product.”*

In other words, the Prospectus represents that care and attention has been taken in selecting the land site in question.

- 1.5 The Prospectus advises that, after 31 July 1992, the Manager will be responsible for the ongoing financial expenditure required to manage and maintain the Plantation until harvest excluding insurance costs.
- 1.6 In respect to the maintaining of the Plantation, the Prospectus advises that the Trustee will appoint an independent forestry expert to report on the progress of the Plantation and the performance of the Manager. The Prospectus states that the forestry expert will produce, on an annual basis, a report detailing the progress of the Plantation and recommendations for future procedures. The Prospectus states that a copy of this report is to be provided to the Trustee and to each investor (described as a Grower).
- 1.7 The Prospectus provides for the appointment of a Technical Adviser, IFS, which was to provide technical advice to the Manager in relation to the establishment, maintenance and management of the Plantation. The Prospectus advises that IFS was formed in 1975 and since that time has established some 32,000 hectares of plantation forest. IFS and its affiliates are said to be engaged in the full range of plantation servicing and management and its extended interests cover plantation logging, forest products marketing and timber treatment in Western Australia, Victoria and New South Wales.

## 2 The role of Forestec

- 2.1 Forestec prepared a Technical Report dated 5 February ("**Forestec Report**") addressed to the directors of the Manager which is included in the Prospectus. The report goes into considerable detail as to the nature of the land upon which the Eucalyptus globulus trees are to be grown. From the reading of the documentation provided to you prior to investment being made, as well as the documentation you obtained subsequently, it is clear that the Forestec Report will be central to any proceedings that may be pursued.
- 2.2 The Report details a number of topics, such as Topography and Drainage, Soil Site Types, Yield, Management and Other Risks. In respect to Topography and Drainage, the Forestec Report states that the properties are either flat or gently undulating with good drainage. In respect to the Alcoa site located at Pinjarra, being the particular site in question, it is stated that there are more fertile soils at the base of the scarp "*which gradually fall to extend out onto the flats of the Swan Coastal Plain which has poorer soils and drainage*". No comment is made in the Forestec Report that the area in question is possibly unsuitable, or some cautionary wording to that effect. Both properties are described as being either flat or gently undulating or with good drainage. In respect to climate, Forestec advises that the climate in which Eucalyptus globulus produces the best growth is in mild to warm conditions. Forestec concludes that the climatic conditions in both areas are suitable for the growth of Eucalyptus globulus (provided planting is "*on good soil*").
- 2.3 As to the Soil Site Types, the Forestec Report advises that "*field surveys of the soil types on each property have been carried out and an assessment made of the potential each site has to produce varying volume growth if a Eucalyptus globulus plantation was established.*" In other words, the site was approved of for growing trees of this nature.
- 2.4 The Forestec Report then explains that an assessment of a site is based on a classification procedure expressed as a site class ranging from Site Class I (the best) to Site Class XII (the poorest), where the growth of Eucalyptus globulus will fail. The property at Pinjarra, being the Alcoa site, which is the relevant site in question, is described as having soil being "*sands or sandy loams with laterite nodules over clay to variable depth*". The salinity level is described as being "*minimal*". The average site class is described as III / IV. The summary from Forestec, in respect to both the Rock Gully and the Pinjarra sites, is that "*the properties have a predominance of soil types which are capable of supporting good growth of Eucalyptus globulus. Whilst there is some variation on each property, there are very few areas of sites which are not preferred such as infertile leached sands or areas prone to water logging.*" The Forestec Report goes on to state that the soils on both sites are of "*adequate depth*" and that the clay, which is only referred to as being present at the Pinjarra site, "*is not expected to be impenetrable to tree root systems*".
- 2.5 In respect to the section headed "Yields", the Forestec Report states that "*the volume yield from plantations of Eucalyptus globulus grown on various site types will vary considerably depending on soil and climatic conditions. The properties included in this proposal have been selected so that good average yields can be achieved. The site type on all properties average Site Class III and is expected to produce yields with gross volumes in the order of 250 cubic metres per hectare after 10 years.*"
- 2.6 Under the heading "Management", the Forestec Report indicates that to achieve the yields intended, certain management practices will need to be applied. The relevant practices include "deep ripping" on shallow sites, the control of competition from grasses and scrub

re-growth, the application of fertiliser and the tree density of the plantation. Forestec advises that careful monitoring will be necessary to provide early detection of attack by pests, fungal diseases or problems caused from grazing. Careful seed selection is said to be important and it is said that increased yields may be achieved through tree breeding programs. Further, under the heading "Other Risks", reference is made to the fact that damage can be caused by grazing or by rabbits or also by "unusual drought conditions", especially in the year of planting. All of these risks are referred to by Forestec as being minimised by way of appropriate management strategies. The subsequent reports (referred to below) provides evidence that it was the site choice, rather than inattention to these management matters, which seemed to have caused the investment to fail.

2.7 Finally, at the end of the report, Forestec state:

*"The management proposals contained in this Prospectus for the establishment of Eucalyptus globulus plantation are realistic and commercially viable and they will permit the application of forestry techniques which will enable the objectives of the project to be achieved."*

2.8 In summary, the Forestec Report considers the topography, drainage and soil at the Alcoa site at Pinjarra to be adequate for the growing of the trees intended.

### **3 The Fortech Report**

3.1 From the instructions you have provided to us, we understand that the first indication given to investors/growers that all was not well with the trees in the Plantation at Alcoa was when the Fortech Report dated 24 August 1999 was circulated. This report was circulated by reason of the requirement under the Deed of the Trust that an annual report be provided on the Plantation by an independent forestry expert.

3.2 Mr Rivers, the author of the Fortech Report, states that he attended at the Alcoa Plantation on 11 August 1999. He carried out his observation of the Plantation by travelling through it by vehicle, by inspections of representative compartments and other features on foot and by carrying out a check list on various matters relevant to the establishment of the Plantation, its protection and management. He also states that representative samples of trees were looked at in each case for basal area and height.

3.3 The Fortech Report indicates a marked contrast between the plantations established at the Pernich and Alcoa sites. The Fortech findings in respect to the Alcoa Plantation are that the trees at the Alcoa Plantation are variable in terms of stocking, health and tree form, with a majority of areas being in poor to medium condition with some areas deteriorating. Mr Rivers states that he considers that the yield predicted at 10 – 12 years of age for these trees is unlikely to be achieved and that "this issue relates to site limitations and climate during the rotation, rather than being a reflection of management." Mr Rivers does state that, in general, the standard of on-ground management of the Plantations was found to be satisfactory. This therefore seems to suggest the fact that the choice of site is relevant to the marked contrast between the success of the Pernich Plantation and that established at Alcoa, particularly as both plantations were, as we understand it, established at about the same time.

- 3.4 In respect to tree condition, the Fortech Report describes the trees at the Alcoa Plantation as being *“of poor vigour and having retarded canopy development on low-lying water-logged sites, improving slightly on free draining sandy dunes. Trees established on gravelly loams are in better condition but are generally below average.”*
- 3.5 In respect to establishment and stocking, the contrast between the Pernich and Alcoa Plantations is again marked. Stocking at the Alcoa Plantation is described as being *“variable across the Plantation with large areas understocked particularly low-lying areas. The stocking rate is continuing to decline due to drought deaths and some confined areas of wind throw.”*
- 3.6 In respect to the water balance at both sites, the observation is made that *“sections of the Plantation are clearly suffering from winter water logging while other sections are effected by autumn drought. This is continuing tree deaths due to drought.”*
- 3.7 Clearly, Fortech observed clear differences between the condition and health of the trees at the two sites. The choice of the different sites was something that was clearly under the control of the Manager and its independent forestry expert, Forestec, prior to planting occurring. This raises significant questions, which will be further considered below.

#### **4 The URS Forestry Report**

- 4.1 The most recent report in respect to the condition of the trees is a report from URS Forestry, a division of URS Australia Pty Ltd. The report in question is a report prepared by John Tredinnick, a principle consultant of URS Forestry, dated 12 August 2002. Again, the report was produced by URS Forestry pursuant to the obligations pursuant to the Trust Deed and supplied to investors.
- 4.2 The URS Forestry report states that a forester in its employ inspected blue gum plantations established during the project in July 2002, such inspection being carried out with representatives of the Manager. Again, the URS Forestry Report reviewed both the plantations established at Pernich and at Alcoa. Under the heading of the report entitled “Management Outcomes”, it stated that there was little outward change to the health and vigour of the trees since the last report. In this regard, we should say that the only report we have been provided with that pre-dates the URS Forestry report is the Fortech report. If there are other reports which you or other investors have, we would like to review those reports. Reports for the years 2000 and 2001 would be of assistance if they are available.
- 4.3 For the purposes of our advice, it is noticeable that the URS Forestry report states that the stocking levels at Alcoa have continued to decline by reason of *“both wind damage and drought”*. Further, and this is the first time that this point has been made as far as we are aware, the Manager apparently advised URS Forestry that it has completed a limited study of wood quality within the Alcoa Plantation. This study has identified the presence of stem decay within the first 1 to 1.5 metres of 24% of the trees sampled.
- 4.4 Further, and importantly, URS Forestry’s report states that: *“At this stage of the rotation limitations of the sites themselves, the initial process of site selection, rather than the current performance of the Plantation Manager, restrict productivity.”*
- 4.5 In consequence, this again focuses upon the role played by the Manager, its independent expert and also possibly the Trustee in respect of the initial site selection.

## **5 Our own enquiries as to the choice of site**

- 5.1 We have made some informal inquiries through contacts within the Western Australian Department of Conservation and Land Management, and also the Forest Products Commission. From what we have been advised to date, we understand that there are extensive plantations of Bluegums in the Rock Gully area, which plantations have generally been productive and which have generally been established over the last decade or so. This basically ties in with the timing that we are dealing with in the circumstances of your case.
- 5.2 In contrast, our information in respect to the Pinjarra area is that there have been quite variable results. We have been told that there have been some very poor results from plantings made in the last decade or so through drought death of trees, despite being planted on good quality soils. As we understand it, the problem seems to be related to the soils, either because of their intrinsic nature or by reason of the lack of appropriate depth to allow trees of the nature of *Eucalyptus globulus* to develop.
- 5.3 As the choice of site is highly relevant, we would recommend that inquiries be made by an independent forester who we would retain to investigate and research the factors relevant to the growing of Tasmanian Bluegums in soil of that nature in that area in the early 1990s. Depending on the outcome of the inquiries made by the independent forester, this may assist in showing that there has been negligence on the part of the Manager and the Independent Forester, and also the Trustee of the scheme, in respect to this matter in attempting to grow *Eucalyptus globulus* on the Alcoa Plantation site. To do this, we would need to show that the subsequent problems, as attested to by both Fortech and URS as outlined above, should have been foreseen. If such matters could be proven satisfactorily, then this would be held to be a breach of the duty of care owed to persons to whom the Prospectus, and the attached report prepared by Forestec, were distributed and who invested in reliance on the representations contained in those documents.

## **6 Who could be sued?**

- 6.1 Having reviewed the materials that you provided to us, we are of the view that the possible defendants to any legal proceedings could be:
- (a) The Manager;
  - (b) Forestec;
  - (c) The Trustee; and
  - (d) IFS.
- 6.2 The claim would want to be pursued against the Manager as the promoter of the scheme and the distributor of the Prospectus. Part of the Prospectus was the Forestec Report and the role played by its representations and statements are analysed in detail above. We would say, subject to confirmation by an independent expert, that the Forestec Report either negligently represented the ability of the Alcoa site to sustain the growth of the *Eucalyptus globulus* plantations, or that it mislead investors into investing in the Trust. We would seek to hold the Manager liable for including this report in the Prospectus. Further, we would also like to examine the ability to claim against the trustee of the Trust, being Perpetual Trustees W.A. Ltd.

- 6.3 As this scheme generally constitutes a managed investment scheme, it is therefore regulated pursuant to the Corporations Act. We are making inquiries through various contacts within ASIC who may be able to assist as to advice as to the particular persons involved with this scheme. Through ASIC, we also expect to be able to get some advice as to what insurances are held by the various entities. Of the entities named above, Forestec has been deregistered. It may be possible to seek to reinstate Forestec in order to attempt to claim upon any professional indemnity insurance. We have been advised by ASIC that such a company would have held professional indemnity insurance.
- 6.4 In respect to IFS, that company is now known as Yates Forestry Services Pty Ltd, which name change seems to have occurred on 30 October 2002. This will bear further investigation and may well allow a claim to be made against that entity and/or its insurers in respect to its role as a technical adviser to the Manager during the life of the plantation.
- 6.5 In respect to the Trustee, we have not done a search in respect to Perpetual Trustees W.A. Ltd, but we understand the company is continuing to function, and would presumably be in funds. We would want to examine its responsibilities as trustee in an investment of this nature.
- 6.6 We appreciate that we can not give you any assurance that the companies have adequate assets to meet any judgment, nor as to the holding of or limit to any insurance policies that may be able to be claimed against. All that we can do at this stage is to indicate to you that we think that there are a number of possible entities against which claims can be pursued.

## 7 The Next Steps to Take

- 7.1 We would recommend that the next steps to be taken should be as follows:
- (a) that a suitably qualified independent forester be retained to carry out inquiries in respect to the Alcoa Plantation and to particularly consider whether the site selection was central to the problems that have arisen in respect to the trees as well as consider what other factors may have been relevant so as to cause the problems that has arisen with that plantation as evidenced in the Fortech and URS reports;
  - (b) that the independent forestry expert provide to us a written report setting out in detail its conclusions; and
  - (c) that, subject to the conclusion of this report, that a letter of demand be sent to the relevant entities asserting that a claim for damages be pursued for negligence as well as also breaches of the Trade Practices Act 1974 (Cth) (“TPA”) and the Corporations Act 2001.
- 7.2 Assuming that no commercial discussions could then be had (and we would agree with the advice that you previously obtained from Isakow Solicitors that defendants are often not willing to “come to the table” in the absence of actual legal proceedings), it may then be necessary to issue such proceedings.
- 7.3 If this were to be the case, we would suggest that careful consideration be given to the investors commencing representative proceedings in the Federal Court. Such a claim is sometimes referred to as a “class action”. What is required is that there be 7 or more persons having claims against the same person or persons. The claims of those persons

must arise out of the same, similar or related circumstances and the claims must have a substantially common issue of law or fact.

- 7.4 It seems to us that there may be sufficient claims such as to allow a representative proceeding to be commenced. We will need to consider the Prospectus representations and any allegations made of misleading and deceptive conduct, or a breach of the relevant provisions of the Corporations Law concerning managed investment schemes, and be advised as to the circumstances of each investor and what induced them to enter into the investment scheme.
- 7.5 We assume that each investor received a Prospectus setting out the Manager's representations together with the report prepared by Forestec, but it may be that some investors were induced to enter into the scheme by reason of what was said by their financial adviser or accountant. We will therefore need to get instructions from each investor who wants to be involved in any claim in order to be aware as to how it was they came to invest and the basis upon which they did so.
- 7.6 A representative action is not the only way in which proceedings could be commenced. A series of individual cases could be issued and ordered to be heard together so as not to be caught up within the representative action procedure. However, in our view, careful consideration should be given to a representative proceeding, but we will discuss this further with you.
- 7.7 As to timing, the first step that will need to be taken is the retention of a suitably expert forester to provide the report referred to above. Such an inquiry will require us to provide a fully detailed brief to the forester who is selected. If we could find a suitable expert without delay and provide a briefing, we would suggest that a forester could commence its work within the near future. We can report to you further as to timing once we have made enquiries as to suitable experts and their respective availability and cost for both inspecting the site and providing a written report.
- 7.8 As to the question of costs, we discussed at our conference the establishment of a "fighting fund". The letter which we provided to you on Monday last, 4 March, was intended to be distributed to various investors on the basis that a fighting fund would be established and held on trust by our firm. Without in any way attempting to avoid the topic of costs, we find it impossible to provide you with any accurate costs estimate at this early stage. The best estimate that we can give for the present is our likely costs in retaining and briefing a suitable forester, digesting the forester's report and then preparing a letter of demand. We would anticipate our likely costs (excluding the forester's costs) involved in this work would be as follows:



<b>Work description</b>	<b>Cost Range</b>	
Preparing a brief to the forester	\$3,000	\$5,000
Liaising with the forester as required	\$1,000	\$2,000
Reviewing the forester's report	\$2,000	\$3,000
Preparing a letter of demand	\$2,000	\$3,000
	<b>\$8,000.00</b>	<b>\$13,000.00</b>

7.9 At the same time, we will continue to make enquiries through our own ASIC and forestry contacts. Ideally, we would like to obtain confirmation from ASIC as to the insurance position of the various entities against which claims are likely to be made, as well as try to gain more knowledge from ASIC as to Bluegum investment schemes generally.

## **8 Conclusion**

8.1 We would be happy to meet to discuss this letter if you or other investors would like to do so. Please feel free to ask any questions by email or phone.

Yours sincerely

**HOWARD RAPKE**

## MEMORANDUM TO COUNSEL

### A. Introduction

1. Senior Counsel's instructing solicitors act for a group of investors (**the Growers**) in the Australian Blue Gum Trust No. 1 (**the Trust**), which was established to administer a business of growing Eucalyptus globulus (Tasmanian Blue Gum) to produce timber for sale as short fibre woodchip used in paper pulp production (**the Project**). The trees were planted in the south west of Western Australia at Rocky Gully and at the site of an Alcoa refinery at Pinjarra.
2. The Growers invested in the Trust in about 1991 on the understanding they would receive both taxation benefits and, after approximately 10-12 years, a return of 300-400% before tax. Until August 1998 the Growers received reports stating the Project was progressing well. In August 1998 the Growers received a report stating a majority of the trees at the Alcoa site were in poor to medium condition with some areas deteriorating. Subsequent reports have indicated the trees at the Alcoa site continue to deteriorate and predicted yields are unlikely to be achieved at either site. As a result, the Growers can expect to receive only approximately 30 to 50% of their initial investment.
3. The Growers are concerned the losses they now face in respect of their investments in the Trust are as a result of the manager of the Project and the trustee of the Trust not fulfilling their respective obligations to the Growers.

### B. Background to instructions

#### Initial expected returns on the investment

4. A Prospectus dated 20 March 1991 (**the Prospectus**) invited the Growers to invest in the Trust by payment of \$10,000 per Leased Area (document 1 in Senior Counsel's brief). The Prospectus states on page 6 that although Growers' returns from the Project are dependent upon the gaining of a taxation deduction, returns of up to 15% per annum after taxation were achievable with a full deduction at the highest effective marginal tax rate (then 48.25%).
5. The Growers also had the comfort of a minimum return of \$11,000 per Leased Area, subject to certain conditions. Clause 11.11 of the Lease and Management Agreements between the Growers and the Manager states that if the Trustee gives written notice to the

Manager between 1 December 2003 and 1 December 2004 directing it to purchase the timber produce on the Grower's Leased Area, the Manager will within 20 business days of receipt of the Trustee's notice purchase the timber produce for \$11,000 per Leased Area. One condition of the arrangement is that the average quantity of the timber produce on the Leased Areas must be more than 300 cubic metres (which equates to 250 cubic metres per hectare).

6. A promotional brochure for the Project issued by Hampton Securities Limited (document 32 in Senior Counsel's brief) refers to payment by the Manager of a guaranteed minimum price of \$11,000 per fully stocked Leased Area. The brochure also states that investors can expect to achieve a return by 30 June 2002 of \$40,000 before tax, which equates to a return of up to 15% per annum after tax at the highest effective marginal rate.
7. Senior Counsel's instructing solicitors have sent a questionnaire to all Growers inquiring of the reasons for investment and what expectations the Growers held. The responses to the questionnaire reveal that the majority of Growers (94% of the Growers who responded to the questionnaire, which equates to 97% of the total number of woodlots held by all Growers who responded to the questionnaire) expected their investment in the Trust to provide both taxation benefits and also a return of approximately \$30,000 to \$40,000 per Leased Area. Such expectations developed from reading the Prospectus and other documents provided by the promoters in about 1991, and from representations made by the promoters and/or the Growers' accountants and financial advisers. The promoters even paid for some Growers to travel to Perth and visit the proposed plantation sites prior to investing. Copies of the questionnaire and a table setting out the responses are documents 49 and 49 in Senior Counsel's brief.

### **The Trust documents**

8. Senior Counsel may be assisted by summaries prepared by his instructing solicitors of the relevant aspects of the various documents relating to the Trust (documents 10 and 11 in Senior Counsel's brief).
9. The Trust was established by a deed dated 20 March 1991 (**the Trust Deed**) between Australian Blue Gum Managers Limited (**the Manager**), Perpetual Trustees WA Ltd (**the Trustee**) and Forest Estates Pty Ltd (document 3 in Senior Counsel's brief).

10. A Lease dated 28 December 1990 (as amended and dated 30 August 1991) (**the Lease**) provides for the lease of land by Forest Estates Pty Ltd from Alcoa of Australia Limited. The Manager is also a party to the Lease however its main involvement is as assignee in the event of default by Forest Estates Pty Ltd. A copy of the Lease and the substituted Lease are documents 2 and 6 in Senior Counsel's brief.
11. The Growers entered into Lease and Management Agreements (**the Lease and Management Agreements**) with the Trustee, Forest Estates Pty Ltd and the Manager under which the Growers leased the Leased Areas to be planted with Eucalyptus globulus. Under the Lease and Management Agreements the Growers also engaged the Manager to establish, maintain and supervise the Project. A copy of an example Lease and Management Agreement is document 5 in Senior Counsel's brief.
12. An agreement between NZFP Forests Limited and the Manager provides for the sale of timber to NZFP Forests Limited upon election by the Growers (**the NZFP Agreement**) (document 4 in Senior Counsel's brief).
13. The Lease and Management Agreement, the Trust Deed and the NZFP Agreement all state that the governing law of the agreements is Western Australian law, and further that court proceedings are to be commenced in Western Australia.

#### **Obligations of the Trustee and the Manager**

14. The Trust Deed and the Lease and Management Agreements set out the various obligations of the Trustee and the Manager. For example, the Trust Deed provides as follows:
  - (a) The Manager is to operate in a proper and efficient manner (Clause 12.34);
  - (b) The Trustee will exercise all due diligence and vigilance in carrying out its functions under the Deed etc (Clause 14.03), and will take the reasonable steps necessary to become informed of the exercise of the Manager of its powers and the performance of its functions under the Deed (Clause 14.04); and
  - (c) The Manager and the Trustee are to perform functions and exercise powers diligently and in the best interests of Growers rather than the interests of the Manager/Trustee (Clause 16.03(c)(i)), and they are to act in a fiduciary relationship of utmost good faith to all Growers (Clause 17.30).

15. The Lease and Management Agreements state as follows:
- (a) The Manager has the expertise available to and will establish, maintain, supervise and manage the Project on a day to day basis in a proper and efficient manner, and to market the Timber Produce (Recital C and Clause 6.1(a));
  - (b) The Manager is to (without limitation) act with reasonable skill and diligence (Clause 6.4(c)), exercise reasonable care (Clause 6.4(d)), act honestly and conscientiously (Clause 6.4(e)) and engage competent employees, delegates, agents and attorneys (Clause 6.4(f));
  - (c) The Manager is to procure as and when necessary from experts and consultants special legal, accounting, engineering, forestry and other professional and advisory services (Clause 6.1(b)). The Manager will carry out certain silvicultural tasks during the Project (Clause 6.3);
  - (d) If the Manager delegates any of its functions pursuant to the Agreement it is not released from liability under the Agreement in respect of those functions, except to the extent that the Manager shall be entitled to rely upon any advice which it may receive and act upon in good faith from its consultants or other experts or professional advisers (Clause 7.6);
  - (e) The Trustee is to represent and safeguard the rights and interests of the Growers (Recital D), monitor the Manager's performance of its obligations under the Agreement, and make such recommendations to the Manager about the Plantation and the Project as it deems fit (Clause 3.2 (a) and (b));
  - (f) The Manager is to purchase Timber Produce for \$11,000 per Leased Area provided certain conditions are satisfied (Clause 11.11); and
  - (g) The Trustee is to appoint a professional forester independent of the Trustee and the Manager to submit to the Trustee and Manager within 45 Business Days of the end of each Year reports on the Project in the immediately preceding Year and for the current Year (Clause 13.3).

**The selection of sites for the Project**

16. Forestry reports on the Project in recent years reveal that the sites selected for the Project were not suitable to grow plantations of *Eucalyptus globulus*. From 1998 it was noted that

the Alcoa plantation was deteriorating due to drought and poor drainage, and that situation has since worsened. In 2000 the forestry consultant engaged by the Manager reported the Alcoa plantation was unlikely to yield the predicted 250 cubic metres per hectare at clearfelling age of 10-12 years. The Rocky Gully plantation appears to have progressed satisfactorily until about 2000, however in 2001 the forestry consultant reported that neither plantation would achieve the productivity expectation outlined in the Prospectus.

17. The Prospectus states (on page 4) that the Plantation land was selected applying the following criteria:

- “1. *Average annual rainfall to exceed 700 millimetres.*
2. *Soil quality to be suitable for the growing of Eucalyptus globulus trees (as detailed in the Forester’s Report commencing on page 13).*
3. *Location of land not to exceed 150 kilometres from the port of Bunbury or Albany.*
4. *Land to be gently undulating.*

*In addition, the Manager has taken steps to enhance the prospects for this project by selecting land which should minimise the cost of harvesting the final product.”*

18. The Forester’s Report on page 13 of the Prospectus is by A R Gobby of Forestec Pty Ltd (**Forestec**) and dated 5 February 1991. The Report refers to the Rocky Gully and Alcoa sites and states “... *there are well established management procedures within the industry to ensure that plantations of Eucalyptus globulus can be successfully established on these sites*”, however “... *techniques to re-establish Eucalyptus globulus plantations where (native jarrah and marri forest) have been removed will need to be vigorously applied to ensure success.*”.

19. The Report goes on to state:

*“The properties are either flat or gently undulating with good drainage. The Rocky Gully property is located in the head waters of several creeks which are tributaries of the Kent River. The property has large areas of higher ground with long moderate slopes to the creek valleys. The moderately undulating topography is consistent with good drainage and better soil types which are found in the surrounding areas.*

*The Pinjarra property on the Alcoa Refinery site occupies the area below the Darling Scarp and the areas where planting is proposed, lie on the Ridge Hill Shelf of sloping higher land with more fertile soils at the base of the scarp which gradually falls to extend out onto the flats of the Swan Coastal Plain which has poorer soils and drainage. The Ridge Hill Shelf is dissected by numerous rivers and streams with fertile valley soils particularly near the scarp.*

*The climate in which Eucalyptus globulus produces its best growth is mild with cool to warm, moist conditions being the most favourable. It is not tolerant of drought and therefore the relationship between precipitation and evaporation over the year is very important. As well as an adequate total rainfall the severity of summer drought as expressed by the total evaporation and the number of months when rainfall exceeds evaporation is critical. Along the south coast this species will grow in areas with lower annual rainfall because annual evaporation is less than 1400mm and the rainfall exceeds evaporation for between eight and nine months of the year. The Rocky Gully property is in this zone with an annual rainfall between 750-800mm.*

*The property at Pinjarra has an even higher annual rainfall between 950-1000mm but this is required to offset higher evaporation averaging 1500mm per annum with rainfall exceeding evaporation between six and seven months of the year.*

*This data indicates that the climatic conditions in both these areas are suitable for the growth of Eucalyptus globulus provided planting is on good soil.*

*The best growth of Eucalyptus globulus is achieved on well drained fertile sands or loamy soils with adequate depth. It is not tolerant of saline soil conditions and hence the presence of salt affected areas in the drainage system on any property is critical. Field surveys of the soil types on each property have been carried out and an assessment made of the potential each site has to produce varying volume growth if an Eucalyptus globulus plantation is established...*

*The properties have a predominance of soil types which are capable of supporting good growth of Eucalyptus globulus. Whilst there is some variation on each property there are very few areas of sites which are not preferred such as infertile leached sands or areas prone to waterlogging.*

*The volume yields from plantations of Eucalyptus globulus grown on various site types will vary considerably depending upon soil and climatic conditions. The properties included in this proposal have been selected so that good average yields can be achieved. The site type on all properties averages Site Class III and is expected to produce yields with gross volumes in the order of 250 cubic metres per hectare after ten years...*

*To achieve these yields proven management practices which have been developed within the industry will be required...*

*... risks can be minimised by appropriate management strategies which are provided for in the structure of the project."*

20. Finally, the Report states (on page 15 of the Prospectus) that *"the management proposals contained in this Prospectus for the establishment of Eucalyptus globulus plantations are realistic and commercially viable and they will permit the application of forestry techniques which will enable the objectives of the project to be achieved"*. However, the Report concludes by stating that *"Forestec Pty Ltd does not guarantee the performance of this project as investment of this nature has by necessity attendant equity risks."*

### **The forestry reports prepared following plantation**

#### 1992

21. The report from Forestec dated 11 August 1992 (document 13 in Senior Counsel's brief) refers to areas planted in June and July 1992 at the Alcoa site and at Rocky Gully and observes that all seedlings have been planted on mounds with adequate weed control and drainage where necessary. The report notes that some of the seedlings had died at Rocky Gully, probably due to unseasonably dry conditions for several weeks after planting. Those areas were to be replanted by the Manager. The report otherwise states that *"given normal weather conditions and the absence of unforeseen attack by insects or other pests there should be no reason why acceptable survival levels will not be achieved and adequately stocked stands will be produced."*

#### 1993

22. The report from Forestec dated 18 August 1993 (document 14 in Senior Counsel's brief) notes that initial planting was not successful in an area south of the Alcoa refinery and



scattered pockets elsewhere, however those areas have been treated with weed control measures and replanted in May to July 1993. The report otherwise states that the Manager has complied with its silvicultural obligations "*and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.*". The Report concludes that there are no specific recommendations of work to be performed aside from normal routine maintenance.

#### 1994

23. The report from Forestec dated 11 August 1994 (document 15 in Senior Counsel's brief) notes the replanting in areas of the Pinjarra site in 1993 was successful. The report also notes the Pinjarra district experienced severe drought conditions over the summer of 1993/1994. The report otherwise states the Manager has complied with its silvicultural obligations "*and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.*". The Report concludes that there are no specific recommendations of work to be performed aside from normal routine maintenance.

#### 1995

24. The report from Forestec dated 11 August 1995 (document 16 in Senior Counsel's brief) notes Western Australia experienced unusually dry summer conditions in the preceding 12 months. The report also notes the average rainfall during November 1994 to May 1995 was well below the average of past seasons, resulting in sporadic deaths and possibly retarded growth of trees in the Pinjarra Plantations. However, the report states that the plantation as a whole continues to progress satisfactorily. The report otherwise states the Manager has complied with its silvicultural obligations "*and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.*". The Report concludes that there are no specific recommendations of work to be performed aside from normal routine maintenance.
25. An undated report from Forestec (document 17 in Senior Counsel's brief) reports in respect of the period 1 July 1995 to 31 December 1995 and notes that in most areas "*growth is on track to meet the objectives of the project*". The report notes there are still some areas, mainly in the south western part of the Pinjarra site "*where establishment survival rates, combined with drought deaths in the 1994/95 summer and generally poor growth since establishment mean that final volume yields will be poor.*" However, the report notes the

overall impact of these poorer areas *“is likely to be at a level which is offset by higher than average growth elsewhere and thus will fall within the scope of normal variation in growth expected in projects of this kind.”*. The report states the Manager has complied with its silvicultural obligations *“and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.”*. The Report does not recommend any silvicultural management action in the following 12 month period, but does recommend continued monitoring of growth particularly in the areas of concern.

#### 1996

26. The report from Forestwest Pty Ltd (formerly Forestec Pty Ltd) (Forestwest) dated 22 August 1996 (document 18 in Senior Counsel's brief) notes that approximately 9 hectares in the south eastern corner of the Alcoa site was damaged by wildfire in February 1995, and there are other areas in the Alcoa site *“where the plantation is not adequately stocked due to a combination of adverse topographical situations and the effect of the severe drought in the summer of 1994/95.”*. The report notes there have been further drought deaths late in the summer of 1995/96 in the Alcoa site, and there are also areas in the Alcoa site where although stocking is adequate growth is less vigorous probably due to soil nutritional factors. The report states the Manager has complied with its silvicultural obligations *“and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.”*. The Report recommends continued monitoring of growth particularly in the areas of concern, and consideration of application of fertiliser in the Alcoa plantation.

#### 1997

27. Forestwest's report dated 20 August 1997 (document 19 in Senior Counsel's brief) again notes there is an area in the Pinjarra site where stocking levels are low due to a combination of initial establishment and deaths in the drought of the summer of 1994/95. There were further deaths in the drought of the summer of 1995/96 and the preceding summer, but the report notes these were minimal and are expected to have limited impact on final yields. The report otherwise states the Manager has complied with its silvicultural obligations *“and has exercised such standard of care and diligence normally expected from qualified persons in the performance of comparable work.”*. The Report recommends continued monitoring of growth particularly in the areas of concern, and application of fertiliser in the Pinjarra site.

1998

28. A report by Roger Underwood of Fortech dated 19 August 1998 (document 20 in Senior Counsel's brief) states the Rocky Gully plantation has been well established and is generally in excellent condition, however the Pinjarra plantation is variable, with the bulk of the area being in poor to medium condition. The report notes that at the Pinjarra site *"growth rates are very poor on low lying swampy soils and poor on the free draining sandy dunes. The areas established on gravelly soils are medium average quality for their age. Grass present as understorey in most of this plantation, reflecting the low average stocking and retarded canopy development."* The report further notes that approximately 50% of the Pinjarra plantation has been refertilised in the last 18 months, however sections of the Pinjarra plantation are *"clearly suffering from winter waterlogging while other sections were affected by autumn drought. There is a scattering of recently dead trees through most stands."* However the report states that *"in general, the standard of on-ground management of the plantations was found to be satisfactory."* The report's recommendations include the preparation of detailed management plans and continued monitoring of nutrient levels in the sandier soils at Rocky Gully.

1999

29. Fortech's report dated 24 August 1999 (document 21 in Senior Counsel's brief) notes the trees at the Pinjarra plantation *"are of poor vigour and have retarded canopy development on low-lying waterlogged sites, improving slightly on free-draining sandy dunes. Trees established on gravelly loams are in better condition but are generally below average."* The report further notes that stocking is variable across the Pinjarra plantation with large areas understocked (particularly in low-lying areas) and a continuing decline due to drought deaths and some confined areas of windthrow. In addition, sections of the Pinjarra plantation were clearly suffering from winter waterlogging while other sections were dying due to autumn drought. Importantly, Fortech's view is that the Pinjarra plantation is unlikely to yield the predicted 250 cubic metres per hectare at clearfelling age of 10-12 years. However the report notes *"this issue relates to site limitations and climate during the rotation, rather than being a reflection of management"* and *"in general, the standard of on-ground management of the plantations was found to be satisfactory."* The report recommends the Manager carry out a cost-benefit analysis of the current productivity (volume, growth and mortality) of the Pinjarra site to determine when the optimal time of harvest is predicted to occur, so as to maximise returns to growers.

2000

30. The report from Roger Underwood at URS Forestry (formerly Fortech) (URS) dated 14 August 2000 (document 23 in Senior Counsel's brief) states that the Rocky Gully plantation is in variable condition and has underperformed expectations during the preceding 12 months. The report notes the Pinjarra plantation is also in variable condition, with most of it being in poor and deteriorating condition, and unlikely to yield the predicted 250 cubic metres per hectare at clearfelling age of 10-12 years. Again, this result was attributed to site limitations and climate during the rotation, rather than the standard of management. The report notes the same problems of waterlogging and drought in the Pinjarra plantation, and further notes that a cost-benefit analysis is currently being undertaken to determine the optimal time of harvest and enable a number of options to be presented to growers.

2001

31. The report from URS dated 22 September 2001 (document 24 in Senior Counsel's brief) makes similar comments about the Rocky Gully and Pinjarra plantations as in its 2000 report. Interestingly, the report notes that damage caused by parrots early on the rotation has impacted on tree form in the Pinjarra plantation and this, together with the low productivity, is likely to impact on the cost of harvesting. That appears to be the first time the problem of parrot infestation has been reported. Finally, the report states:

*“Neither plantation will reach the productivity expectation outlined in the Prospectus for the Project. However, the result is largely attributed to limitations of the site itself, and the initial process of site selection, rather than the current performance of the Plantation Manager. The maintenance operations of the Plantation Manager have improved considerably over the previous twelve months and performance is consistent with industry best practice. All recommendations made in the previous report have been implemented.”*

2002

32. The report from URS dated 12 August 2002 (document 25 in Senior Counsel's brief) notes *“there was little outward change to the health and vigour of trees since the last report, with growth continuing to be variable on both plantations as a result of site conditions. Stocking levels at Alcoa have continued to decline as a result of the impact of both wind damage and drought.”* The report refers to a study performed by the Manager of the Alcoa

plantation, which identified the presence of stem decay within the first 1 to 1.5 metres of some trees, which *“appears to be increasing susceptibility of the stand to wind damage and may also impact on the value of the wood fibre.”* The report goes on to say URS is unaware of any previous occurrences of the decay, however it is considered likely the problem will extend further along the stem, and *“as the plantation is now mature, harvesting should take place as early as practicable to ensure that there are no further losses of merchantable fibre.”* The report also notes the productivity of the plantations is restricted by the sites themselves and the initial process of site selection, rather than the current performance of the Manager. Finally the report notes the Manger has undertaken maintenance operations over the preceding 12 months with the standard of care and diligence normally exercised in the performance of comparable work.

### **Forecasted returns on Growers' investments in 2001**

33. The report from the Manager (Yates Equity Limited) to the Trustee (Charters Securities Limited) dated 28 September 2001 (document 24 in Senior Counsel's brief) states the Manager has commenced negotiation with interested parties for the harvesting and sale of the Alcoa plantation and intends to commence the harvesting of the Alcoa plantation prior to 30 June 2002.
34. The report from the Manager to the Trustee dated 16 September 2002 (document 26 in Senior Counsel's brief) states that harvesting plans for both sites are being prepared, and the Manager has commenced negotiation with interested parties for the harvesting and sale of timber from both sites. The report refers to the presence of decay within the bottom 1 to 1.5 metres of the stems of a significant proportion of the standing plantation (24% of the sample taken), and states *“the presence of this decay may impact negatively upon the value of the wood fibre and on the projected yields. There may also be an associated rise in the expected harvesting costs. The Manager is currently in discussion with a number of parties for the purchase of this wood, including the potential salvage of the decayed wood for sale as boiler fuel if it is unable to meet export woodchip specifications. ... This recent development is likely to have a significant impact on returns to growers.”* The report concludes that harvesting will now proceed.
35. In the 2001 report to the Trustee, the Manager forecasts that the projected harvest proceeds per timberlot are in the range of \$3,000 to \$5,300 for the Alcoa plantation and \$3,800 to \$6,400 for the Rocky Gully plantation. The resulting weighted average for the project is therefore in the range of \$3,096 to \$5,432.

36. The estimate in the 2001 report to the Trustee should probably be revised down even further since the discovery of decay in some of the tree stems. Accordingly, the Growers can expect to receive no more than 30.96% to 54.32% of each initial investment of \$10,000, compared to the returns of 300% to 400% expected at the time of making the investment.

#### **Status of the plantations**

37. Counsel's instructing solicitors understand that on or about 6 September 2002 the Trustee sent a notice to all Growers declaring that both plantations had been adjudged mature by the Manager, and the Manager would now commence the tasks required for the harvesting of the plantations. An example of such a letter is document 37 in Senior Counsel's brief. Some Growers may have recently received correspondence from the Manager regarding the harvesting of the plantations and requesting details for the purpose of preparing documentation. The correspondence states harvesting of the Alcoa site commenced in mid May 2003 and is yet to commence at the Rocky Gully site. A copy of such correspondence is document 30 in Senior Counsel's brief.

#### **Great Southern Plantations Limited**

38. John Young was a promoter of the Project and some of the Growers met with him in Western Australia prior to investing in the Project. The Growers instruct that for some time Mr Young also managed the Project.
39. John Young is now the managing director (and previously executive chairman) of Great Southern Plantations Limited (Great Southern) which undertakes Blue Gum plantations in Western Australia, South Australia and Victoria. Copies of Great Southern's April 2003 and June 2003 newsletters are documents 47 and 50 in Senior Counsel's brief. Copies of historical company extracts of Great Southern Plantations Limited and Great Southern Timber Pty Ltd are also included (documents 43 and 44).
40. Senior Counsel will note that Great Southern was named Templegate Services Pty Ltd and Templegate Services Ltd from its commencement in May 1991. Instructions from the Growers are that in recent years John Young and his Templegate companies were sued in the Federal Court in respect of another plantation. A search of the Federal Court's files reveals 2 separate proceedings in which investors in a pine forest plantation in NSW sued their promoters, managers and trustee (including Beagle Holdings Pty Ltd (formerly

Templegate Holdings Pty Ltd), John Young, Perpetual Trustees WA Limited and Great Southern Managers Australia Ltd) for failure to establish a secondary market for the timber and for making representations as to forecasts without reasonable grounds. It appears the proceedings settled in about March 2003. Senior Counsel may be assisted by his instructing solicitors' file notes of the inspection of the 2 Federal Court proceedings (documents 51 and 52).

41. Great Southern promotes its plantations on the basis of the success of past plantations. For example the Great Southern June 2003 newsletter states, "*Great Southern is the industry leader, with a track record of success established over the past 15 years*". Great Southern also states on its website ([www.great-southern.com.au](http://www.great-southern.com.au)) that investors can have the peace of mind in "*dealing with the industry leader, the Great Southern Group: net assets of more than \$180 million, more than \$350 million funds under management, land holdings of more than 67,000 hectares, 15 years' experience, no borrowings*".
42. Promotion on that basis is misleading because Great Southern was established (as Templegate Services Pty Ltd in 1991) and therefore does not have 15 years' experience. The claim may be referring to the Australian Blue Gum Trust or Templegate Trust investments. However those plantations do not demonstrate a "*track record of success*". The only plantations that have reached maturity are the Project - the Australian Blue Gum Trust No. 1 - and some Templegate plantations. All such plantations appear to have failed.
43. It therefore seems possible that any exposure of Great Southern's conduct may cause it some commercial embarrassment and its operators may therefore be willing to participate in negotiations with the Growers.

#### **Joint action by the Growers**

44. In February 2003 one of the Growers, Gerald Vaughan, wrote to all Growers inviting them to join him in taking action in respect of the likely losses on their investments in the Project. A copy of Mr Vaughan's letter is document 38 in Senior Counsel's brief. Mr Vaughan has since formed a small committee known as the Concerned Growers Group.
45. To date 111 Growers have contributed \$100 for every woodlot they hold toward Stage 1 in the investigation and possible litigation of the matter. Stage 1 involves investigation and advice to the Growers as to their causes of action and potential defendants. Senior

Counsel's instructing solicitors have not yet retained a forestry expert but, subject to Senior Counsel's advice, intend doing so in Stage 2.

46. Senior Counsel's instructing solicitors have sent letters of advice dated 7 March 2003 and 28 March 2003 to the Concerned Growers Group (documents 45 and 46 in Senior Counsel's brief). Senior Counsel will note from the correspondence that the Concerned Growers Group also seeks some indication of the resources (either directly or through insurance) that may be available to any potential defendants. The Group is concerned not to commence legal proceedings against individuals or corporations that hold no assets. Whilst it is difficult at this early stage to be definitive about that point, Senior Counsel is requested to bear the issue in mind when he provides his advice.
47. Also included in Senior Counsel's brief are copies of historical company extracts of Australian Bluegum Managers Limited (document 39), Yates Forestry Services Pty Ltd (document 41), Forestwest Pty Ltd (document 42) and Perpetual Trustees WA Ltd (document 40).

**C. Senior Counsel's instructions**

48. Senior Counsel is briefed to advise on the causes of action available to the Growers and the potential defendants the Growers could sue in that regard. In addition, Senior Counsel is briefed to address the following specific matters:

- (a) Clause 11.03 of the Trust Deed states that, subject to Clause 17.09, the Manager is liable for all acts or omissions of foresters, surveyors, contractors, qualified advisers, etc it appoints, as if such acts or omissions were the Manager's own.

Clause 17.09 states that the Manager may act upon any statement/information obtained by foresters, etc and believed by the Manager in good faith to be expert in relation to the matters upon which they are consulted. Clause 17.09 goes on to state that the Manager is not liable for any liability incurred as a result of misconduct, mistake, etc of such an agent, where liability is not recovered from the agent directly and the Manager acted in good faith in reliance upon the statement/information.

Similarly, Clause 7.6 of the Lease and Management Agreements states that the Manager is not released from liability under the Agreements in respect of functions it delegates pursuant to the Agreement, except to the extent that the Manager is



entitled to rely upon any advice it may receive and act upon in good faith from its consultants or other experts or professional advisers.

How does the operation of Clauses 11.03 and 17.09 of the Trust Deed and Clause 7.6 of the Lease and Management Agreements affect any causes of actions the Growers might otherwise have against the Manager?

- (b) Are there any other provisions of the Trust documents that might limit the liability of any potential defendants?
  - (c) Clause 13.01 of the Trust Deed provides that the Manager is required to retire from the management of the Trust and the Project if and when required to do so by the Trustee if the holders of 50% or more of the number of Lease and Management Agreements entered into resolve that the Manager should be removed at a meeting of Growers. Is it likely the Growers would achieve some leverage if they call a meeting and vote on a resolution to remove the Manager?
  - (d) The Lease and Management Agreement, the Trust Deed and the NZFP Agreement all state the governing law of the agreements is Western Australian law, and further that court proceedings are to be commenced in Western Australia. However, the representations about the Project were made to many of the Growers outside of Western Australia (Victoria, Tasmania, New South Wales and Queensland) and many of the Growers applied for Lease and Management Agreements outside of Western Australia. In the circumstances, would the Growers still be required to commence court proceedings in Western Australia?
49. Once Senior Counsel has had an opportunity to review his brief he is requested to contact his instructing solicitors to arrange a conference as soon as possible. It is intended that Senior Counsel will initially provide his advice in conference with his instructing solicitors and the Concerned Growers Group. Thereafter Senior Counsel will be requested to provide a written advice and attend a further conference with all Growers who have contributed to Stage 1 to discuss his advice.
50. Senior Counsel may contact Fleur Summons on 9321 9751 or fleur.summons@holdingredlich.com.au or Howard Rapke on 9321 9742 of his instructing solicitors if he has any queries.

**Dated:** July 2003

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**HOLDING REDLICH**

**Solicitors for the Growers**

### MINUTES OF A MEETING OF THE CONCERNED GROWERS GROUP

held at 44 Pakington Street, St Kilda, Victoria  
on Tuesday, 30 September 2003 - 10.05am - 11.50am

**Present:** Gerry Vaughan (GV) ([committee member](#)), John Aalders (JA) ([committee member](#)), Howard Rapke (HR) (Holding Redlich), Fleur Summons (FS) (Holding Redlich), [15 investors, and 3 proxies representing 15 other investors involved in Stage 1](#)

**Apologies:** [12 apologies](#)

GV	<ul style="list-style-type: none"> <li>• There will be no video of today's meeting, and the committee does not intend to seek any media coverage at this early stage.</li> <li>• I was annoyed when the results of the Australian Blue Gum Trust No. 1 were foreshadowed to be significantly different to those set out in the prospectus</li> <li>• I obtained positive legal advice about potential legal action</li> <li>• There is representation of 66% of the woodlots <del>holders</del> involved in <del>S</del>stage <del>1</del>one funding present at today's meeting</li> </ul>
HR	<ul style="list-style-type: none"> <li>• We obtained an opinion from Mark Derham QC regarding the causes of action and likely merits of legal action against a number of potential defendants.</li> <li>• Mr Derham advised there is some merit to the investors' claims but there are also some difficulties</li> <li>• Investors appear to have causes of action in respect of loss they have suffered as a result of investing in ABGT1, as follows:             <ul style="list-style-type: none"> <li>• Breach of contract, in respect of the Trust Deed and the Lease and Management Agreements; and</li> <li>• Misleading and deceptive conduct in contravention of section 52 of the <i>Trade Practices Act 1974 (Cth)</i>.</li> </ul> </li> <li>• A claim for breach of contract will relate to whether the Manager was competent, skilful and careful in its management of the plantation, and also whether the Trustee has fulfilled its obligations in overseeing the Manager's performance. Assessment of the Manager's performance of its obligations relates to both site selection and ongoing management of the plantation. To establish both of these issues the</li> </ul>

	<p>investors will require expert evidence from a forester.</p> <ul style="list-style-type: none"> <li>• If the investors are successful in establishing breach of contract, a court will award damages compensating them for losses they have suffered as a result, which will be assessed based on what the investors expected to earn from their investment.</li> <li>• A claim for misleading and deceptive conduct requires the investors to establish that they relied on representations made in the Prospectus or other documents, or by persons marketing the project. The investors must show that the representations were false. NB: the survey results showed there was some reliance on statements made in the Prospectus and other documents. An example is the representation that the Alcoa and Rocky Gully sites were suitable for growing Eucalyptus Globulus trees.</li> <li>• If the investors are successful in establishing breach of contract, a court will award damages which will be assessed according to the position an investor might be in had they been aware of the misleading and deceptive conduct and not invested in the project. That is, the damages will not be based on the promised returns on the investment.</li> <li>• Possible defendants are the Manager, the Trustee, the publishers of the Prospectus, and the promoters of the project.</li> <li>• The investors will have to consider what form of litigation with which to proceed: an individual plaintiff running a test case; a multi party action; or a class action. In a test case or a multi party action, the plaintiffs are liable (jointly and severally) for any costs ordered in favour of the defendants. In a class action only the lead plaintiff will be liable for any costs ordered in favour of the defendants.</li> <li>• A class action requires a common them, for example, site selection. However, different promotional material was provided to different people and therefore a claim for misleading and deceptive conduct based on representations as to returns might be less straightforward to run as a class action.</li> <li>• There are always risks in litigation: for example, we have not yet seen the potential defendants' documents, and there are always 2 sides to every story.</li> <li>• However we consider there is a case to be made out</li> </ul>
<p>GV</p>	<ul style="list-style-type: none"> <li>• The QC's estimate is that it will cost approximately \$400,000 to proceed with court action</li> <li>• 56% people contacted for this meeting did not respond at all</li> <li>• I have spoken to John Walker of IMF who provides litigation funding and may be interested in assisting but reserves the right not to assist depending on the assessment in a forester's report</li> </ul>

	<ul style="list-style-type: none"> <li>We need a lead litigant</li> <li>We have attempted mediation by recently meeting with John Young and speaking to Ken Richards. Mr Richards is a director of Yates Forestry Services Pty Ltd, and his view is that they purchased the project some years ago and it had <u>existing problems originating from site selection</u><del>been poorly run then</del>. Mr Young &amp; Hampton Securities were <del>the</del> promoters <u>of the project</u>, and Mr Young denies any liability. Therefore the mediation was not successful at this stage.</li> <li>Reliance/promotion – e.g. some of you obtained promotional material promising a minimum 110% return</li> <li>Jack Stuk – a tax lawyer – has dealt in other similar large schemes, e.g. in respect of the Templegate plantation in NSW. That case settled but not quickly, therefore is there a chance of settling on this too?</li> </ul>
<b>Question by investor</b>	<b>Yates took over this project – what is their position in relation to any legal action?</b>
HR	They are probably not in the firing line
<b>Question</b>	<b>Were the circumstances of the NSW case similar to this?</b>
HR/GV/FS	The representations were regarding the manager's obligation to locate a secondary market for the timber, so not that similar
<b>Question by investor</b>	<b>What about the role of the trustee?</b>
HR/FS/GV	The trustee would certainly be in the firing line because it has obligations to oversee the Manager's performance
<b>Question by investor</b>	<b>Would all managers and all trustees who have been involved over the time, be sued?</b>
GV/HR	Yes, they would most likely be joined by other defendants if not named in the writ.
<b>Question by investor</b>	<b>Will the forester have any money?</b>
GV	We do not know, however the forester is likely to have (and/or is likely to have had at the relevant times) professional indemnity insurance
<b>Question by investor</b>	<b>Was the forester one man, or a company?</b>
GV/HR	There have been a couple of foresters (companies) that have had name changes over time
<b>Question by investor</b>	<b>How much will it cost per woodlot to raise \$400,000?</b>

GV	<p>202 woodlots are represented at this meeting today, and there might be others who are interested. Say 300 at best. That is approximately \$2,500 per woodlot to raise \$400,000 (assuming a drop out of the holders of 2-3 woodlots)</p> <p>As to returns – I have been advised that we will never obtain the \$40,000 per woodlot, however the court will most likely look at industry benchmarks</p>
HR	As well, investors could expect an order for the defendants to pay them interest on a successful claim, plus ½ to 2/3 of the costs they incurred
Question by investor	<b>What is expected of us in the litigation?</b>
HR	Everyone will be required to provide a statement. Most of the work will be for the lead litigant
Question by investor	<b>Do we know very much about the history of the Alcoa site?</b>
JA	<u><a href="#">Alcoa is an aluminium refinery.</a></u>
GV	<p><del>Alcoa is an aluminium refinery.</del></p> <p>There was some discussion about the fact that historically Alcoa has not been a clean company; they often have a green belt around their plants to camouflage any pollution; to oxygenate</p>
Question by investor	<b>Does the estimate of costs of \$400,000 include expert fees?</b>
GV	Yes, it includes everything, except of course any costs awarded against us
	<b><u>Way Forward</u></b>
	<ul style="list-style-type: none"> <li>• We require a lead plaintiff</li> <li>• We also require a forester's report – in part because the litigation funder requires it</li> </ul>
	<b><u>Lead litigant</u></b>
	Does anyone know of woodlots being held by a trust that has divested itself of all other interests; or by a \$2 company (although there are director's liabilities)?
Investor	I would like to see minutes of today's meeting and a bit more information/detail
GV	<p>We have intentionally made it a brief letter of invitation to today's meeting, however we will distribute minutes of today's meeting.</p> <p>We need to have some expression of interest as to whether we will go forward</p>

HR	We are not charging for today and we have not charged for work in recent weeks
Question by investor	<b>What happens to those who have paid for stage 1 but are not prepared to pay beyond that; can they share in the proceeds of a win?</b>
GV	We tried to structure the contribution process so that cannot happen
Question by investor	<b>What can happen to the lead plaintiff?</b>
GV	The case will be based on the experience of the lead plaintiff. A court is likely to order that the lead plaintiff pay the defendants' costs if the plaintiff's action is unsuccessful.
Question by investor	<b>What about the tax affairs of the lead plaintiff?</b>
HR	The tax affairs of the lead plaintiff - and all those in the class who make a claim for damages - can potentially be disclosed, because the claims for damages will be closely scrutinised
HR	With respect to litigation funding, the funders take a percentage of the proceeds if the action is successful.  Any funding and settlement will be based on per woodlot (not per head)
GV	<b><u>Motion</u></b>
	Provided we find a lead plaintiff, is there support for pursuing legal action in respect of the investments in ABGT1 on a per woodlot funding basis at \$2,500 per woodlot?
	<ul style="list-style-type: none"> <li>- Show of hands – 4 or 5</li> <li>- One will not proceed</li> <li>- All others are undecided</li> </ul>
GV/HR	A forester's report might cost up to approximately \$15,000
GV	An additional contribution of \$100 per woodlot would more than cover the cost of obtaining a forester's report
Question by investor	<b>Who would we retain? Would they have difficulty in accessing the site?</b>
GV	We have made inquiries with some foresters, and 2 have shown interest; one in particular. They should have a right to access under the Lease and Management Agreements
Question by	<b>Where does the timber stand now?</b>

<b>investor</b>	
<b>GV</b>	Last indications from the West suggest some have been harvested; some are still standing. Yates have indicated the harvesting process will probably end up being undertaken and completed over 3 financial years. The timber value is dropping over time so it seems the only reason it is still standing is because there is no market for boiler fuel at the moment.
<b>Question by investor</b>	<b>What knowledge do Gerry Vaughan and John Alders have in forestry? If you are on committee we want to know about you.</b>
<b>GV</b>	My background in forestry is as an investor, investing on and off prospectus in 4 states.
<b>JA</b>	I worked in forestry - technically - from 1967-1977. I worked within the industry, and have kept up with things since then
<b>GV</b>	<b><u>Motion</u></b>
	Future meetings to be held outside of business hours
	Show of hands indicated in favour
<b>Question by investor</b>	<b>What would it take to talk to every investor to see if they have a suitable lead litigant?</b>
<b>HR</b>	We could send out a mass email, and write to other investors not contactable by email
<b>Question by investor</b>	<b>How much might be sought as security for costs against the lead plaintiff?</b>
<b>HR</b>	Possibly up to \$250,000
<b>Investor</b>	So we would have to raise \$650,000 i.e. \$400,000 + \$250,000 Would the litigation funder be prepared to put up funds as security for costs?
<b>GV</b>	I believe so, however I will check.
	<b><u>Motion</u></b>
	Raise \$33 per woodlot, thereby raising approximately \$10,000. The additional funds would be used to pay approximately \$4,100 for the balance of an account owing to Holding Redlich. The balance of funds would be used by Holding Redlich to find a lead litigant
	Show of hands – 8 All others indicated they were undecided or they are present only as proxies.
<b>GV</b>	Holding Redlich will minute today's meeting and distribute the minutes together with a request to contribute a further \$33 per woodlot



<b>GV</b>	Are there any volunteers to assist the committee to drive this? - none indicated
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