

**IN THE MATTER OF PROPERTY TUITION PTY LTD
(ACN 129 421 281)**

Proceeding No: VID407/2015

Australian Securities and Investments Commission

Applicant

Jamie Neville McIntyre First Respondent

Dennis McIntyre Second Respondent

**Archery Road Pty Ltd
(ACN 162 921 735)** Third Respondent

**Secret Valley Estate Pty Ltd
(ACN 602 817 532)** Fourth Respondent

**Kingsway South Holdings Pty Ltd
(ACN 159 230 976)** Fifth Respondent

**Bendigo Vineyard Estate Pty Ltd
(ACN 600 088 211)** Sixth Respondent

**Melbourne Tarniet Estate Pty Ltd
(ACN 603 945 393)** Seventh Respondent

**Property Tuition Pty Ltd
(ACN 129 421 281)** Eighth Respondent

**Education Holdings Pty Ltd
(ACN 129 551 917)** Ninth Respondent

**Sourcing Property Pty Ltd
(ACN 602 474 779)** Tenth Respondent

Third Respondent's Report

**Archery Road Pty Ltd
(Provisional Liquidators Appointed)
15 December 2015**



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Definitions

21 st Century Group	Education Holdings Pty Ltd, Property Tuition Pty Ltd, Archery Road Pty Ltd, Secret Valley Estate Pty Ltd, Kingsway South Holdings Pty Ltd, Bendigo Vineyard Estate Pty Ltd, Melbourne Tarniet Estate Pty Ltd, Sourcing Property Pty Ltd and other entities controlled by Dennis and / or Jamie McIntyre
21 st Century Media Holdings Pty Ltd	Media Holdings
805 ARPL	805 Archer Road Pty Ltd (In Liquidation) (Subject to Deed of Company Arrangement)
ARITA	Australian Restructuring Insolvency and Turnaround Association
ARPL	Archery Road Pty Ltd
ASIC	The Australian Securities & Investments Commission
ATO	Australian Taxation Office
Bendigo property or Bendigo Vineyard Estate and Resort	51 St Andrews Road, Maiden Gully
Bendigo Scheme	Bendigo Vineyard Estate Scheme
Bendigo Vineyard	Bendigo Vineyard Estate Pty Ltd
Botanica	805 Archer Road, Kialla, Victoria
Broadview	Broadview Pinkett Pty Ltd
Corporate Respondents	Education Holdings Pty Ltd, Property Tuition Pty Ltd, Archery Road Pty Ltd, Secret Valley Estate Pty Ltd, Kingsway South Holdings Pty Ltd, Bendigo Vineyard Estate Pty Ltd, Melbourne Tarniet Estate Pty Ltd, Sourcing Property Pty Ltd
Date of Appointment	7 October 2015
Deloitte	Deloitte Touche Tohmatsu
Developments	805 Archer Road, Kialla, Victoria, 1955 Old Sydney Road, Bylands, Victoria, 124 Booth Road, Brookhill, Queensland, 51 St Andrews Road, Maiden Gully, Victoria and 1491 Dohertys Road, Mount Cottrell, Victoria
Development Companies	Archery Road Pty Ltd, Secret Valley Estate Pty Ltd, Kingsway South Holdings Pty Ltd, Bendigo Vineyard Estate Pty Ltd and Melbourne Tarniet Estate Pty Ltd
DIRRI	Declaration of Independence and Relevant Relationships and Indemnities
DOCA	Deed of Company Arrangement
Education Holdings	Education Holdings Pty Ltd, formerly 21 st Century Education Pty Ltd
ERV	Estimated Realisable Value
FME	Farm Management Enterprises Pty Ltd
Henry River	Henry River Pty Ltd
IOC3	Isle of Capri 3 Pty Ltd
Kialla property	805 Archer Road, Kialla
KS Holdings	Kingsway South Holdings Pty Ltd
LRA	Lot Reservation Agreement
LRD	Lot Reservation Deed
Management	Management of the Company
McIntyre Controlled Entities	Broadview Pinkett Pty Ltd, Pinnacle Event Management Pty Ltd, Financial Educators Association Pty Ltd, Salarium Services Pty Ltd, 21st Century Media Holdings Pty Ltd, Isle of Capri 2 Pty Ltd, Isle of Capri 3 Pty Ltd, Property Direct (International) Pty Ltd, GC

	Princess Boatshare Pty Ltd, Farm Management Enterprise Pty Ltd, Siddha Holdings Pty Ltd and Phoenix Investment Holdings LLC
Melbourne Grove Estate or Mt Cottrell Property	1491 Dohertys Road, Mount Cottrell, Victoria
MGE Scheme	Melbourne Grove Estate Scheme
MIS	Managed Investment Scheme
NAB	National Australia Bank Ltd
Oak Valley Lakes Estate and Resort	124 Booth Road, Brookhill, Queensland
Order	Order made by Middleton J. on 7 October 2015 in the Federal Court of Australia, Victoria General Division No.VID 407/2015
OVE Scheme	Oak Valley Estate Scheme
Pinnacle	Pinnacle Event Management Pty Ltd
POD	Proof of Debt
PPSA	Personal Properties Security Act
PPSR	Personal Property Securities Register
Proceeding	Federal Court of Australia, Victoria General Division No.VID 407/2015 between ASIC and Jamie Neville McIntyre &OR's commenced by Originating Process dated 3 August 2015
PDI	Property Direct (International) Pty Ltd
Provisional Liquidators	Simon Wallace Smith and Robert Scott Woods appointed pursuant to s472(2) of the Act as joint and several provisional liquidators of each of the Corporate Respondents pursuant to the Orders
PSA	Property Sourcing Agreement
PT	Property Tuition Pty Ltd formerly 21 st Century Property Pty Ltd
RATA	Report as to Affairs
Salarium Services	Salarium Services Pty Ltd
Schemes	Botanica, Secret Valley Estate, Oak Valley Lakes Estate and Resort, Bendigo Vineyard Estate and Resort and Melbourne Grove Estate
Secret Valley	Secret Valley Estate Pty Ltd
Secret Valley Estate or Wallan Property	1955 Old Sydney Road, Bylands, Victoria
Sourcing Property	Sourcing Property Pty Ltd
SV Scheme	Secret Valley Estate Scheme
Tarniet	Melbourne Tarniet Estate Pty Ltd
The Act	Corporations Act 2001
The Court	The Federal Court of Australia or any of the state Supreme Courts
The Regulations	Corporations Regulations 2001
Townsville Property	124 Booth Road, Brookhill, Queensland
WBC	Westpac Banking Corporation Ltd
www	What Working Women Want
Xero	Xero Accounting Software Program

Archery Road Pty Ltd

This report is to be read in conjunction with our Summary Report.

ARPL was incorporated on 19 March 2013. Dennis McIntyre is the sole Director and Secretary of ARPL. The sole shareholder of ARPL is Henry River. Jamie McIntyre is the sole shareholder of Henry River.

Since 27 July 2015, ARPL's registered office and principal place of business was Corporate Centre One, Suite 8, 2 Bundle Corporate Court, Bundall, Queensland. Prior to this, ARPL operated from premises located at Level 8, 96-100 Albert Road, South Melbourne, Victoria.

A copy of the historical company extract maintained by the ASIC is attached as **annexure ARPL-1**.

1. Business Activities

ARPL was incorporated in order to purchase and develop a property at 805 Archer Road, Kialla ("Kialla property"). The Kialla property comprises 216 acres (88.15 hectares) of predominately vacant farm land and is situated approximately 10 kilometres south of Shepparton. This development was referred to as "Botanica."

The Kialla Property is encumbered by a mortgage in favour of Peter John Robertson ("Robertson"). This mortgage (the "Robertson Mortgage") is discussed in further detail below.

ARPL did not have any other trading activities nor did it employ any staff.

1.1 805 Archer Road Pty Ltd

Our investigations have revealed that by contract of Sale dated 10 April 2013, ARPL purchased the Kialla property from 805 ARPL for \$700,000, plus GST ("Contract of Sale"). Settlement of the property occurred in February 2014.

On 28 June 2012, 805 ARPL was wound up as a creditors' voluntary liquidation and Trajan John Kukulovski and Malcolm Howell of Jirsch Sutherland were appointed joint and several Liquidators. On 16 July 2012, Mr Kukulovski and Mr Howell were appointed joint and several Administrators of 805 ARPL and on 24 October 2012, 805 ARPL executed a DOCA and Mr Kukulovski and Mr Howell were appointed joint and several Deed Administrators ("Deed Administrators"). We note that the liquidation and DOCA of 805 ARPL are concurrent appointments.

We note that according to the Administrators' report to creditors, between September 2010 and December 2011, 805 ARPL sold lots in the proposed development of the Kialla property via the issue of Put and Call Options ("PC Option") and raised c\$4.7m, from approximately 91 investors ("805 investors"). This development was known as "Moir Park".

We have been provided with the sworn valuation obtained by Mr Kukulovski and Mr Howell following their appointment as liquidators which revealed that the property had a market value at the time of \$410,000.

We note that 805 ARPL originally purchased the Kialla property from Robertson for an amount of \$1.794m. At settlement, a portion of the purchase price being \$414,000 was satisfied via mortgage back to Robertson.

A copy of this contract of sale is attached as **annexure ARPL-2**.

The contract of sale in relation to the purchase by ARPL from 805 ARPL provided for the purchase price to be payable as follows:

- Deposit of \$7,000;
- Assumption of the Robertson Mortgage (which at the time was \$444,000¹); and
- The balance of the purchase price, being the difference between the sale price and the value of the Robertson mortgage assumed, payable to the Deed Administrators

ARPL is the Registered Proprietor of the Kialla Property. A copy of the certificate of title is attached as **annexure ARPL-3**.

Under the terms of the DOCA, in addition to the purchase of the Kialla property, ARPL was to:

- Pay an amount of \$50,000 to the unit holders² in the 805 ARPL Unit Trust by 30 June 2015; and
- Assume and perform the obligations of 805 ARPL under the Put and Call Option agreements with respect to which 805 ARPL granted options to purchase lots in the unregistered plan of subdivision of the Kialla property (the Moira Park development).

At a meeting of creditors of 805 ARPL, creditors resolved to amend the date of completion under the DOCA to 30 September 2016. On 14 October 2015, we received correspondence from the solicitors acting for 805 ARPL requesting that we, in our capacity as Provisional Liquidators of ARPL, execute the variation and make payment of \$50,000 to the unit holders as required under the DOCA.

We have advised the Deed Administrators that we do not intend to execute the variation to the DOCA nor are we able to make payment of the \$50,000. Accordingly, the DOCA will likely terminate. We note however that pursuant to Section 445H of the Act, ARPL's interest in the property will not be affected by virtue of the termination.

1.2 Sale of lots in the Kialla property

In or around May 2014, PT commenced promotion of the sale of lots in the Kialla property on behalf of ARPL.

As outlined in the Summary Report, the sale of these lots was promoted as follows:

- Contacting persons listed on the database of 21st Century Group³.
- Through the website "www.landbanking.com.au" (the "Land Banking Website") that promoted the Schemes and multiple other websites which redirected internet traffic to the Land Banking Website;
- Events such as cocktail parties, information nights and day trips;

¹ \$414,000 plus accrued interest.

² The unit holders in the 805 Archer Road Unit Trust were parties to a joint venture agreement with 805 ARPL.

³ According to the affidavit of Jamie McIntyre, there are over 250,000 people on the database. We were advised that the database was owned by the McIntyre Family Trust and licenced to various 21st Century companies by a licence agreement. We have not been provided with the agreement as evidence of same.

- Contacting potential investors through publications; and
- Contacting potential investors through social media such as Facebook.

PT issued a marketing and due diligence kit to prospective investors regarding the opportunity to purchase a lot in the unregistered plan of subdivision of the Kialla property (“model plan”). The development was referred to as “Botanica” and was marketed as a 20 year project. The model plan contained 1339 lots. The plan was to sell up to a maximum of 669 lots prior to subdivision approval (representing 50% of total lots available on the model plan) with the balance to be sold as retail lots in the event that approval for rezoning and subdivision was obtained.

According to the marketing material issued by PT, the development plan, set to commence in 2015, would be residentially developed and would “set a new standard for developments of residential estates, one that far exceeds the visions of other planned developments in regional Victoria.” The Botanica development would include parks, lakes, cafes and tennis courts.

Attached as **annexures ARPL-4 and ARPL 5** are copies of emails sent to people on the 21st Century database regarding the Botanica development.

Investors were offered the opportunity to reserve a lot in Botanica by payment of a reservation fee. By virtue of reserving a lot and paying a reservation fee, investors were granted an option to then purchase the lot for a pre-agreed option price sometime in the future in the event that development approval of the plan of subdivision in relation to the Kialla property was obtained. We note that the right and ability of an investor to exercise their option is contingent upon ARPL obtaining development approval of the plan of subdivision.

Investors signed a Lot Reservation Agreement (“LRA”) to secure their lot. The LRA was an agreement between ARPL (as the development company) and respective investors. The LRA provided ARPL with a 20 year period with which to obtain approval to develop the property.

On 20 October 2015, we were provided with a client list from Carlton Ross on behalf of Swarit Verma, the CFO of ARPL and the 21st Century Property group. This list indicates that ARPL sold a total of 20 lots to 17 investors and received \$372,175 by way of lot reservation fees. A copy of the investor list is attached as **annexure “ARPL-6”**.

As outlined above, pursuant to the terms of the DOCA, ARPL was to assume and perform the obligations of 805 ARPL under the PC Option agreements. According to Dennis and Jamie McIntyre, they issued correspondence to the 805 investors offering them the opportunity to sign new agreements with ARPL (“Deed Poll”) thereby transferring their investment to ARPL. During the interview with Dennis McIntyre on 20 October 2015, he advised that he believed approximately twenty (20) of the 91, 805 investors transferred to ARPL.

We were provided with a list of 805 investors from the Deed Administrators on 1 December 2015. We note that we are unable to confirm how many of the 805 investors executed Deed Polls with ARPL, transferring their investment from 805 ARPL to ARPL. Accordingly, we are unable to confirm to which investors ARPL is bound under the terms of the PC Options as opposed to newly executed Deed Polls. Further, we have not been provided with copies of all executed PC Option agreements, Deed Polls or LRA's.

A liquidator, if appointed, would be required to undertake further investigations in order to confirm how many 805 investors executed Deed Polls and investigate the whereabouts of all executed PC Option agreements, Deed Poll or LRA's.

According to Dennis and Jamie McIntyre, in consideration for promoting sales of lots in Botanica on behalf of ARPL, PT was entitled to, pursuant to a commission agreement between the respective companies, receive 50% of the lot reservation fees paid by investors. This fee was to satisfy “administrative expenses, marketing expenses and commissions paid to PT.”⁴ We note that we have not been able to locate a copy of the commission agreement.

During separate interviews with both Jamie and Dennis McIntyre on 19 October 2015 and 20 October 2015, respectively we requested that a copy of the commission agreement be provided to our office. On 20 October 2015, a list of documentation / information required to be provided to our office (including the commission agreement) was emailed to Michaela Prince of Carlton Ross.⁵ On 23 October 2015, Michaela Prince of Carlton Ross emailed our office and advised that Dennis McIntyre believed that a copy of the commission agreement had been provided to ASIC. We note that ASIC has advised that they have not been provided with or sighted a copy of the agreement. On 2 November 2015, Ms Stephanie Forgione of our office emailed Michaela Prince and requested details of who provided the commission agreement to ASIC and asked that they seek a copy of the agreement from that person. On 10 November 2015, we received a reply email advising that they were unsure who provided the commission agreement to ASIC and accordingly were unable to provide our office with this information.

On this basis, we have concerns regarding the existence of a documented commission agreement between the respective development companies and PT. Further, we consider the payment of a 50% commission to be excessive and unreasonable in the circumstances and it does not appear that this arrangement was disclosed to investors. This is discussed in further detail later in this report.

Following our appointment, I, Simon Wallace-Smith and a member of my staff met with Mr Tim Watson, a Senior Strategy Planner for the Shepparton City Council (the “Council”). Mr Watson has advised that the Kialla property is currently zoned Farming Zone 1. He advised the Kialla property has never been considered by the Council to be re-zoned and further, it does not intend to give any consideration to the re-zoning within the next 10 to 15 years as the Greater Shepparton Housing Strategy does not provide support for any re-zoning proposal within that timeframe.

A copy of the correspondence received from the Council is attached at “**annexure ARPL-7**”.

⁴ Para 23 of affidavit of Jamie McIntyre, sworn on 31 August 2015

⁵ Carlton Ross represent Dennis and Jamie McIntyre

2. Assets and Liabilities

On 8 October 2015, we were provided access to the Xero accounting software maintained by the Corporate Respondents in relation to 7 of the 8 Corporate Respondents over which we were appointed, including ARPL.

On 4 November 2015, Dennis McIntyre provided our office with a completed RATA. We lodged same with ASIC on 5 November 2015.

A summary of the ARPL balance sheet from the Xero accounts and the RATA provided by Dennis McIntyre is provided below together with the Liquidators' ERV.

A copy of the balance sheet as extracted from Xero and the RATA provided by Dennis McIntyre are attached as **annexures "ARPL-8" and "ARPL-9"**, respectively.

Category	Provisional Liquidators' ERV (\$)	RATA (\$)	Management Accounts (Xero) (\$)
ASSETS			
<u>Current Assets</u>			
Cash at Bank	810	Nil	910
Planning and Development Costs	Nil	Nil	6,486
Related party loans	Nil	Nil	9,174
	810	Nil	16,570
<u>Non-Current Assets</u>			
Interest in Land	670,000	1,600,000	704,486
	670,000	1,600,000	704,486
Total Assets	670,810	1,600,000	721,056
LIABILITIES			
<u>Current Liabilities</u>			
ATO	12,884	Nil	32,288
Accrued Interest	Nil	Nil	20,347
Accounts Payable	11,247	12,198	12,496
	24,131	12,198	65,131
<u>Non-Current Liabilities</u>			
Secured Creditors	505,120		444,000 ⁶
Inter-entity loans	225,769	Nil	225,769
Contingent Claims - Investors	372,175	Nil	194,182
Contingent Claims - 805 Investors	4,796,004	Nil	Nil
	5,899,068	Nil	859,951
Total Liabilities	5,923,199	12,198	929,082
Net Surplus / (Deficiency) (before the costs of the provisional liquidation)	(\$5,252,389)	\$1,587,802	(\$208,026)

⁶ We note that we have reclassified this as a current liability as the principal and interest owing pursuant to the mortgage is payable on or before February 2016.

2.1 Current Assets

2.1.1 Cash at Bank

Our investigations have revealed that ARPL operated two (2) bank accounts with Westpac at the date of our appointment, a Business Account with a credit balance of \$810 and a Cash Reserve which did not have any funds.

We have taken control of the credit funds.

No further accounts have been located.

2.1.2 Development Costs

The Xero accounts record as a current asset amounts incurred for Planning and Development (solicitors fees and planning consultants) in relation to the Kialla property. We consider that these costs should be added to the cost base of the Kialla property however this does not change the asset position.

2.1.3 Accounts Receivable

The Xero accounts record an amount of \$9,174 owed to ARPL by Pinnacle. This relates to unsecured loans made to Pinnacle by the Company.

We note that Dennis McIntyre is the sole director and secretary of Pinnacle. During the interview with Dennis McIntyre on 20 October 2015, he advised that Pinnacle was unable to repay this debt.

We further note that we have reviewed the financial accounts for Pinnacle which record a net asset deficiency in excess of \$3.7m as at 30 June 2015 and a net loss for the financial year ended 30 June 2015 of over \$2.4m.

Accordingly, we do not consider this amount to be collectible.

2.2 Non-Current Assets

2.2.1 Interest in Land

The Xero accounts and RATA record the only non-current asset of ARPL as its interest in the Kialla property with a value of \$704,486 and \$1.6m, respectively.

A search of the records maintained by the Victorian Registrar of Titles, revealed that ARPL was the registered proprietor of the Kialla property at the date of our appointment.

The property comprises 216 acres (88.15 hectares) of vacant land and is situated approximately 10 kilometres south of Shepparton.



As outlined above, payment of the purchase price was payable as follows

- Deposit of \$7,000;
- Assumption of the vendor's liability under the Robertson mortgage; and
- The balance of the purchase price due at settlement, being the difference between the sale price and the value of the mortgage liability assumed payable to the Deed Administrators.

Our investigations have revealed that an amount of \$215,527 was required by ARPL to facilitate settlement⁷ of the sale of the Kialla Property with \$201,067 being paid to the Deed Administrators at settlement. We note that these amounts were paid by bank cheque and we have been unable to confirm the source of these funds. We note however that ARPL appears not to have operated a bank account at the time of this payment.

We have requested this information from the Deed Administrators however they were unable to provide same.

Following our appointment we instructed Opteon Property Group ("Opteon"), registered valuers in Shepparton to provide us with a sworn valuation for the property. Opteon have advised that the property has a current market value of \$670,000.

A copy of the valuation report is attached as **annexure ARPL-10**.

Opteon have also advised the following in relation to the Kialla property:

- Property is currently zoned "farming";
- Land is subject to a Floodway Overlay and Inundation Overlay (located in a flood storage or flood fringe area);
- Can be subdivided into a maximum of 2 lots under current zoning (minimum subdivision area of 40 hectares)
- Subject land is unlikely to be rezoned; and

⁷ This amount included payments to the State Revenue Office, Greater Shepparton Council and Goulburn-Murray Water.

- Best use for property is agricultural.

According to Jamie McIntyre, the Kialla property is worth \$1.6m,⁸ pursuant to an offer received from a prospective purchaser. We note that this is reflected in the RATA provided by Dennis McIntyre.

Our investigations have revealed that the offer to purchase the land was made by a local farmer who had been using the land for his crops.

On 8 October 2015, the farmer contacted our office and advised that he had been in informal negotiations with ARPL prior to our appointment for the purchase of the land for \$1.1m however he ceased these negotiations once he was notified of the current proceedings. On 13 October 2015, a member of my staff contacted the farmer to discuss his offer. He advised that he believed his offer was somewhere between \$1.4m and \$1.6m, payable over a period of six (6) months and that he was still interested in purchasing same.

In the event ARPL is wound up, we will contact the farmer and invite him to formalise his offer.

We note that the property is subject to the following encumbrances:

Encumbrance	Holder	Date Interest Created	Date Lodged
Mortgage (first)	Peter John Robertson (“Robertson”)	11 April 2011	14 April 2011
Mortgage (second)	Robertson	19 February 2014	6 March 2014
Caveat	Ramirez Family Super Pty Ltd (“Ramirez”)	6 March 2014	6 March 2014

These are discussed in further detail below.

2.3 Current Liabilities

The RATA and Xero accounts record total current liabilities of \$12,198 and \$12,496, respectively, as follows. The Xero accounts record GST payable of \$32,401 however the RATA does not include any taxation liability.

	RATA (\$)	Management Accounts (Xero) (\$)
Accounts Payable		
Goulbourn Murray Water	9,263	9,263
Greater Shepparton City Council	2,933	2,933
Simons Pest Control	1	300
Ezaz Ahamad MD	1	Nil
ATO	Nil	32,288
Total	\$12,198	\$44,784

The ATO has advised that at the date of our appointment, they were owed \$12,884 however that income tax returns for the financial years ending 30 June 2014 and 2015 together with business activity statements for the June and September 2015 quarters were outstanding.

We have not reviewed the GST liability recorded in Xero nor called for proofs of debts from creditors and therefore are unable to determine the accuracy of these amounts.

⁸ Paragraph 34 of the Jamie McIntyre, sworn 31 August 2015

Our investigations have revealed that GST was payable on the purchase price of the Kialla property to 805 ARPL. This GST has been claimed and the refund received by ARPL.

We note that accrued interest recorded in the Xero accounts relates to accrued interest payable on the Robertson mortgage. This has been added to the amounts owing to secured creditors under the liquidators' ERV. The Robertson mortgage is discussed in further detail below.

2.4 Non-Current Liabilities

2.4.1 Secured Creditors

As outlined above, the Kialla property is subject to the following encumbrances:

Encumbrance	Holder	Date Interest Created	Date Lodged
Mortgage (first)	Peter John Robertson ("Robertson")	11 April 2011	14 April 2011
Mortgage (second)	Robertson	19 February 2014	6 March 2014
Caveat	Ramirez Family Super Pty Ltd ("Ramirez")	6 March 2014	6 March 2014

The borrower under the first Robertson mortgage is 805 ARPL for an amount of \$414,000. As outlined above, pursuant to the terms of the contract of sale and DOCA, ARPL was to take an assignment of 805 ARPL's liability under this mortgage in partial satisfaction of the purchase price. We note that the second Robertson mortgage, in the amount of \$444,000 represents the assignment of the value of the first mortgage as at the date of settlement of the property and includes the principal amount borrowed plus capitalised interest of \$30,000. Under the terms of the mortgage, interest of 10% per annum is payable yearly in arrears and the principal amount payable two years from the date of the mortgage, being 19 February 2016. We note that the amount secured by the mortgage includes an additional amount of interest totalling \$30,600 which was outstanding prior to the assignment which was not capitalised. Under the terms of the mortgage, if the principal sum (\$444,000) plus accrued interest is paid within 2 years then Robertson would forego the \$30,600.

According to Robertson, ARPL has not made any payments towards the principal owing under the mortgage however that interest payments of \$39,802 and \$30,520 were made on 19 February 2014 and 12 March 2015, respectively. We can confirm that payment of \$30,520 from the ARPL Westpac bank account. We note that at the time of the interest payment in February 2014, ARPL did not appear to operate a bank account.

We note that the ARPL Xero accounts record that on 10 April 2013, an amount of \$330,935 was paid by PT in relation to the purchase of the Kialla property and recorded against the PT loan account. We note that our investigations have revealed that this entry to the Xero accounts was made on 25 August 2015 via manual journal, more than two (2) years after the alleged payment. We note that we have been unable to verify payment of this amount from the PT bank account. We note that the Xero accounts for PT record the same entry however they record this entry against a loan account for PDI. Dennis McIntyre is the sole director of PDI. The sole shareholder is Broadview. Jamie McIntyre is the sole shareholder of Broadview.

We have requested information from the Deed Administrators regarding who paid these funds however they have advised that they were unable to locate this information.

Without the further information regarding the source and terms of the funds paid, we are not satisfied that the payer of these funds may have a claim or interest as constructive trustee over the Kialla Property.

Further investigation would need to be conducted to confirm same.

The balance currently owing under the mortgage is \$474,520 (\$444,000 plus interest which was payable on 19 February 2015 in the amount of \$30,520) with the total amount payable of \$505,120 if ARPL is unable to finalise payment on or before 19 February 2016.

Robertson has advised that in the event ARPL does not satisfy its obligations under the mortgage, which fall due in February 2016, he may consider exercising his rights under the mortgage and take steps to realise the property.



Pursuant to the terms of the DOCA, ARPL was to assume and perform the obligations of 805 ARPL under the PC Option agreements. According to Dennis and Jamie McIntyre, they issued correspondence to the 805 investors offering them the opportunity to sign new agreements (“Deed Poll”) thereby transferring their investment to ARPL. These new agreements did not provide investors with any rights to a refund however granted them the right to lodge a caveat over the Kialla property in certain circumstances.

We note that the Deed Polls are in the form of a LRA with similar terms to the LRAs signed by investors, except:

- the Lot Reservation Fee is \$0;
- the reference to the Reservation of the Property states the investor has received the option as a 'goodwill gesture from the developer'; and
- there is no time period for the exercise of the option to purchase the Property, rather the terms are conditional upon 'development approval of the plan of subdivision'.

During the interview with Dennis McIntyre on 20 October 2015, he advised that he believed approximately twenty (20) 805 investors transferred to ARPL. As outlined above, a liquidator, if appointed, would be required to undertake further investigations in order to confirm how many of the 91, 805 investors executed Deed Polls with ARPL.

We note that the terms of the LRA executed by investors who purchased lots directly from ARPL, provided investors with a right to charge their right, title and interest in the Property and over the assets and goodwill of ARPL. Clause 19.1 of the LRA provides investors with an equitable charging right over its interest in the lot reserved and the assets and goodwill of ARPL as security for all monies that may become now and hereafter due and payable to the investor. The charge becomes registrable and enforceable in the event of a default by ARPL. An event of default has occurred by the application to wind up ARPL in the Proceeding. Further investigations will need to be made of the amounts that are 'due and payable' to investors under the LRA and their rights and priority (if determined) as a member of an unregistered scheme⁹. Presently there are no registered security interests or caveats registered under the LRA. The Ramirez caveat is made by an 805 investor.

The application for a winding up made by ASIC in the Proceeding, is an event of default by ARPL under the LRA and accordingly investors may have charging rights over the assets and goodwill of ARPL in relation to all monies due and payable to them. Further investigations will need to be made if the amounts are 'due and payable' to investors and if so quantify the amounts owed to investors as members of an unregistered scheme¹⁰.

⁹ s601EE of the Act.

¹⁰ s601EE of the Act.

At this stage of our investigations and pending clarification and or further declarations we have accordingly classified investors' claims as unsecured contingent liabilities.

2.4.2 Related party loans

The Xero accounts record a non-current liability to PT in the amount of \$225,769. This relates to unsecured loans made by PT to ARPL and includes manual journal entry of \$330,935 for the payment of the Kialla property as discussed above. We note that if this payment was not in fact made by PT, the resulting position would be a loan payable by PT to ARPL of \$105,166.

We have located a secured loan agreement (“SLA”), executed on 24 March 2013, between the following parties:

- PT;
- Pinnacle;
- ARPL; and
- Jamie McIntyre

We note that Dennis McIntyre is the sole director of all three (3) entities and Henry River, the sole shareholder. We note that Jamie McIntyre is the sole shareholder of Henry River.

A copy of the SLA is attached as **annexure ‘ARPL-10’**.

We note the following in relation to the SLA:

- It did not in fact provide ARPL with any security in relation to funds lent to the parties;
- It allowed borrowing to be made to the parties on an interest free basis; and
- It did not require repayment of any prospective borrowings made to the parties until 2020.

We note that the terms of the SLA do not provide, or grant any security to the lender from time to time.

2.4.3 Contingent liabilities

As outlined above, we have identified 17 investors in the Botanica Scheme who invested amounts totalling \$372,175. These investors purportedly signed LRA’s with ARPL.

Following our appointment, we requested a copy of all LRA’s signed by investors in Botanica from Dennis McIntyre. Dennis McIntyre subsequently provided our office with a USB of all the documentation in his possession which did not include any signed LRAs for Botanica. We note that the USB did not contain a complete set of LRAs.

Dennis McIntyre has advised that he does not have any further documentation or LRAs. We have located 19 LRAs however not all have been executed in full. We note that the LRA’s we have in our possession are those contained in the books and records collected by our office and those provided by various investors.



According to clause 6.1 of this LRA:

- ARPL would have a period of 20 years to obtain development approval;
- If approval was not obtained following the expiry of the 20 year period, investors would have **45 days** to request a refund of their reservation fee, failing which their investment would roll over for a further 5 year period;
- If approval was not obtained following the expiring of the additional 5 year period, the LRA would terminate and “no monies would be refundable whatsoever.”¹¹



The LRA required ARPL to ‘use its best efforts and do all acts necessary and execute all documentation required to obtain development approval’.¹² Investors however were not afforded any rights in the event that ARPL breached the terms of, or did not fulfil its obligations under the LRA.

In the event that development approval was obtained, the investor would have a period of 30 days following receipt of notice of the approval, to exercise the option to purchase the lot they reserved.

If investors did not request a refund as outlined above, they would only be entitled to a refund of their reservation fee in the event that ARPL elected to terminate the LRA. Given that ARPL had a period of 20 years, followed by a further period of 5 years to obtain development approval following which the LRA would automatically terminate with no amount refundable to investors, it is inconceivable that ARPL would elect to terminate the agreement in accordance with clause 6.2. **In this way it appears that the LRA essentially provided ARPL with the ability to raise funds by way of reservation fees, potentially do nothing for a period of 25 years and have no obligation to refund any remaining amounts to investors who had not successfully made a claim for a refund in the 45 day period.**

The meaning of ‘sale’ includes an agreement for sale, an offer to sell (which commonly take the form of a contract of sale) and the giving of an option to purchase¹³. However, the LRA can only be categorised as a restriction on ARPL’s right to sell the Lot to anyone else without first complying with the terms of the LRA and giving the Lot Holder the right to purchase the Property by exercising its option. Therefore, the LRA is a contract between the parties to grant the Lot Holder the option to purchase the Property if certain conditions are met, ie development approval is obtained to subdivide the land. It is not therefore the sale of land. The Lot Holder has no right to deal with the Property under the LRA. If those conditions are not met, then the Lot Holder cannot exercise its option. The Lot Holder may never become the registered proprietor of the Property and gain indefeasibility of title¹⁴. As such, the Lot Holder has no legal or equitable interest in the Lot under the *Transfer of Land Act (Vic) 1958* as it has no contract of sale which is specifically enforceable, given the number of conditions that must be satisfied before the Lot Holder can even exercise its option and enter into a contract of sale.

¹¹ Clause 6.1(c) of the ARPL Lot Reservation Agreement

¹² Clause 3.4 of the ARPL Estate Lot Reservation Agreement

¹³ Section 2 of the *Sale of Land Act (Vic) 1962*

¹⁴ *Transfer of Land Act (Vic) 1958*

Clause 19.1 of the LRA provides investors with a charging right over the assets of ARPL for all monies due and payable to the investor in the event of a default by the developer, which includes an application to wind up the developer.

As outlined above, the application for a winding up made by ASIC in the Proceeding constitutes an event of default by ARPL under the lot reservation agreement and accordingly investors may have had charging rights over the assets and goodwill of ARPL in relation to all monies due and payable to them.

We note however that under the LRA's, investors are only entitled to a refund in the event that ARPL elects to terminate the agreement. Accordingly, in order to trigger investors' right to a refund and charge securing same, the developer would need to terminate the agreement. This has not occurred. A liquidator, if appointed however would be able to terminate the lot reservation agreement.

Investors rights under the LRA and may be clarified if declarations are made in accordance with paragraph 3 of the Originating Process filed in the Proceedings for a declaration that the Botanica Scheme was an unregistered managed investment scheme. If a declaration is made then the LRA may be voidable¹⁵ at the option of the investor. If this was to occur, investors would be entitled to claim a refund of the \$372,175 invested.

We have accordingly classified this as an unsecured contingent liability.

As outlined above, 805 investors were also provided with the right to charge their right, title and interest in the Property and over the assets and goodwill of ARPL. The charge operates in the same way as the charge referred to above.

As previously advised, the rights of 805 investors under the PC Option agreements were to be transferred to ARPL, who assumed and agreed to perform the obligations of 805 ARPL.¹⁶ Regardless whether an 805 ARPL investor entered into a Deed Poll, ARPL assumed and must perform the obligations to them under the PC Option Agreement. Further investigation will be required to be made about each 805 ARPL investor about the amount that was paid by them to 805 ARPL, the terms of the PC Option Agreement and the interest in the Kialla property to quantify any claims they may have in ARPL by virtue of the DOCA.

Accordingly, there may be liability to the 805 investors in amounts to be quantified and determined following further investigations.

Accordingly, we have recorded a contingent claim of the 91, 805 investors in ARPL.

¹⁵ Section 601MB of the Act

¹⁶ Clause 8.1.2 of the DOCA

3. Opinion as to Solvency

Pursuant to Section 95A of the Act:

- a) a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- b) a person who is not solvent is insolvent.

Solvency can be assessed on both a balance sheet and cash flow test. In accordance with the statutory definition, our approach in determining whether the Company was insolvent at all relevant times is based on balance sheet and cash-flow tests. In particular, a working definition of 'insolvency', as an inability to pay debts, as and when they fall due, is dependent on the ability of a company to meet liabilities from the company's assets on hand and/ or the ability to generate sufficient cash flows to meet payment of its debts, as and when they fall due.

According to the ARPL Xero accounts, the Company had a net asset deficiency as at 31 October 2015 and for the financial years ended 30 June 2014 and 2015 as follows:

	7 October 2015 ¹⁷ (\$)	30 June 2015 (\$)	30 June 2014 (\$)
Total Current Assets	7,396	15,235	73,900
Total Non-current Assets	713,660	713,660	704,486
Total Assets	721,056	728,895	778,386
Total Current Liabilities	65,132	53,200	100,995
Total Non-Current Liabilities	863,951	870,619	830,567
Total Liabilities	929,083	923,819	931,562
Net Assets	(\$208,027)	(\$194,924)	(\$153,175)

A copy of the comparative balance sheet is attached as **annexure ARPL-8**.

We provide the following commentary in relation to the above Xero accounts:

- Total non-current assets predominately comprise the value of the Kialla property in the amount of \$704,486. As outlined above, following our appointment we obtained an independent sworn valuation of the property which indicated that the property was worth \$670,000;
- The value of the Robertson mortgage¹⁸ in non-current liabilities has been recorded as \$444,000 however we note that the amount payable under the mortgage at the date of our appointment was \$474,520 with an additional contingent amount payable of \$30,600 if the mortgage is not satisfied on or before 19 February 2016;
- The accounts do not reflect any prospective liability to investors totalling at least \$372,175;
- The accounts do not reflect any prospective liability to the 91, 805 investors which is potentially \$4.7m.

¹⁷ We note that the Xero accounts annexed to this report are as at 31 October 2015. We note that Xero is only able to produce a balance sheet as at month end not between specified periods. This does not alter the amounts recorded in the financials. "

¹⁸ Recorded in the Xero accounts as "Funding from Private Lender"

Based on the above, we have restated the balance sheet as at the date of our appointment as follows:

	7 October 2015 (\$)
Total Current Assets	810
Total Non-current Assets	670,000
Total Assets	670,810
Total Current Liabilities	24,130
Total Non-Current Liabilities	5,899,068
Total Liabilities	5,923,198
Net Assets Surplus / (Deficiency)	(\$5,252,388)

Accordingly, we consider that ARPL is insolvent from a balance sheet perspective.

The profit and loss recorded in Xero is set out in the table below. These accounts show a net loss for the financial years ended 30 June 2014 and 2015. As our appointment was on 7 October 2015, we have not conducted an analysis of the October, month to date profit and loss. A copy of the comparative profit and loss is attached as **annexure ARPL-13**.

	30 June 2015 (\$)	30 June 2014 (\$)
Income		
Shepparton - Reservation Fee	54,616	136,864
Total Income	54,616	136,864
Less Cost of Sales		
Commission - Property Consultants	27,460	0
Contract Administration Fee	0	1,136
Marketing and Advertising costs	0	216,244
Total Cost of Sales	27,460	217,380
Gross Profit	27,156	(80,517)
Plus Other Income		
Interest Income	73	0
Total Other Income	73	0
Less Operating Expenses		
Accrued interest	0	20,347
ASIC Fee	243	0
Bank Fees	94	0
Council rates	2,592	0
Development costs	10,500	2,000
Director Fee	12,000	12,000
Interest Expense	31,012	0
Legal Fee	2,450	38,412
Rates	9,814	0
Repairs & Maintenance	273	0
Total Operating Expenses	68,979	72,758
Net Profit / (Loss)	(\$41,748)	(\$153,275)

We provide the following commentary in relation to the above Xero accounts:

- Total lot reservation income is recorded as \$191,479 however \$372,175 was paid by investors. We note that the difference of \$180,696 has been recorded (via manual journal entry) against this revenue as being paid / payable to PT pursuant to the purported commission agreement and thereby reducing the lot reservation income in the profit & loss; and
- The marketing and advertising expense during the 2014 financial year was added to the Xero accounts via manual journal on 10 June 2015. The notes record that this entry was to reflect marketing and advertising expenses paid on behalf of ARPL by PT (\$138,550) and Pinnacle (\$77,694).

We consider ARPL is insolvent from a cash flow perspective for the following reasons:

- At the date of our appointment, it had cash at bank of only \$810;
- The only cash inflow was income from lot reservation fees paid by investors. We note that there does not appear to have been any sale of lots in Botanica since February 2015;
- But for the sale of lots in Botanica, ARPL does not generate any cash flows and accordingly will be unable to satisfy:
 - its liability under the Robertson mortgage in February 2016;
 - insurance and rates¹⁹; and
 - any taxation liability.
- We do not consider that ARPL would have the ability to raise further capital against the Kialla property as borrowings were currently secured against approximately 75% of the value of the property.²⁰

4. Likely return to creditors

The estimated equity in the Kialla property, subject to selling costs but after satisfaction of the Robertson mortgage is \$164,880.²¹

We consider that there may be a constructive trust claim against the surplus proceeds of sale in relation to the following payments:

- Payment of interest under the Robertson mortgage of \$39,805; and
- Payment of the balance of the purchase price of \$215,527.

Further investigation would need to be conducted to confirm same.

¹⁹ We note that rates for the 2015 / 2016 financial year in the amount of \$2,933.53 are due on 13 February 2016.

²⁰ This is based on the sworn valuation obtained from Opteon.

²¹ This is based on the sworn valuation obtained from Opteon.

We consider that ARPL's prospective liability to investors is at least \$372,175. We consider that the investors are contingent creditors of ARPL. We further note that ARPL may have a contingent liability of an additional \$4.7m in relation to the 805 investors.

Furthermore, there is likely to be a debt owing to the ATO in addition to that currently claimed by the ATO.

Subject to the above, we consider that there may be a small return to creditors of ARPL, subject to the costs of provisional and official liquidation, however any return to investors would be dependent on any claim made by the ATO and any other creditors which come to light.

5. Other information necessary to enable the Company's financial position to be assessed

In order to enable a proper assessment of the financial position of ARPL and each of the Corporate Respondents we would be required to do the following:

- Undertake a complete funds tracing exercise of each of the bank accounts operated;
- Obtain proofs of debt and copies of LRAs signed by each investor. We note that on 14 October 2015 and 19 November 2015, we issued correspondence to individuals recorded as having purchased lots in the ARPL property and requested details of their investment;
- Obtain proofs of debt from each creditor;
- Obtain executed LRAs and Deed Polls in relation to each investor to understand any variation of rights afforded to investors;
- Understand which investors transferred from 805 ARPL to ARPL; and
- Obtain and review source documents in order to verify and explain transactions.

6. Suspected contraventions of the Act

6.1 Failure to maintain proper books and records

Pursuant to Section 286 of the Act, a company must keep written financial records that correctly record and explain its transactions, financial position and performance and would enable true and fair financial statements to be prepared and presented in accordance with the accounting standards.

From an examination of the available books and records we have obtained, there appears to have been a failure by the directors to have prepared and maintained proper financial records. We note the following in this regard:

- We have been unable to locate a complete set of executed LRAs;
- We have been unable to locate a complete set of executed Deed Polls;
- It failed to record which 805 investors executed Deed Polls;
- It failed to maintain original executed parts of all LRA's and Deed Polls;

- It had failed to prepare income tax returns and recent business activity statements; and
- We have identified numerous transactions, primarily loans made to related companies which are not supported or explained by any documentation. This is discussed in further detail below.

Whilst there were financial statements prepared and found amongst the records, the transactions underlying the compilation of these accounts were not supported by primary source records such as vouchers, invoices, loan agreements, journals and/or an explanation of the purpose of intercompany transactions. In our opinion, the deficiency in primary source records and the absence of records explaining the significant movement of funds between director related entities did not enable an accurate set of financial statements to be prepared.

6.2 Uncommercial Transactions

Section 588FB defines an uncommercial transaction as a transaction where it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

- a) the benefits (if any) to the company of entering into the transaction; and
- b) the detriment to the company of entering into the transaction; and
- c) the respective benefits to other parties to the transaction of entering into it; and
- d) any other relevant matter.

We consider that the amounts paid to PT pursuant to the purported commission agreement or otherwise to constitute uncommercial transactions pursuant to Section 588FB of the Act.

As outlined above, we have doubts as to the existence of a documented commission agreement between the respective development companies and PT. Further, we consider that the payment of a 50% commission, whether based on a written or verbal agreement, to be excessive for the following reasons:

- It does not reflect actual costs incurred by PT in promoting the Schemes;
- Accordingly to both Jamie and Dennis McIntyre, no adjustments were made between the development companies and PT in the event that these costs were less than 50% of the funds raised by the development companies;
- PT undertook promotion activities for all five (5) Schemes and accordingly there were economies of scale as the fixed costs incurred by PT, including marketing, wages and other overheads, would have been spread across the respective Schemes; and
- Accordingly to Jamie and Dennis McIntyre, when PT undertook promotion activities for developers outside the 21st Century group, it charged a commission rate of 20% to cover the same costs.

Furthermore, we note that the above arrangement was not adequately disclosed or communicated to prospective investors. In this regard, we comment as follows:

- The LRA's refer to the developer incurring project expenses. Project expenses are defined as "the expenditure and all capital and operating costs, charges, expenses, fees, taxes.....and other payments and expenditures incidental to the conduct of the project."²²

They do not include reference to any obligation to pay to PT any commission. We note that we do not consider that an agreed commission of 50% to fall within the definition of "project expenses" as per the LRA.

- Questions 9 and 13 in the document titled "Frequently Asked Questions" ("FAQ") which was provided to investors as part of the Botanica marketing material did not disclose any commission agreement between ARPL and PT;

The following is an extract from the FAQs:

9. What does the developer use the option fees for?

The developer has associated costs to get rezoning and permit approvals, development and land costs, marketing costs, administrative costs etc. The option fees help advance the project.

13. What's in it for 21st Century Property?

21st Century Property gains a membership fee for acting as an educational resource on advanced property strategies such as land banking. 21st Century Property also offers the service of connecting potential option holders with developers, including development projects of associated companies.

The Marketing Material, Due Diligence Kit and FAQs are attached as **annexures ARPL-14, ARPL-15 and ARPL-16**, respectively.

We note that ARPL raised \$372,175 from investors in the Botanica Scheme. We have only been able to identify investor deposits in accounts maintained by ARPL in the amount of \$201,480. The balance of investor deposits appear to have been made directly into the PT account and recorded against the PT loan account.

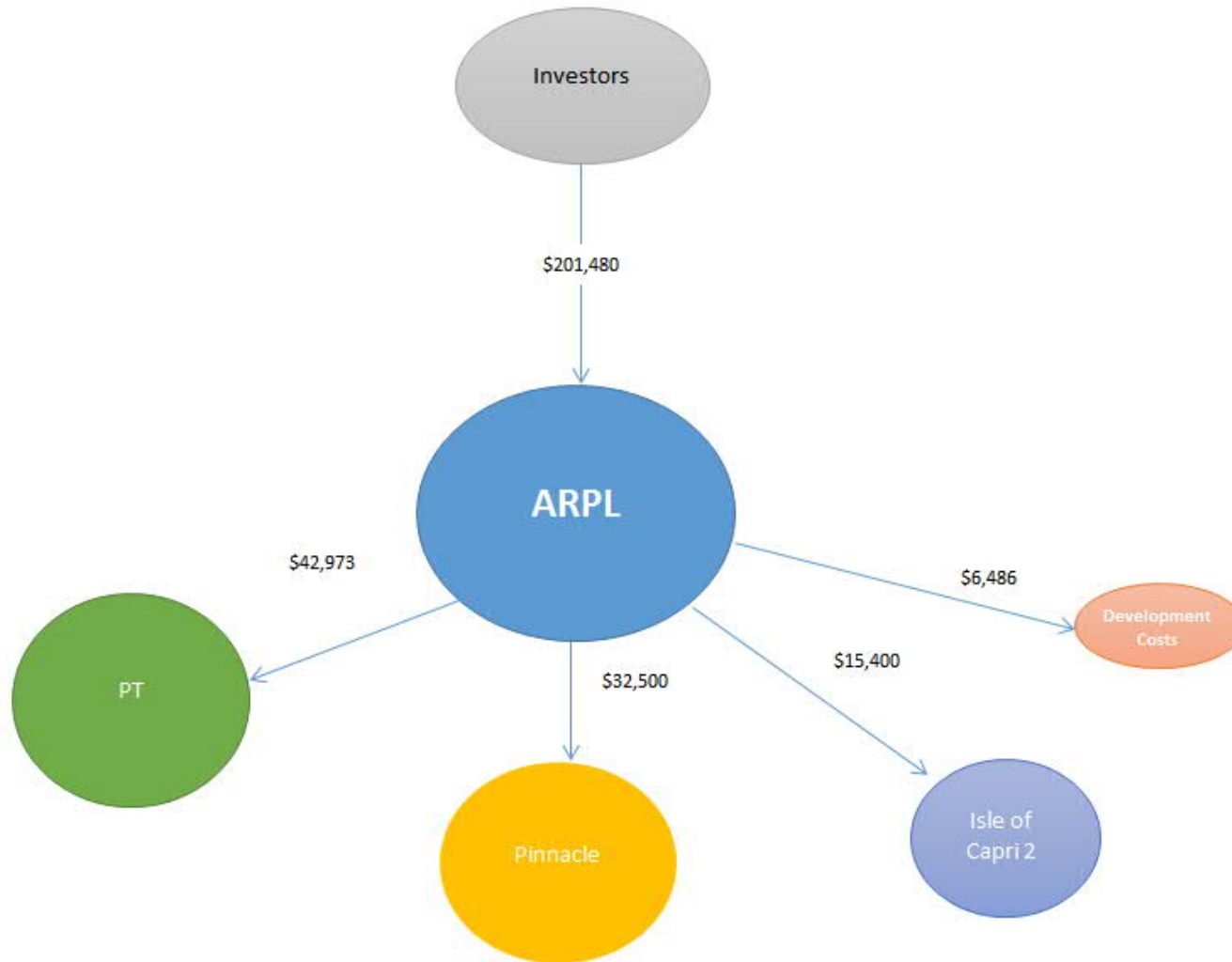
Our investigations reveal that only \$6,486 was actually used for costs associated with the development of the Kialla property. This amount related to consultancy costs paid in relation to the Botanica Scheme.

At the date of our appointment ARPL only had cash at bank of \$810.

In addition, we have identified net cash movements from ARPL to PT in the amount of \$42,973. This is in addition to any amounts paid by investors directly to PT.

²² Clause 1.1 of the Archery Road Pty Ltd Lot Reservation Agreement

A summary of the some of the net movements in the ARPL accounts is illustrated below:



6.3 Breach of Directors Duties

Section 9 of the Act defines a director to include a person who, despite not being validly appointed as a director, acts in that capacity or the directors of the company are accustomed to acting in accordance with that person's instructions.

We consider that Jamie McIntyre is a director of ARPL within the definition of section 9 of Act by virtue of the following:

- He liaised with and made representations to ASIC regarding the Company's financial position;
- It is clear, from interviews conducted with the group's Chief Financial Officer and General Manager that they were all accustomed to acting in accordance with the instructions of Jamie McIntyre;
- Swarit Verma (the CFO) advised during his interview that transactions from the bank account were approved by Jamie McIntyre; and
- Dennis McIntyre, the Director was accustomed to acting in accordance with his instructions.

We further consider that both Dennis and Jamie McIntyre (the "Directors") have breached the following duties as directors.

6.3.1 Failure to act in good faith, in the best interests of the Company and for a proper purpose

As outlined above, ARPL was party to the SLA executed on 24 March 2013, between PT, Pinnacle and Jamie McIntyre (the "parties").

We consider that by entering into the SLA, the Directors have failed to act in good faith and in the best interest of ARPL for the following reasons:

- The SLA did not provide ARPL with any security in relation to funds lent to the parties;
- It allowed borrowing to be made to the parties on an interest free basis; and
- It did not require repayment of any prospective borrowings made to the parties until 2020.

We consider that there may be claims made for breach of duties as director(s) pursuant to Sections 180 to 184 of the Act as follows:

- failing to exercise care and due diligence;
- failing to act in good faith and in the best interest of ARPL;
- failure to act for a proper purpose and making improper use their respective positions as director(s) of ARPL;
- improper use of confidential information of ARPL as there is no evidence to suggest that investors gave permission for their information to be shared under clause 13 of the LRA; and
- acting in conflict of interest in making the commission agreement; and
- authorising the transfer of funds from ARPL to PT.

6.4 Unregistered Managed Investment Scheme

Section 9 of the Act contains the following definition of a managed investment scheme:

- a) *'a scheme that has the following features:*
- i. *people contribute money or money's worth as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*
 - ii. *any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);*
 - iii. *the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or*
- b) *a time-sharing scheme;*

A scheme that falls within the definition of section 9 of the Act above must be registered if:

1. it has more than 20 members;²³
2. it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes;²⁴ or
3. if ASIC has determined and provided the operator written notice that the scheme, as a part of a number of closely related schemes, has to be registered when the total number of members of the schemes exceeds 20 members.²⁵

However, a scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 of the Act.²⁶

In this regard and as referred to in paragraph 2 of the Originating Process, as part of the ARPL Scheme, investors were offered the opportunity to reserve a lot on the concept plan (of an unregistered plan of subdivision) by payment of a lot reservation fee to ARPL.

By virtue of reserving a lot and paying a reservation fee, investors were granted the benefit of an option to purchase the lot for a pre-agreed option price sometime in the future in the event that development approval of the plan of subdivision in relation to the Kialla property was obtained.

The development of the Kialla property was to be controlled entirely by ARPL to which a total of 17 investors paid reservation fees for the purposes of reserving lots on the concept plan.

²³ Section 601ED(1)(a) of the Act

²⁴ Section 601ED(1)(b) of the Act

²⁵ Section 601ED(1)(c) and (3) of the Act

²⁶ Section 601ED(2) of the Act

We note the following:

- i. Investors paid a contribution by way of a lot reservation fee;
- ii. This contribution was paid to reserve a lot on the concept plan (and thereby acquired a contingent right to exercise an option in the future in the event that development approval was obtained);
- iii. More than 20 lots were available to be, and intended to be sold to investors (there was intention to sell 669 lots); and
- iv. The investors did not have day to day control in relation to any activities of the development company, including the development of the property and the sale of lots.

By virtue of the manner in which funds were raised, we consider that it would be open to the Court to determine that ARPL was operating a Scheme within the definition of the Act and that it was required to be registered in accordance with Section 601ED of the Act.

As referred to at paragraph 3.4.4 of the Originating Process, if investors' rights are clarified and declarations are made that the Botanica Scheme was required to be registered and therefore an unlawful unregistered managed investment scheme in accordance with paragraphs 3 and 4 of the Originating Process filed in the Proceedings, the investors may:

1. pursuant to section 601MB(1) of the Act, render the lot reservation agreements entered into by them to subscribe for an interest in the Botanica Scheme voidable at their option by providing notice to the person(s) who offered an interest in the scheme; and
2. if such a notice was validly given, have the potential to seek restitution.

If orders are made in accordance with paragraphs 9 and 11 of the Originating Process filed in the Proceedings to wind up the Botanica Scheme and appoint the Provisional Liquidators as liquidators, further investigations will be required to investigate whether:

1. ARPL breached section 911A of the Act which requires person(s) who carry on a financial services business to hold an Australian Financial Services Licence;
2. the person(s) who offered an interest in the Botanica Scheme may have contravened section 1012B of the Act; and
3. ARPL and any other person(s), either alone or together, carried out the Botanica Scheme for a purpose (that is not incidental) of avoiding the application of any provision of Part 7.7A of the Act.²⁷

The above matters require further investigation for the purposes of providing a Section 533 report to ASIC and for civil recoveries from directors and/or other parties.

7. Provisional Liquidators' Recommendation

Given the nature of the breaches identified and the financial position of ARPL, we recommend that ARPL be wound up to enable proper investigations to be conducted into its affairs and to identify any transactions which may be recoverable for the benefit of creditors.

²⁷ This would be a breach of section 965 of the Act

8. Botanica Scheme

8.1 Scheme Property

The Botanica Scheme relates to the development of the Kialla property. As outlined above, ARPL is the sole registered proprietor of the Kialla property. We note that we have not seen any documentation or been provided with any information which would suggest that ARPL does not own the Kialla property beneficially and / or holds it on trust or otherwise for any other party, including investors.

Accordingly, we do not consider that any property is owned by the Botanica Scheme.

8.2 Third party claims against Scheme property

We have been unable to identify any property owned by the Botanica Scheme.

8.3 Investors

The affidavit of Andrew James Price, indicates that as at 25 May 2015, 17 investors had invested amounts totalling \$372,175²⁸. We note that this information was provided to ASIC by Jamie McIntyre under direction.

In the absence of a registered Managed Investment Scheme, we consider that the investors are contingent creditors of ARPL in relation to the lot reservations fees paid.

We further note, as outlined above, that ARPL may have a contingent liability to 805 investors also. Further investigations will be required to determine the rights of the 91, 805 investors under the PC Option agreements and / or Deed Polls.

8.4 Scheme liabilities

Our investigations have not revealed any separate liabilities of the Botanica Scheme.

8.5 Solvency of the Scheme

We have not identified any assets or liabilities of the Botanica Scheme and therefore cannot comment on the solvency of same.

8.6 Realisation of Scheme property

ARPL is the registered proprietor of the Kialla property. Further, we have been unable to identify any documentation which would indicate that the property was held in any way on trust for the investors in the ARPL. As contingent creditors of ARPL however by virtue of the LRA and / or Deed Polls, investors and 805 investors would be entitled to share equally in the surplus proceeds from the sale of the Kialla property. They would also be entitled to participate in any dividend payable to creditors of ARPL in the event that further recoveries were made by a liquidator.

8.7 Recovery of money owed to Schemes

We have not identified any money owed to the Schemes.

²⁸ Paragraph 52 of the Affidavit of Andrew James Price, sworn on 3 August 2015

8.8 Recommendation regarding the Scheme

In the event that the Court makes the declarations referred to in paragraph 3.4.4 that the ARPL Scheme is an unregistered managed investment scheme,²⁹ orders should be sought from the Court appointing the Provisional Liquidators as liquidators of the ARPL Scheme.

This is to enable the liquidators of the ARPL Scheme to carry out further investigations into contraventions of the Act by the person(s) who offered interests in the ARPL Scheme.

²⁹ s601EE of the Act

Annexures

Document No.	Description of Document
1	Historical Company Extract as at 7 October 2015
2	Contract of Sale between 805 Archer Road Pty Ltd and Archery Road Pty Ltd
3	Copy of Extract of Title of the Kialla Property
4	Marketing Email issued to clients on the 21 st Century Database
5	Marketing Email issued to clients on the 21 st Century Database
6	Investor List
7	Correspondence received from the Shepparton City Council
8	Balance Sheet as extracted from Xero
9	Report as to the Affairs of the Company as prepared by Dennis McIntyre
10	Valuation Report prepared by Opteon
11	Secured Loan Agreement (SLA)
12	Lot Reservation Agreement for [REDACTED]
13	Comparative Profit & Loss Statement as extracted from Xero
14	Marketing Material for Botanica
15	Due Diligence Kit for Botanica
16	FAQs for Botanica