

**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

Fourth Respondent's Report

**Secret Valley Estate 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

Secret Valley Estate Pty Ltd

This report should be read in conjunction with our Summary Report.

Secret Valley was incorporated on 12 November 2014. Dennis Hugh McIntyre is the sole Director and Secretary of Secret Valley. The sole shareholder of Secret Valley is Henry River. We note that Jamie McIntyre is the sole shareholder of Henry River.

Since 30 July 2015, Secret Valley's registered office and principal place of business was Corporate Centre One, Suite 8, 2 Bundle Corporate Court, Bundall, Queensland. Prior to this, Secret Valley operated from premises located at Level 8, 96-100 Albert Road, South Melbourne, Victoria.

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

1. Company Background

Secret Valley was incorporated to purchase and develop a property at 1955 Old Sydney Road, Bylands in Victoria ("Wallan property"). The development was referred to as "Secret Valley Estate."

It did not have any other trading activities or employ any staff.

1.1 Sale of lots in the Wallan property

In late 2014, PT commenced promotion of the sale of lots in the Wallan property (SV Scheme) and issued a marketing and due diligence kit in relation to same.

As outlined in the Summary Report, these lots were promoted for sale as follows:

- Contacting persons listed on the database of 21st Century Group¹.
- 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;
- Contacting potential investors through publications; and
- Contacting potential investors through social media such as Facebook.

PT issued the marketing and due diligence kit to prospective investors regarding the opportunity to purchase a lot in the unregistered plan of subdivision of the Wallan property ("concept plan").

A copy of the due diligence kit is attached as **annexure SV-2**.

According to the due diligence kit, the SV Scheme would comprise:

- 258 acres of breathtaking views;
- A luxury estate and country club; and
- Resort facilities.

¹ 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.

Investors were offered the opportunity to reserve a lot on the concept plan for Secret Valley by payment of a reservation fee. By virtue of reserving a lot and paying a reservation fee, investors were granted 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 Wallan property was obtained.

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

We note that the right and ability of an investor to exercise their option is contingent upon Secret Valley obtaining development approval of the plan of subdivision. We note that Secret Valley does not own the Wallan property, nor did it own the property at the time of marketing and selling the lots. This is discussed in further detail below.

We have contacted the Mitchell Shire Council in relation to the Wallan property. They have confirmed the advice previously given to ASIC² in relation to the property, as follows:

- It is currently zoned farming;
- It is located outside the Urban Growth Boundary;
- It does not fall within future residential growth plans for at least 20 years; and
- The Council does not support or even consider a request for rezoning in the foreseeable future.

It appears that lots in Secret Valley were promoted and / or sold on the basis of approval which was not likely to eventuate within 20 years. We further note that Secret Valley became aware of this at least on 15 January 2015³ however lot reservation fees totalling c\$1.7m were recorded as being paid by investors after this date.

On 20 October 2015, we were provided with a client list from Carlton Ross on behalf of Swarit Verma, the CFO of Secret Valley and 21st Century Property group. This list indicates that Secret Valley sold a total of 20 lots to 17 investors and that amounts totalling \$1,740,750 were paid by investors in full satisfaction of lot reservation fees recorded as payable under their LRAs. It further indicates that additional reservations fees of \$819,765 were paid by 14 investors in part payment of the reservation of 14 additional lots.

A copy of the reservations fees recorded as being received by Secret Valley following 15 January 2015 is attached as **annexure “SV-3”**.

Our investigations conducted to date indicate that a total of 34 lots were sold to 31 investors and amounts paid by way of lot reservation fees total \$2,425,865.

A copy of the investor list is attached as **annexure “SV-4”**.

According to Dennis and Jamie McIntyre, in consideration for promoting sales of lots in SV on behalf of Secret Valley, 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

² As referred to in Paragraph 70 of the affidavit of Andrew James Price sworn on 3 August 2015

³ As referred to in Paragraph 71 of the affidavit of Andrew James Price sworn on 3 August 2015

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 the basis, we have concerns about the existence of a documented commission agreement between the respective development companies and PT. We also consider the payment of a 50% commission to be excessive and unreasonable in the circumstances. Further, based on our investigations conducted to date it does not appear that the obligation to pay a 50% commission to PT was disclosed to investors. This is discussed in further detail below.

We note that we have not conducted a detailed analysis of the bank account maintained by Secret Valley as we have been unable to gain online access to same, however in our capacity as Provisional Liquidators of the other Corporate Respondents, we have conducted an analysis of their respective bank accounts and have been able to identify amounts paid to / received from the Corporate Respondents by Secret Valley. We also note that we have been able to review the Xero accounts maintained by Secret Valley.

These investigations have revealed that PT received amounts totalling \$1.8m from Secret Valley between November 2014 and the date of our appointment being 7 October 2015. We cannot confirm what portion of this was paid pursuant to the purported commission agreement and amounts which were paid by way of loans. We note however that any loans were unsecured and according to both Jamie and Dennis McIntyre there were no loan agreements in relation to, or in support of same.

We further note that our investigations reveal that despite investors paying lot reservation fees totalling c\$2.4m, only \$10,236 was actually used for costs associated with the development of the property. This amount related to consultancy costs paid in relation to development of the “concept plan” for Secret Valley Estate.

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 Secret Valley.

Dennis McIntyre provided our office with a completed RATA on 4 November 2015. A copy of the RATA is attached as **annexure SV-5**. We lodged the RATA with ASIC on 5 November 2015.

A summary of the RATA and the Xero accounts is provided below together with our estimated recoverable values (“ERV”) of assets and liabilities from the investigations we have conducted to date. A copy of the balance sheet as extracted from Xero is attached as annexure **SV-6**.

Category	Provisional Liquidators' ERV (\$)	RATA (\$)	Management Accounts (Xero) (\$)
ASSETS			
<u>Current Assets</u>			
Cash at Bank	116,271	Nil	116,271
Planning and Development Costs	Nil	Nil	10,236
Accounts Receivable	Nil	268,557	266,555
Prepayments - Deposits for Land	45,000	Nil	125,238
	161,271	268,557	518,301
<u>Non-Current Assets</u>			
Related Party Loans	Nil	Nil	1,040,836 ⁶
	Nil	Nil	1,040,836
Total Assets	161,271	268,557	1,559,137
LIABILITIES			
<u>Current Liabilities</u>			
GST	Unknown	Nil	158,901
Accounts Payable	Unknown	Nil	Nil
Holding Deposits from Customers	Nil	Nil	11,000
	Nil	Nil	169,901
<u>Non-Current Liabilities</u>			
Investors / Contingent Liability	2,425,865	Nil	Nil
Related Party Loan	100	Nil	100
	2,425,965	Nil	100
Total Liabilities	2,425,965	Nil	170,001
Net Surplus / (Deficiency) (Before costs of the provisional liquidation)	(\$2,264,694)	\$268,557	\$1,389,136

⁶ We note that this was recorded in the Xero accounts as a negative liability and accordingly we have reclassified it as an asset. We note that this does not alter the net asset position.

2.1 Current Assets

2.1.1 Cash at Bank

Following our appointment, we issued correspondence to all the major financial institutions in order to determine whether the Company operated any accounts.

Westpac advised that the Company operated the following accounts:

Bank	Account Type	Balance (\$)
Westpac	Transaction Account	116,269
Westpac	Cash Reserve Account	2
Total		\$116,271

We note that these balances match those in the Xero accounts.

Following our appointment, we placed a freeze on the above accounts and have taken control of the balance.

No further accounts have been located.

We note that no cash at bank was disclosed in the RATA.

2.1.2 Development Costs

The Xero accounts record a current asset by way of planning and development consultancy costs in the amount of \$10,236. This relates to the Wallan property which is discussed in further detail below.

We note that Secret Valley is not the registered owner of the Wallan property. It will be unable to add these costs to the cost base and accordingly these costs will not be recouped by Secret Valley.

2.1.3 Accounts Receivable

The Xero accounts and RATA record accounts receivable in the amount of \$266,555 and \$268,557, respectively. This relates to lot reservation fees which remain outstanding from investors.

At present there is insufficient evidence to support an enforceable agreement to recover the balance from investors and further investigations would need to be conducted to determine the enforceability of the LRA, particularly given that it cannot be honoured by Secret Valley.

We consider it unlikely that these amounts are recoverable.

2.1.4 Pre-Payments – Deposits for Land

The Secret Valley Xero accounts record a current asset by way of pre-payments for deposits for land in the amount of \$125,238. This relates to deposits paid by Secret Valley for the purchase of the Wallan property.

In November 2014, Secret Valley entered into a contract for the purchase of the Wallan property for \$1.1m, with settlement due on 14 May 2015. A copy of the contract of sale is attached as **annexure SV-7**.

Pursuant to the contact of sale, Secret Valley was to pay \$110,000 by way of deposit. We have been advised by Michaela Prince of Carlton Ross⁷ that payments totalling \$120,000 were made by way of deposit, as follows:

Bank	Amount Paid (\$)
24/11/2014	10,000
24/11/2014	50,000
30/12/2014	50,000
6/05/2015	10,000
Total	\$120,000

Our investigations indicate that the payments of \$10,000 and \$50,000 on 24 November 2014 were paid by PT directly to the conveyancer.

We have issued correspondence to the vendor's solicitor in relation to the purchase of the property, the deposit held and the status of the contract. We have been advised that the actual deposit paid was \$110,000. The additional \$10,000 paid on 6 May 2015 was made pursuant to an agreement to extend the date for settlement. We have been advised that as settlement was not effected a notice of rescission was issued to Secret Valley and the deposit forfeited. We have been further advised that the property has since been resold at a loss to a non-related third party.

Our investigations have revealed that the property was in fact sold for \$1.025m to Couta Investments Pty Ltd. Attached as **annexures SV-8** and **SV-9** is a copy of the title to the Wallan property and the transfer of land, respectively. On the basis of the sale price and the deposit forfeited, we consider that there has been a gain by the vendor in the amount of \$45,000 over the original sale value of \$1.1m. We have issued a demand to the vendor's solicitor with regards to repayment of the \$45,000. We are currently awaiting a response.

We consider that PT may have a constructive trust claim over funds advanced for the payment of the deposit in the event that any amounts are refunded by the vendor.

We note that the current Xero accounts record the pre-payment amount as \$125,238 not \$215,000. Our investigations have revealed that the Xero accounts have been amended post our appointment, on 21 October 2015 to record a refund of \$115,762 made by Joshi Lawyers to Secret Valley in relation to funds held in their trust account which were to be put towards the purchase of the Wallan property.

We note that these amendments are recorded as having been made by the person in charge of accounts payable for the 21st Century Property group. At this time, we cannot confirm whose direction (if any) this amendment was made on.

2.1.5 Related Party Loans

No amounts due from related parties are disclosed in the RATA.

The Secret Valley Xero accounts record a negative liability owed to PT in the amount of \$1,040,836. We note that this has been incorrectly classified as a negative liability and is in fact a debt payable to Secret Valley and accordingly an asset. We note however that this does not alter the overall net asset position.

⁷ Carlton Ross represent Dennis and Jamie McIntyre

As outlined above, an analysis of the PT bank account indicates that PT received amounts totalling \$1.8m from Secret Valley. We cannot confirm what portion of this was unsecured loans and what was paid pursuant to the purported commission agreement.

On 7 October 2015, we were appointed as Provisional Liquidators of PT. We have examined the accounts of PT. The major asset of PT in the Xero accounts is a loan account receivable from Pinnacle. 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 2015⁸ and a net loss for the financial year ended 30 June 2015 of over \$2.4m.

Accordingly, we do not consider any amount owed by PT to be collectible.

2.2 Current Liabilities

The Xero accounts record total current liabilities of \$169,901, comprising \$158,901 GST payable and holding deposits from customers in the amount of \$11,000.

2.2.1 GST

The Xero accounts record a GST liability owed by Secret Valley in the amount of \$158,901. We note that no GST liability was disclosed in the RATA.

Following our appointment, we issued correspondence to the ATO in order to determine whether Secret Valley had any taxation liability.

The ATO has advised that Secret Valley is not currently registered for GST and accordingly there is no debt recorded as being owed. Further, Secret Valley has an outstanding income tax return for the financial year ended 30 June 2015. The ATO has advised that there may be a liability owed by Secret Valley once the return is lodged.

We note that the Company was charging GST and issuing tax invoices to investors in relation to the lot reservation fees and accordingly would have a liability to the ATO in relation to the GST collected as recorded in the Xero accounts. We note that we have not reviewed the liability recorded in Xero to determine its accuracy.

Further, we note that the deposit paid in relation to the purchase of the Wallan property may have included GST to the vendor. Secret Valley would be entitled to offset any amounts owed to the ATO in relation to GST collected on lot reservation fees against any GST claimable in relation to the deposit paid.

2.2.2 Holding Deposits

The holding deposit liability of \$11,000 recorded in Xero relates to deposits received by investors in relation to securing a lot in the Wallan property. We do not consider these holding deposits to be refundable.

We note that we have been unable to confirm whether these investors signed lot reservation agreements and accordingly further investigations would need to be conducted in relation to same.

⁸ Balance sheet as at 30 June 2015 shows a date stamp as being printed on 12 June 2015

If the terms of the deposit were 'non-refundable' then the investors may not have any right nor could they be classified as contingent creditors.

2.3 Contingent Liabilities

As outlined above, we have identified 31 investors in Secret Valley who paid amounts totalling \$2,425,865 to reserve 34 lots in the SV Scheme.

The Secret Valley Lot Reservation Agreement (“LRA”) is attached as **annexure SV-10**.

Clause 6 of this LRA provides that the LRA would continue for a period of at least 20 years, unless terminated earlier by agreement, by the developer, being Secret Valley or otherwise in accordance with the LRA.

Clause 19.1 of the LRAs however provides investors with an equitable charging right over its interest in the lot reserved and the assets and goodwill of Secret Valley 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 Secret Valley.

An event of default has occurred by the application to wind up Secret Valley 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 by investors as Secret Valley is not the owner of the Wallan property.

We have located LRA's in relation to each of the 20 lots for which reservation fees were recorded as being paid in full.

According to the terms of the LRA:

- Secret Valley 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 by signing a Refund Option document and paying the refund option fee (if applicable);
- If investors did not exercise their right to a refund within the 45 days then 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”¹⁰



The LRA required Secret Valley to ‘use its best efforts and do all acts necessary and execute all documentation required to obtain development approval’.¹¹ Investors however were not afforded any

⁹ s601EE of the Act.

¹⁰ Clause 6.1(c) of the Secret Valley Lot Reservation Agreement

¹¹ Clause 3.4 of the Secret Valley Lot Reservation Agreement

rights in the event that Secret Valley 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.¹²

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 Secret Valley elected to terminate the LRA. Given that Secret Valley 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 Secret Valley would elect to terminate the agreement in accordance with clause 6.3. **The LRA it appears provided Secret Valley 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 remaining amounts not already claimed to investors.**

Our investigations have revealed an amended version of the LRA (“amended LRA”).

Attached as **annexure SV-11** is a copy of the amended LRA.

This was provided to us by Dennis McIntyre on a hard drive. We note that the file is dated 30 June 2015 however we cannot confirm the date the LRA was amended or whether any prospective investors were issued with same. The executed LRAs we hold were the original and not amended version.

We have reviewed the amended LRA and note that the material changes are as follows:

- The insertion of clause 3.6 which give Secret Valley the right to terminate the LRA in the event that it is yet to settle on the property and despite all reasonable efforts is unable to do so;
- The insertion of clause 8.1 allowing Secret Valley to amend the option contract and sale contract provided to the investor prior to the exercise of the option; and
- Deletion of clause 9 which granted the investor the opportunity to appeal the termination of the LRA on the basis that the investor had failed to exercise their option in accordance with clause 6.

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 Secret Valleys'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.

¹² Clause 7 of the Secret Valley Lot Reservation Agreement

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

¹⁴ *Transfer of Land Act (Vic) 1958*

The application made by ASIC in the Proceeding, is an event of default by Secret Valley under the LRA and accordingly investors may have charging rights over the assets and goodwill of Secret Valley in relation to all monies due and payable to them. Further investigations will need 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 scheme¹⁵.

Investors rights 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 SV Scheme was an unregistered managed investment scheme. If a declaration is made then the LRA may be voidable¹⁶ at the option of the investor. If this was to occur, investors would be entitled to claim a refund of the \$2,425,865 paid.

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

2.4 Non-Current Liabilities

2.4.1 Related party creditors

The Xero accounts record a liability to Bendigo Vineyard Estate Pty Ltd ("Bendigo") the amount of \$100. This relates to a payment made by Bendigo on behalf of Secret Valley by way of commission to a sales consultant.

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.

According to the Secret Valley Xero accounts, the Company had a positive net asset position as at the date of our appointment and the financial year ended 30 June 2015.

	7 October 2015 ¹⁷ (\$)	30 June 2015 (\$)
Total Current Assets	518,301	899,668
Total Non-current Assets	1,040,836	Nil
Total Assets	1,559,137	899,668
Total Current Liabilities	169,901	182,506
Total Non-Current Liabilities	100	(866,488)
Total Liabilities	170,001	(683,982)
Net Assets	\$1,389,136	\$1,583,650

¹⁵ s601EE of the Act.

¹⁶ S601MB of the Act

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.

We make the following comments in relation to the above accounts:

- As outlined above, current assets comprise the following amounts which we do not consider collectible / recoverable:
 - \$125,238 paid by way of deposit in relation to the purchase of the Wallan property;
 - \$266,555 recorded as owing by investors; and
 - \$10,236 development and planning costs.
- Non-current assets have been overstated by c.\$1.04m. This relates to an amount recorded as owing by PT which is not collectible; and
- No provision is made in the accounts for the contingent liability to investors.

We have restated the balance sheet as at 7 October 2015 as follows:

	7 October 2015 (\$)
Total Current Assets	\$161,271
Total Non-current Assets	Nil
Total Assets	161,271
Total Current Liabilities	Unknown
Total Non-Current Liabilities	2,425,965
Total Liabilities	2,425,965
Net Assets	<u>(\$2,264,694)</u>

We note that the current liability amount is likely to increase once the liability to the ATO is determined. We further note that we have not called for proofs of debt and therefore there may be additional creditors which have not been identified.

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

- At the date of our appointment, it had cash at bank of \$116,271;
- The only cash inflow was income from lot reservation fees paid by investors; and
- A tax liability of \$158,901 as recorded in the Xero accounts.

We also consider that Secret Valley was insolvent from a balance sheet perspective as its only realisable asset is cash at bank in the amount of \$116,271. The value of which is far exceeded by the prospective liability to investors in relation to refunds for lot reservation fees paid (discussed in further detail below) being \$2,425,865.

4. Likely return to creditors

As outlined above, we have identified payments made by PT directly to the conveyancer in relation to deposit monies totalling \$60,000. We consider that PT may have a constructive trust claim to these funds and as such may be entitled to make a claim to any deposit funds refunded by the vendor.

We consider that there may be a small return to creditors of Secret Valley however this will depend on refund of the deposit and the value of identified creditor claims.

We note that if Secret Valley is placed into liquidation, a liquidator would conduct further investigations into the affairs of the company and determine whether there are any claims which may be made, or any transactions which may be recoverable for the benefit of creditors. Any likely return would be dependent on the successful outcome of any recovery proceedings.

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 Secret Valley and each of the Corporate Respondents we would require the following:

- Undertake a complete funds tracing exercise of each of the bank accounts operated;
- Proofs of debt from each investor;
- Proofs of debt from each creditor;
- Obtain executed LRAs in relation to each investor to understand any variation of rights afforded to investors;
- Source documents in order to verify and explain transactions;
- Income tax returns and business activity statements; and
- Any other documentation required in order to properly investigate Secret Valley's affairs.

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.

As outlined in the Summary Report, from an examination of the books and records we have obtained to date it appears that there has been a failure to maintain proper books and records. Although we have LRAs in relation to the 20 lots for which reservation fees were recorded as being paid in full, some of these are only partially executed. Furthermore, we do not have a complete set of LRAs in relation to the additional 14 lots sold.

Whilst there were financial statements prepared and found amongst Secret Valley's 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

We consider that the commission payments made to PT constitute uncommercial transactions pursuant to Section 588FB of the Act.

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.

As outlined above, we have doubts as to the existence of a documented commission agreement between the respective development companies and PT, including Secret Valley.

Our investigations have revealed that net amounts totalling approximately \$1.8m were received by PT from Secret Valley. As outlined above, the balance of the PT loan account at the date of our appointment was approximately \$1.04m. Recorded against the loan account by way of manual journal is an amount of \$866,587 being recorded as payable to PT with the narration "50% of income belongs to Property." We note that this had the effect of reducing the balance of the loan payable by PT. We note that the manual journal was recorded as at 30 June 2015 however the entry only posted in the Xero accounts on 25 August 2015.

As outlined above, we have doubts as to the existence of a documented commission agreement between the Secret Valley and PT. Further, we consider that the payment, or obligation to pay, 50% of the lot reservation fees by way of 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;
- According 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 both 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 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."¹⁸
- They do not include reference to any obligation to pay to PT a 50% 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.

We note that we have been unable to conduct a complete funds tracing exercise as we have not had access to electronic accounts online. We have been able to identify some transactions between the corporate respondents by virtue of the analysis conducted in their respective accounts, in particular an analysis of the PT bank accounts.

As outlined above, the analysis of the PT bank accounts reveals that it actually received amounts from Secret Valley totalling c\$1.8m which is higher than the 50% commission already considered excessive. We consider that these additional payments were made by way of loans to PT.

We note that PT is insolvent and unable to repay these amounts.

We consider that these loans to PT are uncommercial and made to the detriment of Secret Valley in circumstances where the Directors ought to have known that PT was unable to repay these amounts. Further, we do not consider that a reasonable person in the circumstances of the Company would have entered into these transactions given the detriment to Secret Valley.

We note that a liquidator, if appointed, would conduct further investigations regarding these transactions in order to identify any further transactions which may be recoverable for the benefit of creditors.

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 Secret Valley 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.

¹⁸ Clause 1.1 of the Secret Valley Estate Lot Reservation Agreement

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

We have been advised that only Swarit Verma (CFO) and Dennis and Jamie McIntyre were signatories to the Secret Valley bank accounts and / or had the ability to authorise payments from same.

We consider that by authorising payments to be made from the Secret Valley account to PT, Dennis and Jamie McIntyre failed to act in good faith and in the best interests of the company. These transfers were not in the best interest of Secret Valley and resulted in the company having insufficient cash to meet its liabilities. Furthermore, we consider that the transfers to PT, in circumstances where they ought to have known that PT did not have the ability to repay were reckless and accordingly in breach of section 184 of the Act which extends the civil penalty to a criminal one where it can be shown the director acted recklessly or with intentional dishonesty and failed to act in the best interests of the company or for a proper purpose.

Further claims for breach of duties as director(s) pursuant to Sections 180 to 184 of the Act made be made as follows:

- failing to exercise care and due diligence;
- failing to act in good faith and in the best interest of Secret Valley;
- failure to act for a proper purpose and making improper use their respective positions as director(s) of Secret Valley;
- the improper use of confidential information of Secret Valley as there is no evidence to suggest that investors gave permission for their information to be shared under clause 13 of the LRA;
- acting in conflict to the interests of Secret Valley by entering into the commission agreement between Secret Valley and PT.
- authorising or using or transferring the funds of Secret Valley to PT; and
- entering or making loans to PT by advancing some or part of Secret Valley funds.

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;¹⁹
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;²⁰ 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.²¹

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.²²

In this regard and as referred to in paragraph 2 of the Originating Process, as part of the Secret Valley 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 Secret Valley.

By 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 Wallan property was obtained.

The development of the Wallan property was to be controlled entirely by Secret Valley to which a total of 31 investors paid reservation fees for the purposes of reserving lots on the concept plan.

We note the following:

- i. Investors paid a contribution by way of a lot reservation;

¹⁹ Section 601ED(1)(a) of the Act

²⁰ Section 601ED(1)(b) of the Act

²¹ Section 601ED(1)(c) and (3) of the Act

²² Section 601ED(2) of the Act

- 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 (in fact 34 lots were sold to 31 investors); 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 Secret Valley 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.

Ultimately however, it will be for the Court to determine this issue

As referred to at paragraph 3.4.4 of the Originating Process, if investors' rights are clarified and declarations are made that the Secret Valley Scheme was required to be registered and is 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 SV 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 SV Scheme and appoint the Provisional Liquidators as liquidators, further investigations will be required to investigate whether:

1. Secret Valley 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 SV Scheme may have contravened section 1012B of the Act; and
3. Secret Valley and any other person(s), either alone or together, carried out the SV Scheme for a purpose (that is not incidental) of avoiding the application of any provision of Part 7.7A of the Act.²³

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 Secret Valley, we recommend that Secret Valley 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

²³ This would be a breach of section 965 of the Act

8. Secret Valley (“SV Scheme”)

8.1 Scheme Property

The SV Scheme relates to the development of the Wallan property. As outlined above, Secret Valley entered into a contract to purchase the property however settlement of same did not occur and the vendor has since resold the property.

In any case, we note that we had not seen any documentation or been provided with any information which would suggest that it was intended for Secret Valley, if able to settle on the contract of sale, to hold the Wallan property on trust or otherwise for any other party, including investors.

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

8.2 Third party claims against Scheme property

As outlined above, we have been unable to identify any property owned by the SV Scheme and accordingly there are no third party rights attaching to any property.

8.3 Investors

We have identified 31 investors who paid amounts totalling \$2,425,865 to reserve 34 lots in the Wallan property.

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

8.4 Scheme liabilities

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

8.5 Solvency of the Schemes

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

8.6 Realisation of scheme property

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

8.7 Recovery of money owed to Schemes

Our investigations have not revealed any money owed to the SV Scheme.

8.8 Recommendation regarding the Scheme

In the event that the Court makes the declarations referred to in paragraph 3.4.4 of the Originating Process that the SV Scheme is an unregistered managed investment scheme,²⁴ orders should be sought from the Court appointing the Provisional Liquidators as liquidators of the SV Scheme.

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

²⁴ s601EE of the Act

Annexures

Document No.	Description of Document
1	Historical company extract as at 7 October 2015
2	Due diligence kit issued for Secret Valley
3	Cash Summary report for the Lot Reservation Income as extracted from Xero
4	Investor list in Secret Valley
5	Report as to Affairs prepared by Dennis McIntyre dated 3 November 2015
6	Comparative balance sheet as at 31 October 2015 extracted from Xero
7	Contract of sale of the Wallan property between [REDACTED] and Secret Valley executed 24 November 2014
8	Title search of the Wallan property as at 23 November 2015
9	Transfer of land for the Wallan property dated 23 October 2015
10	Lot reservation agreement for the Wallan property
11	Amended lot reservation agreement for the Wallan property