

**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

Sixth Respondent's Report

**Bendigo Vineyard 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

Bendigo Vineyard Estate Pty Ltd

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

Bendigo Vineyard was incorporated on 12 June 2014. Dennis McIntyre is the sole Director and Secretary of Bendigo Vineyard. The sole shareholder of Bendigo Vineyard is Henry River. Jamie McIntyre is the sole shareholder of Henry River.

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

Attached as **annexure BV-1** is a copy of the company extract.

1. Business Activities

Bendigo Vineyard was incorporated to purchase and develop the Bendigo property. The Bendigo property comprises 65.09 hectares of land located in Maiden Gully, 7.5 kilometres west of the Bendigo Central Business District (32.5 hectares of which is timberland and 3.3 hectares Shiraz vines). It also comprises a bed and breakfast (B&B) and vineyard which at the time of our appointment was being operated by Bendigo Vineyard.

Bendigo Vineyard is the Registered Proprietor of the Bendigo Property.

A copy of the certificate of title is attached as **annexure BV-2**.



In addition to operating the B&B and the vineyard, Bendigo Vineyard commenced selling lots in the proposed unregistered plan of subdivision of the property ("concept plan"). These lots were marketed by PT¹ on behalf of Bendigo Vineyard.

Besides the above, Bendigo Vineyard did not have any other trading activities, nor did it employ any staff. Our investigations have revealed that Bendigo Vineyard utilised the services of a casual caretaker, a manager and a cleaner however we have been advised that they were employed by a related company, Salarium Services. Our investigations have not revealed any information which would suggest otherwise.

¹ Formerly 21st Century Property Pty Ltd

1.1 Sale of lots in the Bendigo property

In or around July 2014, PT issued a marketing and due diligence kit to prospective investors regarding the opportunity to purchase a lot in the concept plan. The proposed development to include 562 housing lots². The plan was to sell up to a maximum of 50% of total lots available on the concept plan, with the balance to be sold as retail lots in the event that approval for rezoning and subdivision was obtained.

A copy of the marketing and due diligence kit is attached as **annexure BV-3**.

As outlined in the Summary Report, the sale of lots were 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;
- Contacting potential investors through publications; and
- Contacting potential investors through social media such as Facebook.

According to the marketing material issued by PT, the development plan, set to commence in 2015, would include:

- A function centre;
- Bar, restaurant and café;
- Additional guest rooms;
- An outdoor Jacuzzi; and
- An indoor swimming pool.

With the long term plan for the property⁴ to include re-zoning of the land to accommodate the 562 lot housing development.

Investors were offered the opportunity to reserve a lot on the concept plan 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 Bendigo property was obtained. We note that the right and ability of an investor to exercise their option is contingent upon Bendigo Vineyard 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 Bendigo Vineyard (as the development company) and respective investors. The LRA provided Bendigo Vineyard with a 20 year period with which to obtain approval to develop the property.

² As outlined on the website for the Bendigo Vineyard Estate and Resort - <http://bendigovineyardestate.com.au/our-plan/> accessed on 20 November 2015

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.

⁴ As outlined on the website for the Bendigo Vineyard Estate and Resort - <http://bendigovineyardestate.com.au/our-plan/> accessed on 20 November 2015

Our investigations have revealed that Bendigo Vineyard sold a total of 120 lots and that investors paid a total of \$3,057,480 by way of lot reservation fees. We note that only c\$2.6m was actually paid into an account maintained by Bendigo Vineyard. The balance appears to have been paid into an account(s) maintained by PT. Attached as **annexure BV-4** is a copy of the investor list of the Bendigo Scheme.

According to Dennis and Jamie McIntyre, in consideration for promoting sales of lots in the Bendigo property on behalf of Bendigo Vineyard, 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”⁵. 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.⁶ 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 of the above, we have doubts as to the existence of a documented commission agreement between the respective development companies and PT, including Bendigo Vineyard. Further, we consider the payment of a 50% commission to be excessive and unreasonable in the circumstances. This is discussed in further detail below.

We have identified 87 investors who paid amounts totalling \$3,057,480 to reserve 120 lots on the Bendigo property. Despite this, we note the following:

- Bendigo Vineyard did not however use these funds to purchase the Bendigo property. Rather, it obtained funding from NAB (\$1.1m) and from PT (\$525,000) to purchase the Bendigo property;
- At the time of settlement of the Bendigo property, Bendigo Vineyard had raised approximately \$1.6m from investors by way of lot reservation fees, however, had cash at bank of approximately \$35,000. Net payments made to PT at this time totalled approximately \$1m. We note that the contract of sale for the Bendigo property was executed in June 2014 and settlement occurred in December 2014;
- At the date of our appointment, there was cash at bank of only \$24,876;
- Net amounts totalling \$1.99m, which included reservation fees paid by investors were transferred to PT from Bendigo Vineyard;
- We have only been able to identify approximately \$2.6m as being paid into the Bendigo Vineyard account by investors. The balance appears to have been paid to related parties, including PT;

⁵ Para 23 of affidavit of Jamie McIntyre, sworn on 31 August 2015

⁶ Carlton Ross represent Dennis and Jamie McIntyre

- Despite raising a further \$1.4m from investors following settlement of the property, the balance of the NAB loan at the date of our appointment was \$970,000. With net funds of approximately \$945,000 transferred to PT following settlement; and
- Our investigations reveal that only \$2,000 was actually used for costs associated with the development of the Bendigo Vineyard property. This amount related to consultancy costs paid in relation to the Bendigo Scheme.

Below is an illustration of the flow of funds:



These transactions are discussed in further detail later in this report.

Following our appointment, I, Simon Wallace-Smith and a member of my staff met with Mr Trevor Budge, Strategy Manager with the City of Greater Bendigo (“Council”) in order to understand the Council’s position regarding the Bendigo property and the likelihood of it being rezoned as proposed in the concept plan.

The Council has provided written advice that in 2014, they made a public call in relation to land owners and developers in the City of Greater Bendigo giving them the opportunity to seek to have their land included within the Urban Growth Boundary. Council advised that Bendigo Vineyard has never made a formal request to have the land re-zoned as residential.

Mr Budge advised that there is no current or anticipated need to consider the Bendigo property for rezoning and accordingly he sees no conceivable reason why the land would need to be rezoned for residential development in the next 10 to 15 years.

It appears that Bendigo Vineyard raised funds from investors for a development that was unlikely to gain approval in the next 15 years and for which there would be doubts as to the likelihood of approval being granted in the next 20 years and then paid commissions and / or loaned these funds to related entities. This is discussed in further detail below.

1.2 Bed and Breakfast

Located on the Bendigo property is the “Bendigo Vineyard Estate and Resort” (“B&B”) and a vineyard (the “Vineyard”). Our investigations have revealed that Bendigo Vineyard took over operation of the B&B and Vineyard when it purchased the property.



The B&B comprises two dwellings which contain a total of four (4) units available for rent as follows:

Accommodation	Occupancy
Homestead	12
Byrons Loft	4
Clydesdale	2
Heatherset	2

We have obtained a copy of the listing of all upcoming bookings for the B&B as at the date of our appointment from the manager of the B&B. Attached as **annexure BV-5** is a copy of the bookings listing provided.

According to Jamie McIntyre,⁷ “bookings for the Bed and Breakfast.....are at record highs.” We note however that there were only ten (10) upcoming bookings recorded (including future bookings for 2016), total booking value of approximately \$5,500, with \$3,495 already having been paid.

In the absence of sufficient income / cash flow to operate the B&B and the costs associated with same, including cleaning and maintenance, we determined that it was uncommercial to continue to operate the business and accordingly we immediately contacted all upcoming guests to cancel the bookings.

Following our appointment, I, Simon Wallace-Smith and a member of our staff attended the property to inspect same. We also met with the contractor who provided maintenance services to Bendigo Vineyard and was responsible for the general upkeep of the Bendigo property. Despite the decision to cease operating the B&B, we elected to continue to engage the services of the contractor to ensure that the property was maintained, particularly with bushfire season approaching.

⁷ Para 78 of affidavit of Jamie McIntyre, sworn on 31 August 2015

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 Bendigo Vineyard.

On 4 November 2015, Dennis McIntyre provided our office with a completed Report as to the Affairs of the Company ("RATA"). We lodged same with ASIC on 5 November 2015.

A summary of the Bendigo Vineyard balance sheet from the Xero accounts, 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 BV-6** and **BV-7**, respectively.

Category	Provisional Liquidators' ERV (\$)	RATA (\$)	Management Accounts (Xero) (\$)
ASSETS			
<u>Current Assets</u>			
Cash at Bank	24,876	Nil	43,413
Planning and Development Costs	Nil	Nil	2,400
Accounts Receivable	Unknown	463,994	460,990
Related Party Loans	Nil	Nil	1,070,781
	24,876	463,994	1,577,584
<u>Non-Current Assets</u>			
Interest in Land	1,350,000	1,500,000	1,509,596
Bed & Breakfast and Vineyard	Nil	Nil	Nil
	1,350,000	1,500,000	1,509,596
Total Assets	1,374,876	1,963,994	3,087,180
LIABILITIES			
<u>Current Liabilities</u>			
GST	Unknown	Nil	215,708
Accounts Payable	41,799	28,939	14,796
Holding Deposits from Customers	Nil	Nil	15,955
	41,799	28,939	246,459
<u>Non-Current Liabilities</u>			
Secured Creditors	965,000	Nil	980,000
Related Party Loans	20,085	Nil	20,085
Contingent Liability - Investors	3,057,480	Nil	Nil
Other	Nil	Nil	66
	4,042,565	Nil	1,000,151
Total Liabilities	4,084,364	28,939	1,246,610
Net Surplus / (Deficiency) (Before costs of the provisional liquidation)	(\$2,709,488)	\$1,935,055	\$1,840,570

2.1 Current Assets

2.1.1 Cash at Bank

We note that the Xero accounts record cash at bank in the amount of \$43,413.

Our investigations have revealed that Bendigo Vineyard operated the following accounts at the date of our appointment:

Bank	Account Type	Balance (\$)
NAB	Business Transaction Account	21,013
Westpac	Transaction Account	3,862
Westpac	Cash Reserve Account	1
Total		<u>\$24,876</u>

We note that the Xero accounts do not appear to have been reconciled since 31 July 2015 and accordingly there is a discrepancy between the balance contained therein and the balance as advised by NAB at the date of our appointment.

Following our appointment, we placed a freeze on the above accounts and have taken control of the credit funds held in the Westpac accounts.

We note that Bendigo Vineyard also holds a loan account with the NAB. Following our appointment, the NAB deducted repayments of principal and interest due under the loan from the Business Transaction Account in the amount of \$8,954. We note that NAB does not hold an All PAAP over the assets of the Company and accordingly we have sought advice regarding NAB's ability to deduct these repayments. In the meantime, NAB has now released the balance of the account in the amount of \$11,898 to our Provisional Liquidators' account.

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 (planning consultant) in relation to the Bendigo property in the amount of \$2,400. We consider that Bendigo Vineyard would be able to add these costs to the cost base of the Bendigo property. This does not however alter the asset position.

2.1.3 Accounts Receivable

The Xero accounts record an amount of \$460,990 owed to Bendigo Vineyard by way of outstanding land option fees 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 satisfied by Bendigo Vineyard.

We consider it unlikely that these amounts are recoverable.

The Xero accounts also record an amount owed to Bendigo Vineyard by Media Holdings in the amount of \$1,390. This debt appears to relate to a holding deposit paid by an investor and a booking fee for a guest at the B&B which was paid to Media Holdings instead of Bendigo Vineyard. We cannot confirm whether Media Holdings is able to repay this debt.

We note that Dennis McIntyre was a previous director of Media Holdings. The current directors are Swarit Verma, the former CFO of the 21st Century Property group and Troy McIntyre, Dennis' brother.

The Xero accounts also record a negative liability to PT in the amount of \$1,069,291. We note that a negative liability is in fact an asset and accordingly this amount has been improperly classified.⁸ We have reclassified this in the above table.

Xero indicates that this amount relates to unsecured loans made to PT by Bendigo Vineyard and / or amounts paid by Bendigo Vineyard investors directly to PT.

We were appointed Provisional Liquidators of PT on 7 October 2015. We note that PT has a net asset position of \$2.7m, with its major asset being a loan payable by Pinnacle in the amount of \$4m. 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 2015⁹ and a net loss for the financial year ended 30 June 2015 of over \$2.4m. Accordingly, we do not consider the debt owed by PT to be collectible.

2.2 Non-Current Assets

2.2.1 Interest in Land

The Xero accounts and the RATA provided by Dennis McIntyre record the only non-current asset of Bendigo Vineyard as its interest in the Bendigo property with a value of \$1,509,596.

A search of the records maintained by the Victorian Registrar of Titles revealed that Bendigo Vineyard was the registered proprietor of the Bendigo property at the date of our appointment, having become the registered proprietor of the Bendigo Property on 30 January 2015.

Our investigations have revealed that Bendigo Vineyard entered into a contract for the purchase of the property in June 2014 for \$1.5m with settlement occurring in December 2014. The Bendigo property is subject to a mortgage held with NAB. The mortgage is discussed in further detail below. Attached as **annexure BV-8** is a copy of the contract of sale.

Following our appointment, we instructed Countrywide Valuers ("Countrywide"), registered valuers in Bendigo to provide us with a sworn valuation for the property. Countrywide have advised that the property has a current market value of \$1.35m. Attached as **annexure BV-9** is a copy of the valuation.

Countrywide have advised the following in relation to the Bendigo property:

- The Bendigo property comprises 65.09 hectares of land located in Maiden Gully, 7.5 kilometres west of the Bendigo Central Business District)
 - 32.5 hectares of the land comprises timberland;
 - 3.3 hectares comprises shiraz vines;
- It is currently zoned "farming" and unlikely to be rezoned as residential by the City of Greater Bendigo in the foreseeable future;
- There are 4 dams and a bore on the property (suitable for garden usage);
- It is subject to the following overlays:

⁸ This classification does not alter the net asset position.

⁹ Balance sheet as at 30 June 2015 shows a date stamp as being printed on 12 June 2015

- Bushfire Management;
 - Environmental Significance – Schedules 1 and 2;
 - Heritage; and
 - Vegetation protection
- Minimum lot subdivision under current zoning for the erection of a dwelling without a planning permit is 40 hectares;
 - A portion of the property is subject to flooding; and
 - Property is designated a bushfire prone area and special bushfire construction requirements apply.

2.2.2 Bed & Breakfast and Vineyard

As outlined above, approximately 3.3 hectares of the Bendigo property comprises vines, both Shiraz and Cabernet Sauvignon, for production and sale. We note that the vines have recently been pruned.

According to Country Wide, the Vineyard appears to require significant expenditure by way of upgrade works.

Following our appointment, we contacted Vintage Services Australia, the winemaker engaged by Bendigo Vineyard to produce wine for sale. We have been advised that there is approximately 2,000 litres of wine currently being stored by him in barrels on behalf of Bendigo Vineyard, which needs to remain in barrels until June 2016. If this wine is sold as bulk wine, it may realise between \$1.50 and \$3.00 per litre.¹⁰ We have been unable to confirm at this stage the costs involved in preparing the wine for sale.

As outlined above, at the date of our appointment there were only ten (10) upcoming bookings at the B&B, total booking value of approximately \$5,500, with \$3,495 already having been paid. We have cancelled these bookings.

We note that Country Wide have advised the following in relation to the B&B and Vineyard:

- The B&B is not considered to significantly add to the overall value of the property; and
- The vineyard appears to require significant expenditure by way of upgrade works.

¹⁰ Midpoint ERV of \$4,500 (range \$3,000 to \$6,000)

2.3 Current Liabilities

The RATA and Xero accounts record total current liabilities of \$28,937 and \$230,504, respectively, as follows:

	RATA (\$)	Xero (\$)
Accounts Payable		
Bendigo Floor & Home Centre Pty Ltd	1,825	1,825
BNJ Cleaning Service Pty Ltd	655	655
Dodo	99	99
Joshua Routh	9,510	9,510
Devendra Menon	2,052	2,052
Spa City	14,796	653
	<u>28,937</u>	<u>14,796</u>
GST	Nil	215,708
Total	<u>\$28,937</u>	<u>\$230,504</u>

The ATO has advised that Bendigo Vineyard is not currently registered for GST and accordingly there is no debt recorded as being owed. We note that Bendigo Vineyard 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. 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. Further, we note that the purchase of the Bendigo property may have included GST to the vendor. Bendigo Vineyard 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 purchase of the Bendigo property. We note however that this would likely still result in a GST liability to the ATO.

Our investigations have also revealed that Bendigo Vineyard is indebted to Fruit Picking Contractors Vic Pty Ltd for \$7,084 in relation to pruning of the vines at the Vineyard in September 2015.

In addition, we have also been advised by the Council that rates for the 2015 / 2016 financial years in the amount of \$5,778 are payable in relation to the Bendigo property by 15 February 2016.

2.4 Non-Current Liabilities

2.4.1 Secured Creditor

The NAB holds a first registered mortgage over the Bendigo property. At the date of our appointment, NAB was owed \$970,000 pursuant to its mortgage. We also note, as outlined above, that following our appointment, NAB applied \$5,000 from the credit funds held in the Bendigo Vineyard account against repayment of the principal loan balance. Accordingly, there is currently \$965,000 owing pursuant to the mortgage.

In addition to the NAB mortgage, we have identified payments made by PT directly to the conveyancer in relation to deposit monies totalling \$75,000. We consider that PT may have a constructive trust claim to these funds as they were directly used for the purchase of the Bendigo property and as such would be entitled to make a claim to any surplus proceeds of sale. Further investigations would need to be conducted in relation to same.

2.4.2 Related party creditors

The Xero accounts record a liability to Pinnacle in the amount of \$20,085. This relates to unsecured loans made between the respective entities between June 2014 and June 2015.

2.4.3 Investors / Holding Deposits

The Xero accounts record a liability to investors in the amount of \$15,955 in relation to holding deposits paid by investors for the Bendigo property.

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

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.

Further investigations are needed to determine whether they are contingent creditors.

2.4.4 Contingent liabilities

We have identified 87 investors in Bendigo Vineyard who invested a total of \$3,057,480. Clauses 6 and 3 of the respective LRAs discussed above provide that the LRA would continue for a period of at least 20 years, unless terminated earlier by agreement or by the developer, being Bendigo Vineyard.

We note that we have identified two versions of the LRAs which provide investors with differing rights with regards to their investment and potential refunds of lot reservation fees paid.

Clause 19.1 of both LRAs however provide investors with an equitable charging right over its interest in the lot reserved and the assets and goodwill of Bendigo Vineyard 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 Bendigo Vineyard.

An event of default has occurred by the application to wind up Bendigo Vineyard 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 scheme¹¹. Presently there are no registered security interests or caveats registered by investors.

Following our appointment, we requested a copy of all LRA's signed by investors to reserve a lot in the Bendigo property from Dennis McIntyre. Dennis subsequently provided our office with a USB of all the documentation in his possession which did not include any signed LRAs for the Bendigo Scheme.

Dennis McIntyre has advised that he does not have any further documentation or LRAs. 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. We note that we have copies of executed LRAs in relation to 84 of the 120 lots sold. Further investigations would need to be conducted in relation to the whereabouts of all LRA's.

According to clause 6 of this LRA which was annexed to the affidavit of Andrew James Price¹² as annexure "AJPX-90":

- Bendigo Vineyard 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;

¹¹ s601EE of the Act.

¹² The Affidavit of Andrew James Price, sworn on 3 August 2015

- 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.”¹³



The LRA required Bendigo Vineyard to ‘use its best efforts and do all acts necessary and execute all documentation required to obtain development approval’.¹⁴ Investors however were not afforded any rights in the event that Bendigo Vineyard breached the terms of, or did not fulfil its obligations under the LRA in this regard other than an event of default.¹⁵

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.

In accordance with clause 6.2, investors would only be entitled to a refund of their reservation fee in the event that Bendigo Vineyard elected to terminate the LRA. Given that Bendigo Vineyard 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 Bendigo Vineyard would elect to terminate the agreement in accordance with clause 6.2. **The LRA appears to have essentially provided Bendigo Vineyard with the ability to raise funds by way of lot reservation fees, potentially do nothing for a period of 25 years and have no obligation to refund any remaining amounts to investors who did not successfully make a claim for a refund within the requisite 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 purchase.¹⁶ However, the LRA can only be categorised as a restriction on Bendigo Vineyard’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 title.¹⁷ 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.

We have also located a copy of the LRA signed by one of the investors in the Bendigo Scheme, [REDACTED] which was executed on 15 August 2014. This LRA is attached as **annexure BV-10**. We note that according to the termination clause of this LRA (clause 3), the agreement would automatically terminate in the event that development approval was not obtained within 20 years.

We also note that this LRA has extended the definition of “project expenses” which the developer is able to incur and claim to include “fees and commissions payable.....in advertising promoting and

¹³ Clause 6.1(c) of the Bendigo Vineyard Estate Lot Reservation Agreement

¹⁴ Clause 3.4 of the Bendigo Vineyard Estate Lot Reservation Agreement

¹⁵ Clause 19 of the Bendigo Vineyard Estate Lot Reservation Agreement

¹⁶ Section 2 of the *Sale of Land Act (Vic) 1962*

¹⁷ *Transfer of Land Act (Vic) 1958*

preparing aids, brochures and plans to assist in the arranging of the sale of the property.”¹⁸ We note that this would arguably capture the amounts payable to PT by way of commission however the LRA and / or any other marketing material in relation to the Bendigo Scheme failed to disclose any percentage that had purportedly been agreed to be paid between the respective parties.

The application made by ASIC in the Proceeding, is an event of default by Bendigo Vineyard of the LRA and accordingly investors may have charging rights over the assets and goodwill of Bendigo Vineyard 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 scheme.¹⁹

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 Bendigo Scheme was an unregistered managed investment scheme. If a declaration is made then the LRA may be voidable²⁰ at the option of the investor. If this was to occur, investors would be entitled to claim a refund of the \$3,057,480 invested.

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

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 Bendigo Vineyard Xero accounts, the Company had a positive net asset position as at the date of our appointment and the financial years ended 30 June 2014 and 2015 respectively.

¹⁸ Clauses 1 and 2.3(b) of the LRA signed by [REDACTED]

¹⁹ s601EE of the Act.

²⁰ S601MB of the Act

	7 October 2015 ²¹	30 June 2015	30 June 2014
	(\$)	(\$)	(\$)
Total Current Assets	1,577,584	1,606,740	59,000
Total Non-current Assets	1,509,596	1,509,596	1,500,000
Total Assets	3,087,179	3,116,336	1,559,000
Total Current Liabilities	246,525	253,460	1,432,364
Total Non-Current Liabilities	1,000,085	1,005,085	73,000
Total Liabilities	1,246,610	1,258,545	1,505,364
Net Assets	\$1,840,569	\$1,857,791	\$53,636

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

- Current assets have increased since 30 June 2014. As outlined above, these current assets represent lot reservation fees recorded as being owed to Bendigo Vineyard from investors. We do not consider that these amounts are collectible;
- Current assets comprise predominately of amounts owed by PT (\$1.069m in FY 15 and \$976,804 in FY14). As outlined above, the amount owing by PT is not collectible;
- Current assets also comprise amounts recorded as being owed by investors in relation to lot reservation fees. As outlined above, we do not consider these amounts to be collectible;
- Total non-current assets are solely made up of the Bendigo Property. This has been recorded at cost, plus expenses associated with purchase and settlement. As outlined above, following our appointment we obtained an independent sworn valuation of the property which indicated that the property was worth \$1.35m;
- Total non-current liabilities as at 7 October 2015 comprise the NAB mortgage in the amount of \$980,000. We note that the non-current liability figure is understated as the accounts include the debt owed by PT in the amount of c\$1.069 as a negative liability; and
- We consider that liabilities should also comprise amounts owed by investors in relation to lot reservation fees. We consider that the total amount raised / paid by investors is a contingent liability of Bendigo Vineyard.

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	24,876
Total Non-current Assets	1,350,000
Total Assets	1,374,876
Total Current Liabilities	41,799
Total Non-Current Liabilities	4,057,565
Total Liabilities	4,099,364
Net Assets	(\$2,724,488)

²¹ 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.

The profit and loss recorded in Xero is set out in the table below. We note that as Bendigo Vineyard was only incorporated in June 2014 we have conducted a quarterly analysis of same. We further note that 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 BV-11**.

	Qtr Ended 30 September 2015 (\$)	Qtr Ended 30 June 2015 (\$)	Qtr Ended 31 March 2015 (\$)	Qtr Ended 31 December 2014 (\$)	Qtr Ended 31 September 2014 (\$)
Income					
Bed and Breakfast Income	8,834	10,418	5,396	1,027	-
Interest Income	1	58	171	1	-
Land Option Fee	-	(428,063)	363,673	1,012,477	1,276,009
Other Revenue	-	-	156	-	-
Total Income	8,834	(417,587)	369,396	1,013,506	1,276,009
Less Cost of Sales					
Booking Charges - Bed and Breakfast	60	68	65	103	-
Commission - Property Sales Consultant	11,373	21,340	64,620	113,017	119,939
Land at Cost (Inventory)	-	-	-	-	-
Purchases	-	-	-	-	-
Gross Profit	(2,598)	(438,995)	304,711	900,386	1,156,070
Less Operating Expenses					
Bank Fees	190	357	488	26	9
Cleaning	596	88	-	-	-
Consulting & Accounting	-	-	2,300	-	120
Director Fee	-	3,000	3,000	3,000	3,000
General Expenses	(1)	5,567	-	-	-
Interest Expense	8,291	8,566	14,343	-	-
Legal expenses	-	243	-	-	-
Marketing Fees	-	45,049	-	-	-
Motor Vehicle Expenses	-	99	-	-	-
Office Expenses	2,617	1,680	-	-	-
Printing & Stationery	-	-	-	175	-
Repairs and Maintenance	2,491	15,596	10,019	-	-
Subscriptions	-	149	-	-	-
Telephone & Internet	91	57	87	-	-
Water Charges	430	-	-	-	-
Total Operating Expenses	14,705	80,452	30,236	3,201	3,129
Net Profit	(\$17,303)	(\$519,447)	\$274,475	\$897,185	\$1,152,941

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

- Bendigo Vineyard commenced operating the B&B in December 2014 following settlement of the sale of the property. The average quarterly income has been approximately \$8,200 (\$2,700 per month). We note, as outlined above, the monthly interest on the NAB loan is approximately \$4,000 per month and the principal repayments are \$5,000. Accordingly, the income generated from the B&B at present only covers approximately 67% of the monthly interest costs;
- The land option fee income relates to lot reservation fees paid by investors for the Bendigo property. We note that the negative income figure for the quarter ended 30 June 2015 is a

result of manual journal in the amount of \$888,458, representing the 50% commission purportedly payable to PT, being recorded against the income account; and

The lot reservation fees paid by investors have been recorded as income of Bendigo Vineyard. We consider that a contingent liability account should have also been created to record the liability to repay these amounts to investors in the event that development approval was not obtained or the LRAs terminated.

We consider that Bendigo Vineyard is insolvent from a cash flow perspective for the following reasons:

- At the date of our appointment, it had cash at bank of \$24,876;
- The cash flow being generated by the B&B was insufficient to satisfy the interest let alone principal on the NAB loan;
- It made significant loans to related parties which are not collectible;
- There are insufficient cash flows to satisfy any operating expenses of the B&B, including cleaning and maintenance;
- There are insufficient cash flows to satisfy other expenses such as council rates and utilities; and
- We do not consider that Bendigo Vineyard would have the ability to raise further capital against the Bendigo property as borrowings were currently secured against over 70% of the property.

We also consider that Bendigo Vineyard was insolvent from a balance sheet perspective, as its only realisable asset is its interest in land with a value of \$1.35m. The value of which is far exceeded by the prospective liability to investors in relation to refunds for lot reservation fees paid being \$3,057,480.

4. Likely return to creditors

As outlined above, the estimated equity in the Bendigo property, subject to selling costs is \$385,000.

As outlined above, we have identified payments made by PT directly to the conveyancer in relation to deposit monies totalling \$75,000. We consider that PT may have a constructive trust claim to these funds and as such would be entitled to make a claim to any surplus proceeds of sale.

We consider that Bendigo Vineyard's prospective liability to investors is approximately \$3,057,480. Furthermore, as outlined above, there is likely to be a debt owing to the ATO.

We consider that there may be a small return to creditors of Bendigo Vineyard, subject to the costs of the provisional and official liquidation (if applicable), 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 Bendigo Vineyard 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 Bendigo property and requested details of their investment;
- Obtain proofs of debt from each creditor; 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.

As outlined in the Summary Report, from an examination of the books and records we have obtained it appears that there has been a failure to maintain proper books and records.

Whilst there were financial statements prepared and found amongst Bendigo Vineyard'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

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 and / or received by PT from Bendigo Vineyard investors 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, including Bendigo Vineyard. Further, we consider that the payment of 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;
- 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;
- We have also identified significant commission payments being made to sales staff from the Bendigo Vineyard account. This appears to be over and above any commission paid to PT; 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 communicated to prospective investors. In this regard, we comment as follows:

- The LRA's do not include reference to any existing obligation to pay to PT a 50% commission;
- Questions 10 and 19 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:

10. 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.

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

21st Century Property gains a membership fee for providing education on advanced property strategies and for acting as a facilitator between the developer and sophisticated investors. 21st Century Property also offers the service of connecting potential option holders with developers, including development projects of associated companies.

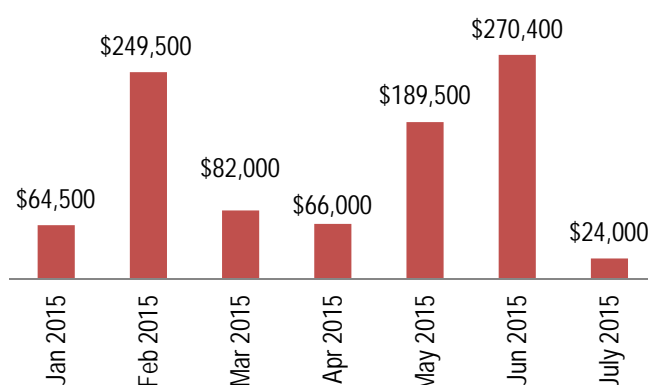
Furthermore, our investigations have revealed that amounts, well in excess of 50% of lot reservation fees paid by investors were transferred to PT. In some instances, the entire amount paid by investors was transferred to PT in the days following the receipt.

We note that Bendigo Vineyard raised \$3,057,480 from investors in the Bendigo property.

An analysis of the Bendigo Vineyard Westpac bank accounts for the period June 2014 to the date of our appointment, being 7 October 2015, reveals net amounts totalling \$1,993,775 were paid to PT, as follows:

	Amount (\$)
Payments to PT	2,474,775
Receipts from PT	(481,000)
	<u>\$1,993,775</u>

This analysis indicates, that \$945,900 of the net amounts paid to PT, were paid between the period 1 January 2015 and 6 July 2015. The largest amount paid in June 2015.



Jamie McIntyre advised during his interview on 20 October 2015 that he was unsure whether there was any loan agreement between Bendigo Vineyard and PT and we note that we have not located any such loan agreements. Accordingly, these loans were both unsecured and not pursuant to any document and / or agreement setting out the terms of the loan/s and / or the obligation to repay.

As outlined above, at the date of appointment the Xero accounts record an amount owed to Bendigo Vineyard by PT in the amount of \$1.069m. A review of the Bendigo Vineyard accounts reveals that net amounts totalling \$1.99m were transferred to PT, pursuant to the purported commission agreement or otherwise.

We note that ASIC was provided with the Bendigo Vineyard balance sheet as at 30 June 2015²² (noted as being printed on 25 May 2015). A copy of this balance sheet is attached as **annexure BV-12**.

This balance sheet indicates that as at 25 May 2015, Bendigo Vineyard had cash at bank in the amount of \$216,197. A review of the Westpac bank statement for the Bendigo Vineyard account confirms this balance. We note that between the provision of this balance sheet to ASIC and the date of our appointment, net amounts totalling \$386,400 were transferred to PT from the Bendigo Vineyard Westpac bank account with the narration “Loan to Property.” During this same period, further amounts totalling approximately \$366,000 were paid by investors.

Our investigations have also revealed that payments of commissions for sales staff were being made directly from the Bendigo Vineyard bank account in addition to the amounts paid to PT. We have identified amounts totalling \$225,174 by way of commission from the Bendigo Vineyard account, with \$196,857 being paid to Warren Stokes, a sales consultant involved in promoting the Schemes on behalf of PT.

²² Annexure “AJPX-96” to the Affidavit of Andrew James Price, sworn on 3 August 2015

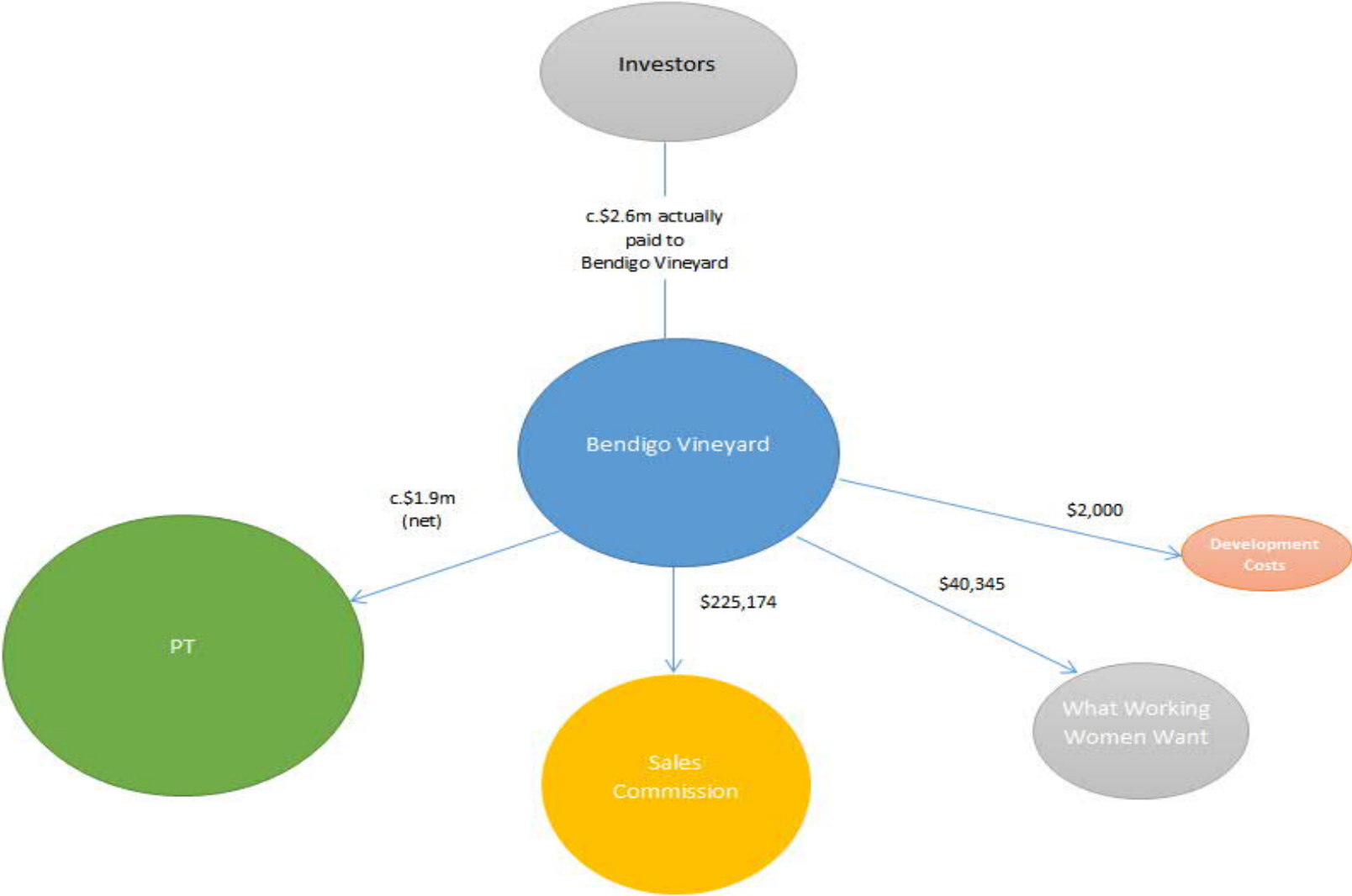
Furthermore, we have also identified a payment of \$40,345 made to ‘What Working Women Want’ (“www”) We note that during the interview with the General Manager of the 21st Century Property group, Fabianne Kiely, she advised that www is her business.

We note that these payments are in addition to the amounts paid, or recorded as commission to PT pursuant to any purported commission agreement between Bendigo Vineyard and PT.

We consider these payments to PT to be uncommercial for the following reasons:

- PT did not have the ability to repay these amounts. PT has a net asset position of \$2.7m, with its major asset being a loan payable by Pinnacle in the amount of \$4m. As outlined above, Pinnacle is unable to repay this debt;
- Dennis McIntyre, as director of Bendigo Vineyard and PT (and Pinnacle), ought to have known that PT did not have the ability to repay these amounts;
- PT obtained significant benefit from the transactions, in circumstances where it was unable to repay any amounts received from Bendigo Vineyard by way of loans; and
- There was no benefit to Bendigo Vineyard by virtue of the transactions.

A summary of the movements in the Bendigo Vineyard 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 Bendigo Vineyard within the definition of section 9 of the 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

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

We consider that by authorising payments to be made from the Bendigo Vineyard account to PT, the Directors failed to act in good faith and in the best interests of Bendigo Vineyard. These transfers were not in the best interest of Bendigo Vineyard and resulted in the company having insufficient cash to meet ongoing expenses including loan repayments and general operating expenses of the B&B. 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.

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 Bendigo Vineyard;
- failing to act for a proper purpose and making improper use of their respective positions as Directors of Bendigo Vineyard;
- improper use of confidential information of Bendigo Vineyard 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 between Bendigo Vineyard and PT; and
- authorising the loan of funds of Bendigo Vineyard 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:*

- 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);*
- 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);*
- 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 Bendigo 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 Bendigo Vineyard.

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 Bendigo property was obtained.

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

The development of the Bendigo property was to be controlled entirely by Bendigo Vineyard to which a total of 87 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 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 (in fact 120 lots were sold); 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 Bendigo Vineyard 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 Bendigo 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 Bendigo 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 Bendigo Scheme and appoint the Provisional Liquidators as liquidators, further investigations will be required to investigate whether:

1. Bendigo Vineyard 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 Bendigo Scheme may have contravened section 1012B of the Act; and
3. Bendigo Vineyard and any other person(s), either alone or together, carried out the Bendigo 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.

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

7. Provisional Liquidators' Recommendation

Given the nature of the breaches identified and the financial position of Bendigo Vineyard, we recommend that Bendigo Vineyard 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.

8. Bendigo Vineyard Estate Scheme (“Bendigo Scheme”)

8.1 Scheme Property

The Bendigo Scheme relates to the property at 51 St Andrews Road, Maiden Gully. As outlined above, Bendigo Vineyard is the sole registered proprietor of the Bendigo property. We note that we have not seen any documentation or been provided with any information which would suggest that Bendigo Vineyard does not own the Bendigo 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 Bendigo Scheme.

8.2 Third party claims against Scheme property

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

8.3 Investors

The affidavit of Andrew James Price, indicates that as at 31 March 2015, 66 investors had invested amounts totalling \$2,959,241²⁸. We note that this information was provided to ASIC by Jamie McIntyre.

We have identified 87 investors who paid amounts totalling \$3,057,480 to Bendigo Vineyard.

In the absence of a declaration that the Bendigo Scheme is an unregistered managed investment scheme, we consider that these investors may have rights as contingent creditors. As outlined above, further investigations would need to be conducted in relation to same before determination regarding their claims can be made. At this stage, we have classified these investors as contingent liabilities to the extent of the funds paid to reserve a lot on the Bendigo property.

8.4 Scheme liabilities

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

8.5 Solvency of the Schemes

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

8.6 Realisation of scheme property

Bendigo Vineyard is the registered proprietor of the Bendigo 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 Bendigo Scheme. As contingent creditors of Bendigo Vineyard however by virtue of the LRA, investors would be entitled to share equally in the surplus proceeds from the sale of the Bendigo property. They would also be entitled to participate in any dividend payable to creditors of Bendigo Vineyard 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 114 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 of the Originating Process that the Bendigo Scheme is an unregistered managed investment scheme,²⁹ orders should be sought from the Court appointing the Provisional Liquidators as liquidators of the Bendigo Scheme or such other orders as the Court considers appropriate for the winding up of the Bendigo Scheme.

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

²⁹ s601EE of the Act

Annexures

Document No.	Description of Document
1	Historical company extract as at 7 October 2015
2	Certificate of Title for the Bendigo property
3	Marketing and due diligence kit for the Vineyard Estate & Resort
4	Investor list
5	Bed & Breakfast bookings register as at 7 October 2015
6	Comparative balance sheet as extracted from Xero
7	Report as to Affairs of Dennis McIntyre dated 3 November 2015
8	Contract of sale between [REDACTED] and Bendigo Vineyard dated 13 June 2014
9	Valuation report by Countrywide Valuers dated 30 October 2015
10	Executed lot reservation agreement of [REDACTED] dated 15 August 2014
11	Comparative profit and loss as extracted from Xero
12	Balance sheet as at 30 June 2015 of Bendigo Vineyard provided to ASIC