

**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

Seventh Respondent's Report

**Melbourne Tarniet Estate Pty Ltd
(Provisional Liquidators' Appointed)
15 December 2015**



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Contents

Definitions	2
Melbourne Tarniet Estate Pty Ltd	4
1. Company Background	4
2. Assets and Liabilities	6
3. Opinion as to Solvency	11
4. Likely return to creditors	12
5. Other information necessary to enable the Company's financial position to be assessed	12
6. Suspected contraventions of the Act	13
7. Provisional Liquidators' Recommendation	16
8. Melbourne Grove Estate Scheme ("MGE Scheme")	17
Annexures	19

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

Melbourne Tarniet Estate Pty Ltd

The report should be read in conjunction with the Summary Report.

Tarniet was incorporated on 30 January 2015. Dennis Hugh McIntyre is the sole Director and Secretary of Tarniet. The sole shareholder of Tarniet is Jamie Neville McIntyre.

Tarniet's principal place of business and registered office at the date of our appointment was Level 8, 96 – 100 Albert Road, South Melbourne, Victoria.

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

1. Company Background

Tarniet was incorporated to purchase and develop a property at 1491 Dohertys Road, Mt Cottrell, Victoria ("Mt Cottrell property"). The development was referred to as Melbourne Grove Estate.

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

1.1 Sale of lots in the Mt Cottrell property

In or around March 2015, PT, on behalf of Tarniet commenced promotion of the sale of lots in the Mt Cottrell property.

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

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

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

According to the marketing material issued by PT, 3-5 year options would be issued for lots in the proposed development, with stage 1 to comprise 10 acres and 60 lots.

Investors were offered the opportunity to reserve a lot on the concept plan of Melbourne Grove Estate by payment of a lot 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 Mt Cottrell property was obtained.

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 signed a Lot Reservation Agreement (“LRA”) to secure their lot. The LRA was an agreement between Tarniet (as the development company) and respective investors. The LRA provided Tarniet with a 15 year period with which to obtain approval to develop the property.

On 20 October 2015, we were provided with a client list from Carlton Ross on behalf of Swarit Verma, the CFO of Tarniet and the 21st Century Property group. This list indicates that Tarniet sold a total of 3 lots to 3 investors and received \$127,000 by way of lot reservation fees. Our investigations confirm this.

A list of the identified investors is attached as **annexure MT-3**.

We note that at the time of marketing and selling these lots, Tarniet did not own the Mt Cottrell property. This is discussed in further detail below.

According to Dennis and Jamie McIntyre, in consideration for promoting sales of lots in MGE on behalf of Tarniet, 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.”² 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.³ 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. Further, we consider the payment of a 50% commission to be excessive and unreasonable in the circumstances. This is discussed in further detail below.

Our investigations indicate that the purported obligation to pay a 50% commission was not disclosed to investors in any of the due diligence or marketing material provided to them by PT or Tarniet with respect to the MGE Scheme.

In addition to Tarniet receiving lot reservation income of \$127,000, we make the following observations:

- In order to fund the deposit for the Mt Cottrell property, Tarniet also received a loan from PT in the amount of \$101,700;
- At the date of our appointment, Tarniet had cash at bank of only \$2,478; and
- Amounts totalling \$25,508 were transferred from Tarniet to PT.

² Para 23 of affidavit of Jamie McIntyre, sworn on 31 August 2015

³ 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 Tarniet.

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

A summary of the RATA and the Xero accounts is provided below together with our 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 MT-5**.

Category	Provisional Liquidators' ERV (\$)	RATA (\$)	Management Accounts (Xero) (\$)
ASSETS			
<u>Current Assets</u>			
Cash at Bank	2,478	Nil	2,478
Planning & Development Costs	Nil	Nil	1,500
Pre-Payments - Land Deposits	Nil	Nil	170,000
	2,478	Nil	173,978
<u>Non-Current Assets</u>			
Related Party Loans	Nil	Nil	Nil
	Nil	Nil	Nil
Total Assets	2,478	Nil	173,978
LIABILITIES			
<u>Current Liabilities</u>			
GST	Unknown	Nil	8,668
Accounts Payable	Unknown	Nil	Nil
Holding Deposits from Customers	Nil	Nil	1,500
	Unknown	Nil	\$10,168
<u>Non-Current Liabilities</u>			
Related Party Loans	76,192	Nil	79,967
Investors / Contingent Liability	127,000	Nil	Nil
	203,192	Nil	79,967
Total Liabilities	203,192	Nil	90,135
Net Surplus / (Deficiency) (Before costs of the provisional liquidation)	(\$200,714)	Nil	\$83,843

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	2,478
Westpac	Cash Reserve Account	0
Total		\$2,478

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

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) to the value of \$1,500. This relates to the Mt Cottrell property which is discussed in further detail below.

We note that as Tarniet is not the registered owner of the Mt Cottrell property, it will be unable to add these costs to the cost base and accordingly these costs will not be recouped by Tarniet.

2.1.3 Pre-Payments – Deposits for Land

The Tarniet Xero accounts record a current asset by way of pre-payments for deposits for land in the amount of \$170,000. This relates to deposits paid by Tarniet for the purchase of the Mt Cottrell property.

In March 2015, Tarniet entered into a contract for the purchase of the Mt Cottrell property for \$1,750,000, with settlement due 27 months after the date of sale, being June 2017. A copy of the contract of sale is attached as **annexure MT-6**.

Pursuant to the contact of sale, Tarniet paid \$170,000 by way of deposit, as follows:

Bank	Amount Paid (\$)
5/03/2015	100,000
16/07/2015	70,000
Total	\$170,000

These amounts were paid from the Tarniet bank account. Our investigations have revealed however that on the same day of the payment of the \$100,000, PT transferred an amount of \$100,000 to Tarniet. At the time of the transfer there was no recorded loan in the Tarniet Xero accounts between Tarniet and PT.

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 amount of \$170,000 has been received and released to the vendor in accordance with general condition 12 of the contract of sale. Further, we have also been advised that Tarniet is not yet in default of its obligations under the contract, but will be if a further payment of \$100,000 is not paid on 12 February 2016, resulting in a Default Rescission Notice being issued at that time.

We note that in accordance with Clause 28.4 of the contract of sale, the purchaser forfeits any deposit paid of up to 10% of the purchase price if the purchaser is in default under the contract and the vendor serves the appropriate default notices. The contract of sale states that the vendor may retain any part of the price paid until the vendor's damages have been determined and may apply that

money towards those damages. In the event that the property is sold and a higher price payable to the vendor, further investigations will be required to determine the treatment of the sale proceeds. We note that if Tarniet is wound up, it will not be in a position to complete the contract of sale and accordingly the deposit monies will likely be forfeited.

If the deposit monies are refunded however further investigation will need to be conducted to determine whether PT might have a constructive trust claim in relation to \$100,000 advanced.

2.2 Current Liabilities

The Xero accounts record total current liabilities of \$10,168 comprising GST payable and holding deposits from customers.

2.2.1 GST

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

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

We note that Tarniet 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 Mt Cottrell property may have included GST to the vendor. Tarniet 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 \$1,500 relates to deposits paid by two investors in relation to securing a lot in the Mt Cottrell 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.

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.

2.3 Contingent Liabilities

As outlined above, we have identified 3 investors in Tarniet who invested amounts totalling \$127,000. We note that we have located only one (1) executed LRA for Tarniet.

Clause 6 of this LRAs provides that the LRA would continue for a period of at least 20 years, unless terminated earlier by agreement, by the developer, being Tarniet or otherwise in accordance with the LRA. We note however that clause 6.1(c) the LRA provided that it would automatically terminate after a period of 15 years if development approval was not obtained. There appears to be some

inconsistency in the LRA. On the basis of clause 6.1(c) we consider that LRA would in fact terminate after a period of 15 years not 20 years.

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

An event of default has occurred by the application to wind up Tarniet 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 scheme⁴. Presently there are no registered security interests or caveats registered by investors as Tarniet is not the owner of the Mt Cottrell property.

Following our appointment, we requested a copy of all LRA's signed by investors to reserve a lot in the Mt Cottrell from Dennis McIntyre. Dennis subsequently provided our office with a USB of all the documentation in his possession which included one (1) signed LRA for MGE. Dennis McIntyre has advised that he does not have any further documentation or LRAs.

We note that we have located one (1) further LRA in the Tarniet books and records however this LRA has not been executed.

The executed Tarniet LRA is attached as **annexure MT-7**.

According to the terms of the LRA:

- Tarniet would have a period of 15 years to obtain development approval;
- However, if approval was not obtained following the expiry of the 10 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; and
- 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”⁵



The LRA required Tarniet to ‘use its best efforts and do all acts necessary and execute all documentation required to obtain development approval’.⁶ Investors however were not afforded any rights in the event that Tarniet 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.

⁴ s601EE of the Act.

⁵ Clause 6.1(c) of the Melbourne Grove Estate Lot Reservation Agreement

⁶ Clause 3.4 of the Melbourne Grove Estate Lot Reservation Agreement

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 Tarniet elected to terminate the LRA. Given that Tarniet had a period of 10 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 Tarniet would elect to terminate the agreement in accordance with clause 6.2. **The LRA appears to have provided Tarniet with the ability to raise funds by way of reservation fees, potentially do nothing for a period of 15 years and have no obligation to refund any remaining amounts to investors.**

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 purchase⁷. However, the LRA can only be categorised as a restriction on Tarniet'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 title⁸. 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.

The application made by ASIC in the Proceeding, is an event of default by Tarniet of the LRA and accordingly investors may have charging rights over the assets and goodwill of Tarniet 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 scheme⁹.

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 MGE Scheme was an unregistered managed investment scheme. If a declaration is made then the LRA may be voidable¹⁰ at the option of the investor. If this was to occur, investors would be entitled to claim a refund of the \$127,000 invested.

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 PT in the amount of \$79,967. This relates to unsecured loans made between the respective entities between January 2015 and the date of our appointment and includes the transfer of \$100,000 for the deposit on the Mt Cottrell property as outlined above.

Our review of the Westpac bank account maintained by Tarniet indicates that net amounts totalling \$76,192 were received by Tarniet from PT.

A copy of the PT loan account as extracted from Xero is attached as **annexure MT-8**.

⁷ Section 2 of the *Sale of Land Act (Vic)* 1962

⁸ *Transfer of Land Act (Vic)* 1958

⁹ s601EE of the Act.

¹⁰ S601MB of the Act

Dennis McIntyre has advised that there were no loan agreements between the respective companies.

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 Tarniet 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 ¹¹ (\$)	30 June 2015 (\$)
Total Current Assets	173,978	229,525
Total Non-current Assets	Nil	Nil
Total Assets	173,978	229,525
Total Current Liabilities	10,168	12,895
Total Non-Current Liabilities	79,967	105,475
Total Liabilities	90,135	118,370
Net Assets	\$83,843	\$111,155

We note the following in relation to the above Xero accounts:

- Current assets comprise the deposit paid for the purchase of the Mt Cottrell property. We do not consider that this deposit is refundable and accordingly that the current assets are overstated; and
- As outlined above, we consider that there may be a contingent liability of \$127,000 owed to investors by virtue of the payment of their lot reservation fee.

Accordingly, we have restated the balance sheet as at 7 October 2015 as follows:

	7 October 2015 (\$)
Total Current Assets	3,978
Total Non-current Assets	Nil
Total Assets	3,978
Total Current Liabilities	10,168
Total Non-Current Liabilities	203,192
Total Liabilities	213,360
Net Assets (subject to the costs of the provisional liquidation)	(\$209,382)

¹¹We 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 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 Tarniet is insolvent from a cash flow perspective for the following reasons:

- At the date of our appointment, it had cash at bank of only \$2,478; and
- The only cash inflow was income from lot reservation fees paid by investors.

We also consider that Tarniet was insolvent from a balance sheet perspective as its only realisable asset is cash at bank in the amount of \$2,478. 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 \$127,000.

4. Likely return to creditors

We consider it unlikely that there will be any return to any class of creditor in Tarniet.

We note that if Tarniet is wound up, 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 Tarniet 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 Tarniet's affairs.

6. Suspected contraventions of the Act

6.1 Failure to maintain proper books and record

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 Tarniet'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.

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

Although we have not identified any payments being made to PT pursuant to the purported commission agreement we consider that entering into such an agreement, whether written or verbal, to be excessive for the following reasons:

- It does not reflect actual costs incurred by PT in promoting the Schemes;
- Accordingly to both Jamie and Dennis McIntyre, no adjustments were made between the development companies and PT in the event that these costs were less than 50% of the funds raised by the development companies;
- PT undertook promotion activities for all five (5) Schemes and accordingly there were economies of scale as the fixed costs incurred by PT, including marketing, wages and other overheads, would have been spread across the respective Schemes; and
- Accordingly to 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;"¹²
- The LRAs do not include any reference to or disclose any obligation to pay PT a 50% commission. Further, we do not consider that an agreed commission of 50% to fall within the definition of "project expenses" as per the LRA.

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 Tarniet 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 duties as directors. This is discussed in further detail below.

6.3.1 Failure to act in good faith, in the best interests of the Company and 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 Tarniet;
- failure to act for a proper purpose and making improper use their respective positions as director(s) of Tarniet;
- the improper use of confidential information of Tarniet 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 to the interests of Tarniet by entering into the commission agreement between Tarniet and PT.

¹² Clause 1.1 of the Melbourne Grove Estate Lot Reservation Agreement

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;¹³
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;¹⁴ 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.¹⁵

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.¹⁶

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

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 Mt Cottrell property was obtained.

The development of the Mt Cottrell property was to be controlled entirely by Tarniet to which a total of 3 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;

¹³ Section 601ED(1)(a) of the Act

¹⁴ Section 601ED(1)(b) of the Act

¹⁵ Section 601ED(1)(c) and (3) of the Act

¹⁶ 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. We note 60 lots were promoted as being available in stage 1 of the MGE Scheme; 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 a the Court to determine that Tarniet 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 MGE 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 MGE 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 MGE Scheme and appoint the Provisional Liquidators as liquidators, further investigations will be required to investigate whether:

1. Tarniet 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 MGE Scheme may have contravened section 1012B of the Act; and
3. Tarniet and any other person(s), either alone or together, carried out the MGE Scheme for a purpose (that is not incidental) of avoiding the application of any provision of Part 7.7A of the Act.¹⁷

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 Tarniet, we recommend that Tarniet 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.

¹⁷ This would be a breach of section 965 of the Act

8. Melbourne Grove Estate Scheme (“MGE Scheme”)

8.1 Scheme Property

The MGE Scheme relates to the development of the Mt Cottrell property. As outlined above, Tarniet entered into a contract to purchase the property however settlement of same has not occurred. 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 amount of \$170,000 has been received and released to the vendor in accordance with general condition 12 of the contract of sale. Further, we have also been advised that Tarniet is not yet in default of its obligations under the contract, but will be if a further payment of \$100,000 is not paid on 12 February 2016, resulting in a Default Recession Notice being issued at that time.

We note however that we have not seen any documentation or been provided with any information which would suggest that it was intended for Tarniet hold the Mt Cottrell property on trust or otherwise for any other party, including investors.

We do not consider that any property is owned by the MGE Scheme.

8.2 Third party claims against Scheme property

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

8.3 Investors

We note that amounts totalling \$127,000 have been identified as being paid into the Tarniet bank account from investors.

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

8.4 Scheme liabilities

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

8.5 Solvency of the Schemes

We have not identified any assets or liabilities of the MGE 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 MGE Scheme.

8.7 Recovery of money owed to Schemes

Our investigations have not revealed any money owed to the MGE 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 MGE Scheme is an unregistered managed investment scheme,¹⁸ orders should be sought from the Court appointing the Provisional Liquidators as Liquidators of the MGE Scheme.

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

¹⁸ s601EE of the Act

Annexures

Document No.	Description of Document
1	Historical company extract as at 7 October 2015
2	Due diligence kit
3	Investor list
4	Report as to Affairs of Dennis McIntyre dated 4 November 2015
5	Balance sheet extracted from Xero
6	Contract of sale for the Mt Cottrell property between [REDACTED] and MT dated 6 March 2015
7	Executed lot reservation agreement of [REDACTED]
8	PT loan account extracted from Xero