Part IV—Aftermath of failed MIS: winding up schemes, compensation for losses and lessons to be learnt

Agribusiness MIS were complex financial products and the problems due to this complexity became increasing evident as some schemes began to fail and external administrators tried to salvage the businesses and ultimately manage the liquidation process.

In this part of the report, the committee examines the difficulties external administrators faced in endeavouring to rescue a failing scheme. It deals with appointing a replacement responsible entity; the functions, responsibilities, obligations of, and complexities confronting administrators including disentangling the affairs of related entities and reconciling competing interests.

The committee also examines the effects of failed MIS on the environment and on farmers who leased land to such enterprises and, overall, the future for agribusiness MIS in Australia with a particular emphasis on using tax concessions as an incentive to invest.

Chapter 15

Liquidation

15.1 Evidence before this committee has highlighted the complicated task of untangling the interests of the various parties affected when an MIS gets into financial difficulties and ultimately fails. In this regard, it should be noted that in November 2010, the government commissioned a review by the Corporations and Markets Advisory Committee (CAMAC) into the current statutory framework for all MIS. This review was in the context of the problems that had arisen for scheme members and creditors where a scheme became financially stressed and the uncertainty around arrangements for dealing with unviable schemes.[1] CAMAC delivered its report to government in July 2012.

15.2 In this chapter, the committee considers the difficulties involved in winding-up an agribusiness MIS and the findings of CAMAC's review.

Complex arrangements

15.3 In 2010 in a submission to the then Treasurer the Hon Wayne Swan, the Law Council of Australia described how the collapse of an agribusiness MIS generally occurred:

- the group of companies, including the RE, becomes insolvent—often blaming the recent GFC, but usually as a result of being unable to refinance their facilities;
- a secured creditor (generally a bank) issues default notices under its facility agreements;
- the RE can no longer afford to maintain the crop and there is a risk that it will die, thereby creating a substantial loss value to the investors/growers and risking the landowner's ability to sell the property;
- the land owning entity seeks to cancel its head lease with the RE, which in turn will cancel the subleases to the investor/grower;
- the secured creditor of the land seeks to sell the land;

1 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 2, http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf (accessed 9 June 2015).

- a dispute arises as to what proportion of the sale price relates to the value of the land *vis-à-vis* the scheme property (which usually comprises the crop and some other hard assets).[2]

MIS in external administration

15.4 When the RE of an MIS goes into external administration, control of the company and its operations passes from the directors to the insolvency practitioners appointed to conduct the administration. According to ASIC:

> Depending on the nature of the external administration, the insolvency practitioner may be an administrator (appointed by the directors or a secured creditor under the voluntary administration regime in Pt 5.3A of the Corporations Act), a receiver, or a receiver and manager of the property of the responsible entity (usually appointed by a secured creditor), or a liquidator.[3]

15.5 Once an insolvency practitioner is appointed to the RE, the external administrator's first priority is to determine whether or not the MIS is viable. If viable, either its members can appoint a new RE or the Court can appoint a temporary RE.[4] Under the Corporations Act, ASIC may suspend or cancel the AFS licence of an RE that becomes an externally administered body corporate. ASIC informed the committee that generally it would discuss this proposal with the external administrator to determine whether such action could potentially cause issues with the ongoing operation of the schemes. Where ASIC has not cancelled the AFS licence, it would monitor the conduct of the RE in external administration, including its compliance with key conditions of its licence.[5] ASIC's approach to the appointment of external administrators to a RE generally involves engaging with them to:

- discuss the terms of appointment and identify whether they are independent and sufficiently resourced to conduct the administration;
- establish lines of communication and contact points between ASIC and the external administrator;
- inform the external administrator of ASIC's expectations in relation to the administration, including having due regard to the interests of members of the schemes operated by the responsible entity; and
- obtain information about the entities involved and the potential effects on investors.

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2 Law Council of Australia, submission to the Treasurer the Hon Wayne Swan, p. 3, http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2300-2399/2351%20Managed%20Investment%20Schemes.pdf (accessed 7 September 2015).

3 ASIC, *Submission 34*, paragraph 126.

4 *Corporations Act 2001*, s 601FM and s 601FP.

5 ASIC, *Submission 34*, paragraph 125.

15.6 ASIC would also consider proposals about the future of the schemes; of the responsible entity's AFS licence; and what action ASIC should take in response to the administration. According to ASIC, it monitors the administration generally through regular meetings with the external administrators.[6]

Replacement RE

15.7 One of the insolvency practitioner's most challenging tasks is to find a suitable or willing replacement RE. ASIC described this process:

> It takes an external administrator some time to understand the arrangements of the entities that they have been appointed to and potential avenues for dealing with the schemes. External administrators will generally obtain reports from experts about the viability of schemes, while also commencing campaigns to determine whether there are any responsible entities interested in becoming the responsible entity for some or all of the schemes the responsible entity operates.[7]

15.8 But, finding a replacement RE can be problematic. In this regard, CAMAC found:

> In some situations, the responsible entity (RE) of a viable scheme may act in a manner, or in some other capacity suffer financial loss, that makes that RE ineligible or unsuitable to continue in its role as operator of the scheme. However, the future of the scheme may be placed in jeopardy through difficulties in immediately securing a suitable replacement RE, given that a scheme cannot continue without an RE.[8]

15.9 Numerous people involved in the external administration of a struggling agribusiness MIS have highlighted the impediments to securing a replacement RE.

Responsibilities of the replacement RE

15.10 With few exceptions, if the RE of a registered scheme changes, the new responsible entity assumes all the rights, obligations and liabilities in relation to the scheme of the former RE.[9] In this regard, Justice Barrett, Judge of the Supreme Court of New South Wales, observed that if a temporary RE is to be appointed, there must be some qualified company willing to be appointed. He noted that this may be a problem:

> When a new responsible entity takes office, it becomes, under s 601FS, the statutory inheritor of the rights, obligations and liabilities of the old responsible entity in relation to the scheme…In our postulated situation, the

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6 *Submission 34*, paragraph 134.

7 *Submission 34*, paragraph 118.

8 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 3.

9 *Corporations Act 2001*, s 601FS.

> successor will come to owe the debts that brought the old responsible entity undone and to have the rights of recoupment that were insufficient to allow it to continue. Simple replacement of the responsible entity in liquidation therefore does not seem a practical possibility. The automatic vesting of the non-viable combination of liabilities and inadequate rights of recoupment must mean that, in the real world, there will never be a new responsible entity.[10]

15.11 ASIC in its submission to the court hearing the matter of Timbercorp Securities Limited in liquidation also drew on the above quote from Justice Barrett.[11] ASIC informed the committee that, historically, it has been difficult for external administrators to find replacement responsible entities, due to a number of issues, including:

- the effect of s 601FS and s 601FT of the Corporations Act to transfer the rights and obligations of the existing RE to any replacement RE in the context of an enterprise scheme where the extent of the liabilities and obligations are extensive, or at least uncertain;
- the lack of funding available to the replacement RE for the continuing operation of the scheme;
- doubts about the viability of the scheme(s); and
- a limited number of potential responsible entities with the experience and resources to take on the scheme(s).[12]

15.12 Ultimately, where a replacement RE cannot be found, a scheme may need to be wound up.

15.13 Willmott Forests Limited (WFL) provided an example of the difficulties involved in securing a replacement RE. The scheme was a forestry scheme, involving 14 plantations, with each grower taking a lease of one or more hectares of land on which to grow timber. That timber was to be harvested and sold about 16 to 25 years after planting. The leased land was registered in the name of WFL. The liquidators

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10 R. I. Barrett, 'Insolvency of Registered Managed Investment Schemes', Banking and Financial Services Law Association, Queenstown, New Zealand, July 2008, pp. 11–12, http://www.supremecourt.justice.nsw.gov.au/Documents/barrett260708.pdf. See also, Leon Zwier, Justin Vaatstra, and Oren Bigos, 'Can Managed Investment Schemes be Restructured?', 10 September 2014, p. 2, http://www.vicbar.com.au/GetFile.ashx?file=CPDAdjournedFiles%2F1057_10092014_ABL+MIS_RESTRUCTURING_PAPER.pdf (accessed 22 September 2015).

11 The Supreme Court of Victoria at Melbourne, Commercial and Equity Division, Commercial Court, Timbercorp Securities Limited (in liq) ACN 092 311 469, ASIC's submission, 14 July 2009, p. 5, http://www.kordamentha.com/docs/51_03_timbercorp-almond-schemes/asic%27s-outline-of-submissions-(14-july-2009).pdf (accessed 4 December).

12 *Submission 34*, paragraph 119. Section 601FS deals with the rights, obligations and liabilities of a former responsible entity. Section 601FT covers the effect of change of responsible entity on documents etc. to which a former responsible entity is party.

found that the Willmott schemes could not continue to operate.[13] They considered that:

> …it was 'very unlikely' that 'a party would be willing to take over as responsible entity and manager of the Willmott Schemes in circumstances where that party would be required to assume the liabilities of WFL and fund the continued operation of the Willmott Schemes without any income or contributions from [individual investors] until harvest'. The liquidators further concluded that it would not be practicable to maintain separately, or harvest separately, the trees on any individual lot leased to a particular investor and that the individual investors' 'right to maintain and harvest their own trees is a theoretical right which cannot be exercised'.[14]

15.14 PPB Advisory informed the committee of the steps it followed in endeavouring to salvage and wind-up this company. It advised that, by order of the Federal Court of Australia on 26 October 2010, Mr Ian Carson and Mr Craig Crosbie, partners of PPB Advisory, were appointed joint and several administrators of WFL and its related companies.[15]

15.15 As administrators, and later liquidators, of WFL, they were required to deal with WFL's role as responsible entity/manager/trustee of the WFL schemes. Early on, they engaged a forestry expert to 'undertake a technical view and verification of the viability of the WFL schemes, including assumptions and cash flow forecasts'. That review found that 'over the life of the WFL schemes, WFL would require funding in excess of $300 million (in absolute terms) and that the vast majority of the schemes would not be viable'.[16]

15.16 The administrators commenced a campaign seeking expressions of interest from parties wishing to (among other things) take over the obligations of responsible entity/manager/trustee for any or all of the WFL schemes. Unsuccessful in finding a party willing to step into that role on an unconditional basis, resolutions were passed at a meeting of investors in one of the schemes to appoint another party as responsible entity.[17]

15.17 But unable to find a replacement responsible entity for all schemes, the liquidators obtained directions from the Federal Court of Australia to enable them to commence a sale process for the WFL scheme assets.[18]

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13 Willmott Growers Group Inc v Willmott Forests Limited (recs and mgrs apptd) (in liq) [2013] HCA 51 (4 December 2013), [15].

14 Willmott Growers Group Inc v Willmott Forests Limited (recs and mgrs apptd) (in liq) [2013] HCA 51 (4 December 2013), [15].

15 Response from PPB Advisory to *Submission 187*, received 6 February, 2015, p. 1.

16 Response from PPB Advisory to *Submission 187*, received 6 February, 2015, p. 1.

17 Response from PPB Advisory to *Submission 187*, received 6 February, 2015, p. 1.

18 Response from PPB Advisory to *Submission 187*, received 6 February, 2015, p. 2.

15.18 As administrators and later liquidators for Gunns Plantations Limited, PPB Advisory followed a similar process—engaged a forestry expert, undertook a campaign seeking expressions of interest for a replacement RE and following this unsuccessful attempt obtained directions from the court to commence a competitive sale process for the Gunns scheme assets.[19]

15.19 A second major difficulty for external administrators involved unravelling the intricate web of agreements comprising the scheme.

Network of agreements and competing interests

15.20 CAMAC observed that the problems encountered with the operation of schemes in recent years had arisen principally, if not exclusively, in the context of common enterprise schemes. These problems centred on the difficulties that occur from the intermingling of the affairs and property of the scheme itself and of its members.[20]

15.21 Relevantly, CAMAC noted that common enterprise schemes are often structured as a series of bilateral or multilateral executory agreements between the member, the RE and various external parties:

> The 'scheme' in that case is not a pool of assets under management, but rather the common enterprise carried out over time in accordance with those agreements. For instance, for taxation or other reasons, various agribusiness common enterprise schemes were structured so that scheme members ('growers') operated their agribusiness investment in their own right, entering into agreements with the RE or external parties to perform the cultivation and management activities associated with the member's enterprise. Scheme members would hold various forms of proprietary or contractual interests in allocated parcels of land, which may be owned by an external party.[21]

15.22 According to CAMAC, with that type of scheme, complex problems could arise 'in determining the nature of the rights of scheme members'. Furthermore, there could be difficulties 'clearly distinguishing during the operation of the scheme

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19 Response from PPB Advisory to *Submission 187*, received 6 February, 2015, p. 2.

20 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 10. http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf (accessed 9 June 2015).

21 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, pp. 27–28, http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf (accessed 9 June 2015).

between the property of the scheme and the property of scheme members used in the enterprise'.[22] CAMAC found:

> Recent experience with the collapse of some agribusiness common enterprise schemes points to the possibility of confusion arising in attempting to untangle these arrangements, with a range of involved parties, including scheme members, each seeking to assert what they perceive to be their proprietary and other rights and attempting to determine the way forward, often in an environment of conflict and resort to litigation.[23]

15.23 ASIC also highlighted the difficulties that administrators face when winding up a failed MIS, which involved undoing the series of interlocking contracts between the growers and the RE, the sub-leases of the land and management agreements for the planting, husbandry and harvest. Based on its experience, ASIC explained the complications facing administrators and liquidators of MIS:

> …external administrators of responsible entities that operate forestry schemes are faced with a complex web of arrangements with limited resources available for the continued operation of the schemes. They also face conflicts in their responsibility to creditors and their duties to members of the schemes.[24]

15.24 In particular, ASIC noted that the effect on ownership rights is 'not always clear as a matter of law'. It observed that this difficult task of unravelling ownership rights and the lack of clarity in the law has meant that external administrators seek judicial guidance.[25] In this regard, ASIC observed:

> Generally, external administrators have sought directions from the courts about the winding up of forestry schemes because it generally involves dismantling arrangements with a variety of parties, including land owners and investors to sell assets (such as land owned by the responsible entity or other third party on which trees are planted) to meet the claims of creditors of the responsible entity and members of the scheme.[26]

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22 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, pp. 28–29, http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf (accessed 9 June 2015). See also Corporations and Markets Advisory Committee, *The establishment and operation of managed investment schemes*, Discussion paper, March 2014, p. 13.

23 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 10, http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf (accessed 9 June 2015).

24 *Submission 34*, paragraph 117.

25 *Submission 34*, paragraph 46.

26 *Submission 34*, paragraph 120.

15.25 WFL exemplified the hurdles encountered when winding up an agribusiness MIS and the liquidators recourse to the courts. According to PPB Advisory, following the unsuccessful attempt to secure a new RE, the sale of WFL scheme's assets was a complex process involving numerous applications to the courts. For example, the liquidators applied to the Supreme Court of Victoria for directions and orders about the sales that had been negotiated. The court determined that the liquidators were not able 'to disclaim the Growers' leases with the effect of extinguishing the Growers' leasehold estate or interest in the subject land'. The Appeal Court, however, confirmed by the High Court, set aside the order and determined that the liquidators did have the power to disclaim the leases to investors.[27] When a purchaser was identified from the competitive sale process, the liquidators sought further approval from the Supreme Court of Victoria to proceed with the sale.[28] The liquidators conducted a competitive sale process for WFL scheme assets and 'sold the assets for the best price obtainable in a sale process that was approved by the Supreme Court of Victoria'.[29]

Interests of the members

15.26 Sections 601FC and 601FD of the Corporations Act (duties of RE and their officers) impose an obligation on the RE and its officers to act in the best interests of the members of the scheme and, where there is a conflict of interest, to prefer the members' interests. ASIC noted, however, that the external administrator of a responsible entity has to manage the competing claims of:

- secured creditors, whose ultimate interest may be having the schemes (which relates to the land) wound up if the effect is to free the land from these encumbrances; and
- growers, whose ultimate interest is to realise the long-term production of their crops.[30]

15.27 According to ASIC, when a company is insolvent, the interests of its creditors come to the fore in deciding where the company's interests reside. In MIS, secured creditors of the responsible entity often have security over the land that is used by growers in the managed investment schemes. ASIC noted:

> The secured creditors will generally have a significant commercial interest in 'un-encumbering' the land over which they have security. The encumbrances on the land include leases and forestry of varying degrees of value and maturity, which are held by investors or by the responsible entity

27 Willmott Growers Group Inc v Willmott Forests Limited (recs and mgrs apptd) (in liq) [2013] HCA 51 (4 December 2013) [57] [78] [79].

28 Response from PPB Advisory to *Submission 187,* received 6 February 2015, p. 2.

29 Response from PPB Advisory to *Submission 187,* received 6 February 2015, p. 4.

30 *Submission 34*, paragraph 128.

> subject to an obligation to hold in accordance with its duties to members on their investment.[31]

15.28 The committee has described the general arrangements whereby growers leased portions of land which the RE or related company owned or leased. The growers' leases were made at various times and for a fixed period. Some leases provided for the whole of the rent due to be paid in advance while others required rent to be paid annually.

15.29 The Australian Restructuring Insolvency & Turnaround Association (ARITA) explained the complexities of winding up such schemes, including determining the rights of investors, and also referred to WFL:

> The decision of the Court was to allow the liquidator of WFL to 'disclaim' leases that had been granted to investors, in some cases, with the whole of the rent paid in advance, leaving them to prove for their losses in the winding up, with little prospect of a return. The investors lost any right to maintain and harvest trees that had been planted on the leased properties.
>
> The facts of that case reflected the particular circumstances of agribusiness schemes, where multiple long-term and often low-rent leases can encumber rural properties, causing those properties to become difficult to sell.
>
> The High Court's decision has broader implications for more common types of leasehold arrangements, particularly in situations where the liquidator of a landlord forms the view that a property may be more readily saleable, or sell for a higher price, without the existing leasehold arrangements in place. This was the case in Willmott Forests.[32]

15.30 As noted earlier, many investors were unclear on what they actually owned. Their rights became particularly contentious when the external administrators began the process of winding up the schemes. For example, in his judgement on 14 September 2009 relating to an MIS growing almonds, Justice Robson explained how growers' rights can be relinquished:

> The growers do not own the almond trees but rather have certain rights to crop the trees. The liquidators are of the view that to realise the maximum value for the land, equipment, and cropping rights (that is in effect the whole business) it may be necessary to offer the lot for sale or recapitalisation as a whole. To that end, the liquidators have amended the constitution of the relevant almond schemes to allow the responsible entity to surrender any interest the growers have in the almond groves. Such a power will enable the liquidators to offer the almond groves on an unencumbered basis to a buyer or a party willing to recapitalise the almond groves.
>
> The relevant land is mortgaged to banks. If insufficient is realised to pay out the mortgagees, then any sale depends on the mortgagee banks agreeing

31 *Submission 34*, paragraph 128.

32 *Submission 23*, p. 2.

> to discharge their mortgages in exchange for a sum less than they are owed. Naturally, the banks will be seeking to have as much as necessary allocated to the land value to discharge the mortgages.[33]

15.31 Many of the growers who wrote to the committee believed that in the process of untangling this complicated network of interests, they were the ones who lost out. Mr Jeff Chin noted:

> Whilst the current regulatory regime recognises that consumers of financial products and services require special protection, in liquidation these protections disappear. Significant powers and trust are delegated to the Liquidators—it is a privileged position where fair and objective behaviour is assumed. However, as has been discussed in other submissions, the Liquidator appointment process makes it very likely that Liquidators will pursue the interests of banks (as large repeat clients).[34]

15.32 In Mr Chin's view:

> …**in situations where the impact is wide, and where there are impediments to victims seeking justice, regulators of the Liquidator (ASIC) and Consumer Law (ACCC) ought to be intervening to assist grower borrowers to assert their rights.** If not, the Liquidator's intimidatory approach is likely to simply steamroll many innocent victims, cause widespread unnecessary distress and incur substantial unnecessary legal costs.[35]

15.33 ASIC acknowledged that, in practice, receivers and liquidators, experience difficulties managing 'the tension between their obligations to scheme members and their obligations to the creditors' of the RE.[36] It stated:

> In recent failures in the sector, it is apparent that (whatever the legal position) the fact that there is no person charged solely with representing members' interests has undermined investors' confidence in the capacity of the existing insolvency laws to protect their position.[37]

Forced sale

15.34 Many submitters dissatisfied with the winding up or liquidation process of the schemes were especially galled by the success of a scheme that had been sold by the liquidator. One submitter noted:

> The Liquidator KordaMentha, has closed all Timbercorp companies except Timbercorp Finance, and has since sold all assets including the Almond

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33 Re Timber Securities Limited (in liq) (No 2) [2009] VSC 411 (14 September 2009) [7]–[8].

34 *Submission 144*, p. [1].

35 *Submission 144*, p. [2] (emphasis in original).

36 *Submission 34*, paragraph 132.

37 *Submission 34*, paragraph 133.

> Trees. They were subsequently purchased by a Singaporean Consortium, Olam Foods, who have just had their first successful harvest. Meanwhile we are left with nothing except the debt, which has increased nearly 200%. We purchased a product, that product was taken from us and sold to another, so while the new owners receive the profits, we are now being hounded to pay for the product we never got.[38]

15.35 Indeed, a common complaint levelled against the liquidators of MIS projects was that assets were sold at below their market value.[39] For example, Mr Trevor Burdon, an investor in Willmott Forests 2000 and in Gunns Plantations, witnessed PPB Liquidators disclaim viable pine assets and sell them at fire-sale for no net return or a very poor return. As noted earlier, however, the liquidators conducted a competitive sale process for WFL scheme assets and 'sold the assets for the best price obtainable in a sale process which was approved by the Supreme Court of Victoria'.[40]

15.36 KordaMentha also referred to the significant level of court oversight of the insolvencies as they attempted 'to navigate the complexities inherent in realising (and distributing the proceeds of) MIS related assets'. It stated:

> The material prepared for the courts during these and other MIS related engagments, and the resultant judgements, has provided clarity for stakeholders that will presumably inform the structure of any future projects and bring into sharp focus the risks associated with these types of tax-effective investments where little of a capital nature is acquired by Growers.
>
> In addition, the issues faced in realising the assets has highlighted a number of areas of possible regulatory change.[41]

15.37 In KordaMentha's view, CAMAC had undertaken valuable work in this area of insolvency and agribusiness MIS.[42]

Landlords

15.38 ASIC spoke not only of the competing interests of the secured creditors and the growers but of the owners of property who leased their land to the schemes and who also have a vital concern in the winding up of a failed MIS. Referring to landowners and their status as creditor, Mr Steel, Rural Affairs Manager, TGFA, noted that identifying the rights among a range of conflicting interests was one of the difficulties unravelling some of the complexity associated with agribusiness MIS. He said:

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38 Name withheld, *Submission 95*, p. [2].

39 *Confidential Submission 140*, p. 1.

40 Response from PPB Advisory to *Submission 187*, received 6 February 2015, p. 4.

41 Additional information provided on 4 December 2014, paragraphs 18–19, p. 7.

42 Additional information provided on 4 December 2014, paragraphs 19–21, p. 7.

> We are still unsure whether the landowners are creditors of GPL [Gunns] as the entity or of the individual schemes. If the latter, there is potential that they might get back-rent. But the liquidator has put options to the landowner which, in most cases, will cancel out any back-rent. So that is probably better for the grower-investor. That is another issue: you have got a liquidator who is looking after two interests. One of those interests is the landowner and the other is the grower-investor. So which one are they actually looking after? In our interests, it would have been better to have separate liquidators looking after the entities themselves so you know that they are actually looking after your interests and not looking over their shoulder. That is still going ahead.[43]

15.39 Mr Jim Crowley, whose property is surrounded by plantation developed land through an MIS, noted the difficulty he was having identifying the current owner of the property.[44]

15.40 KordaMentha informed the committee that it supported CAMAC's proposed regulatory reforms to the extent they would 'streamline the process and reduce the complexity for stakeholders in distressed MIS'. In its assessment, 'the benefits of any changes of this type would clearly extend to reduce the burden on landowners with distressed MIS plantations on their land and the wider rural communities'.[45]

Multi-function REs

15.41 According to CAMAC, another important distinction to be drawn when dealing with a financially stressed MIS was between sole-function REs and multi-function REs. In this regard, it noted that there was the potential for complexity where schemes were run by multi-function REs. It noted that:

> …the task of administering an insolvent multi-function RE can be made more difficult by having to disentangle its own dealings in its personal capacity from its dealings as operator of a number of schemes, and then determine which dealings as scheme operator go with which schemes. This process can be further complicated by disputation amongst a range of affected parties about the nature of their rights and remedies where the RE fails.
>
> This potentially complex untangling task would not arise if schemes could be operated only by sole-function REs.[46]

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43 *Proof Committee Hansard*, 5 August 2015, p. 19.

44 *Submission 7*, p. [1].

45 KordaMentha, additional information provided on 4 December 2014, paragraph 21.

46 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 11.

15.42 The difficulties facing external administrators when attempting to reconcile competing interests means that they often resort to the courts for direction as demonstrated by the experiences of PPB Advisory and KordaMentha.[47]

Call for reform

15.43 Mr Carl Möller, member of the Victorian Bar, commented on the reliance on the courts for guidance when winding-up an agribusiness MIS. He wrote that when a company goes into voluntary administration or liquidation, it was usual for the relevant administration to be conducted without a court's involvement. He noted, however, that the opposite applied in respect of MIS and applications to the courts were common, observing that:

> The time, expense and effort in such applications are extraordinary.[48]

15.44 Overall, according to Mr Möller, MIS 'have not coped well with the challenges of insolvency' due in the main to 'the absence of a comprehensive regime governing how schemes should be wound up'.[49] Likewise, the Australian Restructuring Insolvency & Turnaround Association noted the extensive case law on forestry schemes that clearly point to the 'complex and unsatisfactory nature of the law'.[50] It referred to the insolvency practitioners involved in the administration of Willmott Forests, Great Southern, FEA applying to the courts for guidance and directions on how Chapter 5 of the Corporations Act (external administration) operates in respect of these schemes.[51] It also noted that many decisions of liquidators have been strongly contested in the courts, including the High Court.[52]

15.45 Similarly, ANZ identified the need to reform the insolvency regime that applied to MIS, urging the committee to 'press for reforms' in this area which may 'benefit future scheme investors'. It cited the findings of the CAMAC report on MIS, mentioning, in particular, to the issue of 'restructuring financially distressed schemes via the introduction of a voluntary administration scheme of the kind that applies to companies'.[53] Noting that currently there was no voluntary administration procedure available for MIS, KordaMentha also referred to the findings of CAMAC.[54] As

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47 See, for example, paragraphs 15.14–15.19 and 15.35.

48 Carl Möller, 'How have Managed Investment Schemes coped with the Challenges of Insolvency', in Stewart J. Madison (ed), *Insolvent Investments*, LexisNexis, Butterworths, Australia, 2015, paragraph, 2.81, p. 30.

49 Carl Möller, 'How have Managed Investment Schemes coped with the Challenges of Insolvency', in Stewart J. Madison (ed), *Insolvent Investments*, LexisNexis, Butterworths, Australia, 2015, paragraph 2.95, p. 33.

50 *Submission 23*, p. 1.

51 *Submission 23*, p. 2.

52 *Submission 23*, p. 2.

53 *Submission 145*, paragraphs 21–23.

54 KordaMentha, additional information provided on 4 December 2014, paragraph 20, p. 7.

mentioned earlier, KordaMentha supported CAMAC's proposed regulatory changes with regard to 'the procedures for restructuring financially distressed schemes, and winding up schemes where restructure is not possible, to the extent they would streamline the process and reduce the complexity for stakeholders in distressed MIS'.[55]

CAMAC's recommendations

15.46 CAMAC's very thorough examination of managed investment schemes enabled it to identify potential areas for reform.[56] It produced many recommendations that would address weaknesses when it comes to dealing with a financially stressed agribusiness MIS and if necessary the winding up of such a company.[57] Importantly, it noted:

> Much of the complexity, disputation, delay and costs that have surrounded the external administration of some common enterprise schemes in recent years can be traced to earlier failure by REs to ensure:
>
> - adequate separation and recording of the affairs of each of the schemes that they operate; and
> - clear identification of scheme property and its separation from the proprietary interests of scheme members utilised in the schemes.[58]

15.47 CAMAC formed the view, however, that it may not have been possible for the Corporations Act introduced in 1998 to 'anticipate the extent to which schemes would continue to develop beyond primarily passive pooled investment vehicles'. It noted that MIS now 'encompass large business enterprises, adopting the common enterprise scheme structure for taxation and other reasons'.[59] It recommended that while it might not be practical to require the redesign or termination of existing common enterprise schemes, there was 'considerable merit in forestalling future problems through a legislative initiative to prohibit the creation of new common enterprise schemes'.[60]

15.48 As noted earlier, ANZ, KordaMentha and ASIC supported the findings of CAMAC. The Australian Restructuring Insolvency & Turnaround Association also

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55 KordaMentha, additional information provided on 4 December 2014, paragraph 21, p. 7.

56 *Submission 34*, paragraph 122.

57 See Appendix 3 for a complete list of CAMAC's recommendations.

58 Corporations and Markets Advisory Committee, *Managed Investment Schemes* Report, July 2012, p. 59, http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 9 June 2015).

59 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p. 10, http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 9 June 2015).

60 Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, p.11, http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf (accessed 9 June 2015).

referred to the number of law reform recommendations proposed by CAMAC that would serve to address a range of legal and other difficulties with the operation, regulation and winding up of schemes under Chapter 5C of the Corporations Act (managed investment schemes).[61] The FSI similarly recognised the work of CAMAC and briefly referred to the difficulties CAMAC identified in managing schemes in financial distress and the consequent consumer harm. It recommended that the government review CAMAC's recommendations, giving priority to matters such as those relating to consumer detriment, including illiquid schemes and freezing of funds.[62]

Conclusion

15.49 Unquestionably, the winding up of agribusiness MIS has encountered many practical difficulties not contemplated by current legislation. Indeed, the collapse and liquidation of some high-profile agribusiness MIS exposed the difficulties finding a replacement RE and the complexities in disentangling the rights and obligations of the various parties. It is clear that legislative change is required: that this area of the law is crying out for reform.

15.50 Clearly, CAMAC has prepared the ground work for more concrete action. The committee is strongly of the view that the valuable work produced by CAMAC in respect of the managed investment schemes especially the very difficult problems of dealing with MIS companies in financial stress provides an ideal starting point for reform.

Recommendation 20

15.51 The committee recommends that the government use CAMAC's report on managed investment schemes as the platform for further discussion and consultation with the industry with a view to introducing legislative reforms that would remedy the identified shortcomings in managing an MIS in financial difficulties and the winding-up of collapsed schemes.

61 *Submission 23*, p. [1].

62 *Financial System Inquiry*, Final Report, Commonwealth of Australia, November 2014, p. 273, http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf