Chapter 18

Conclusion

> As part of a small group of weary victims tied into the Class action we have been disappointed and frustrated at every turn and have been let down by everybody who is supposed to have our best interests at heart.[1]

18.1 Based on the experiences of retail investors who invested in agribusiness MIS, the committee has made a number of recommendations directed at improving the standard of advice provided by financial advisers, product issuers and research houses. In this chapter, the committee recognises the important role that ASIC has in enforcing the powers conferred on it. The committee has also advocated expanding and strengthening ASIC's power which further underlines the regulator's central role. The committee then summarises its findings and recommendations.

ASIC

18.2 ASIC informed the committee that it registers and regulates registered MIS 'at every point from their incorporation through to their winding up' and also ensures that officers comply with their responsibilities. In its view, this 'cradle to the grave' approach 'enhances regulatory oversight'.[2] ASIC also has formal powers to conduct surveillance checks of MIS.[3]

18.3 The committee examined in great depth the performance of ASIC in its 2014 report and consequently will only deal briefly with the effectiveness of ASIC as a regulator of MIS. In its report on the performance of ASIC, the committee noted Professor Dimity Kingsford Smith's reference to ASIC's after-the-loss approach to enforcement, which she described as: 'waiting for complaints, investigating a minute proportion of them, and prosecuting even fewer'.[4] The committee also quoted from a former enforcement adviser at ASIC, who spoke of a regulator that lacked 'a culture of urgency, pro activity and flexibility', with its processes driven by 'a management culture that has a wait and see attitude'. Indeed, Mr Niall Coburn suggested that if there were hundreds of complaints from individuals in a MIS, he doubted whether

---

1 Mr Greig Allan, *Supplementary Submission 133.1*.

2 *Submission 34*, paragraph 21.

3 Section 601FF of the Corporations Act.

4 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, paragraph 4.21. Dimity Kingsford Smith, 'A Harder Nut to Crack?', Responsive Regulation in the Financial Services Sector' forthcoming in symposium issue on responsive regulation in (2011) Univ British Columbia Law Review (Summer 2011). p. 698.

ASIC could pick up on the message or put it together and, if it could, it would still fail to react.[5]

18.4 In 2014, the committee considered two case studies in depth—predatory lending practices and financial advice provided by Commonwealth Financial Planning Limited (CFPL). In both cases, the committee found that ASIC's response to known problems was too slow and disappointingly unenthusiastic. For example, in respect of poor lending practices, the committee concluded that:

> ASIC had available to it persuasive and less formal measures to stop unscrupulous practices. In this regard, the committee believes that ASIC did not take the opportunity to intervene in a far more direct and public way. It did not send a strong message regarding its concerns about irresponsible lending practices to lenders. Nor did ASIC do enough to alert Australian consumers to the risks associated with low doc loans, their vulnerability to irresponsible or even fraudulent activity, and of the need to protect their own interests. Such early and decisive publicity may have educated the community about ASIC's limited ability to protect their interests and minimised the damage.[6]

18.5 The committee's observation applies with equal force to the marketing of agribusiness MIS to retail investors, especially the need for early and decisive publicity to warn potential investors of the risks associated with certain financial products or advice.

18.6 When it came to reports of wrongdoing in CFPL, the committee formed the view in 2014 that:

> Evidence received during this inquiry has underlined ASIC's poor handling of the CFPL whistleblowers and the information they provided. The committee regards the fact that it took ASIC nearly 17 months to take meaningful action in response to the information provided by the CFPL whistleblowers as a significant failure on the part of the corporate regulator. Having said that, the committee notes that ASIC has itself acknowledged its failures in this regard, both in terms of taking too long to move toward an enforceable undertaking…and in terms of its handling of the CFPL whistleblowers and the information they provided.[7]

18.7 This concern about ASIC failing to take decisive steps early to prevent further consumer harm was also evident in the case of the promotion and selling of

---

5 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission.*, June 2014, paragraphs 16.34–16.36 and Inquiry into the performance of the Australian Securities and Investments Commission, *Committee Hansard*, 21 February 2014, p. 1.

6 Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, June 2014, paragraph 5.72.

7 Senate Economics References Committee, *Performance of the Australian Securities and Investments* Commission, June 2014, paragraph 9.47.

agribusiness MIS. The only difference was that ASIC became aware of concerns through much of its own surveillance, but its response was still nonetheless tepid.

Criticism of ASIC

18.8 A number of witnesses were dissatisfied with ASIC's performance when it came to agribusiness MIS. Mr David Cornish of Cornish Consultancy believed that ASIC must take its share of the blame for the losses incurred by the many thousands of investors. He referred to the regulator's lack of policing of corporate governance of the schemes 'even when it became public knowledge of questionable Corporate Governance'.[8]

18.9 One investor was of the view that ASIC's involvement as a regulator appeared to be 'more like that of an observer rather than an active participant in protecting those who are less informed than the advisers who take advantage of them'.[9] Another described ASIC's contribution as 'sitting on the sidelines'—'there seems to be threats they will get involved but in reality they seem to sit and allow things to fall as they may'.[10] Yet another investor stated:

> It is my current view that there is absolutely no consumer protection for financial products. I am a point in case. I took the advice of a fully licensed financial planner with the appropriate insurances. I was sold a product on misinformation that he took huge commissions for. When it all imploded he has walked away, I have not [been] protected or looked after in any way. Indeed, the very agencies charged with that, such as ASIC, the Financial Ombudsman, and the Courts have not only failed me but they seem to be the protector of business.[11]

18.10 In the view of one investor, a client of Mr Holt:

> It seems to us that the overall performance of ASIC has been grossly inadequate. Had a swift and thorough investigation taken place into Peter Holt and his associates, it would have prevented years of needless stress, anxiety, heartache and despair for his victims and protected them from the likelihood of losing their life savings, their homes, their mental health and their self-esteem.[12]

18.11 The committee has made recommendations to strengthen ASIC's powers in order to provide more robust investor protection measures by enhancing and expanding banning powers and conferring the power to intervene in the marketing of products. But, for some time, the committee has been concerned about ASIC's slow and inadequate response to employ the powers it already has. Should the government proceed to implement the FSI and committee's recommendations, the onus rests

---

8 *Submission 60,* p. [3].

9 Name withheld, *Submission 68,* p. [2].

10 Name withheld, *Submission 70,* p. [1].

11 Name withheld, *Supplementary Submission 52,* p. [2].

12 *Confidential Submission 37,* p. 1.

squarely on ASIC's shoulders to exercise its powers accordingly. Importantly the government must ensure that ASIC has the resources it needs to carry out its responsibilities effectively.

Enforcement

18.12 In most cases, retail investors only became aware of the flawed financial advice after the MIS collapsed. One particular area of concern relates to ASIC's response to financial advisers who provided inappropriate advice to retail investors. In this regard, the committee has before it numerous examples of investors receiving and acting on advice from individuals who, according to ASIC, did not hold an AFS licence but were authorised representatives of a number of companies including Financial Wisdom, a top 10 seller of Timbercorp financial products. Some were authorised representatives of Timbercorp Securities Limited. They appear to have been instrumental in convincing their clients to invest in an agribusiness MIS and facilitating that investment, including arranging the loan. Despite complaints against them, ASIC has not taken action.[13] The committee has not made the names of these individuals public.

18.13 In a number of cases cited in this report, the adviser who allegedly provided inappropriate recommendations no longer holds, or ever held, an ASF licence. In this regard the committee has named two particular individuals—Mr Peter Holt and Mr Steve Navra. ASIC has banned Mr Holt for three years for, among other things, failing to have a reasonable basis for the advice he gave to retail clients but has taken no action against Mr Navra. Mr Steve Navra was a significant seller of Great Southern products between 2006 and 2009 and, according to a number of submitters, engaged in unethical practices. It should be noted that, as a result of its investigations into the collapse of Timbercorp and Great Southern, ASIC:

> …did require a number of Australian financial services licensees to write to clients where there were indicators of potentially inappropriate advice. The letters to affected clients explained how to make a complaint in connection with the advice provided including information about the licensee's internal dispute resolution (IDR) process and the external dispute resolution (EDR) process.
>
> Further, as a result of ASIC's inquiries into these collapses, one licensee provided an undertaking to ASIC that it would immediately cease to provide financial services to retail clients while a number of licensees introduced new training programs for its financial advisers.[14]

18.14 Apart from what appears to be very lenient penalties for the harm caused to clients, there appears to be a real problem taking action against people or businesses that either never held an AFS licence or no longer hold such a licence. Unfortunately, the MIS experience has left many retail investors believing that their financial adviser

---

13 ASIC, confidential answer to written question on notice, No. 19. These advisers are not listed on ASIC's Financial Advisers' Register.

14 ASIC, 'Information for Timbercorp Growers', http://asic.gov.au/about-asic/media-centre/key-matters/information-for-timbercorp-growers/ (accessed 24 November 2015).

or accountant, who abused their position of trust to advantage themselves, has not been brought to account and, even worse, continues in some form to practice in the industry.

18.15 It is important that penalties contained in legislation provide both an effective deterrent to misconduct as well as an appropriate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties, or the failure to apply them, undermine the regulator's ability to do its job. Inadequately low penalties or poor enforcement do not encourage compliance or make regulated entities take threats of enforcement action seriously. In 2014, the committee considered that a compelling case had been made for the penalties currently available for contraventions of the legislation ASIC administers to be reviewed to ensure they are set at appropriate levels. The committee reinforces this recommendation. But, ASIC must also ensure that it uses its powers to effect in order to send a potent message to all those in the financial services industry that it is serious about exposing misconduct and bringing the full weight of the law to bear on wrong-doers.

Recommendation 24

18.16 The committee recommends that ASIC review the complaints made against advisers and accountants, licensed or unlicensed, who engaged in alleged unscrupulous practices when recommending that their clients invest in agribusiness MIS. The review would identify any weaknesses in the current legislation that impeded ASIC from taking effective action against those who engaged in such unsound practices. This review would also examine the adequacy of the penalties available to ASIC to impose on such wrong doers. In particular, ASIC should consider the adequacy of penalties that apply to those who were unlicensed or have since become unlicensed. Banning in such cases is redundant.

18.17 The committee also recommends that as part of this review, ASIC consider the practice of advisers using bankruptcy as a means to avoid recompensing clients who have suffered financial loss as a result of their poor financial advice and any possible remedies.

18.18 Finally, the committee recommends that ASIC provide its findings to the committee.

18.19 The following section provides a summary of the committee's findings located throughout this report and their accompanying recommendations.

Committee findings and recommendations

18.20 Overall, the committee has made recommendations directed not only at improving the advice provided by financial advisers but, importantly the product issuers and the research houses or experts that rate the schemes. The committee acknowledges that the investor must take responsibility for their own decisions and has made recommendations to strengthen disclosure obligations. Armed with accurate and reliable information, which is presented in a clear and comprehensible way that clearly spells out the risks associated with the scheme, should enable the investor to make informed decisions.

18.21 Furthermore, there was irresponsible lending on a systemic basis by representatives of the RE and, at best, a laxity on the part of the major lenders to scrutinise the loan arrangements that many borrowers were entering. The revelations of the lending practices around the MIS should be understood in the broader context of predatory lending practices that emerged before 2008, which clearly demonstrated that any form of industry self-regulation would be inadequate. The committee believes that the government should give priority to reforming this area of investment credit.

18.22 The committee also recognised that the legislative framework around the winding-up of an MIS needs reform and has, accordingly, made a recommendation. Finally, when considering the harm caused by the failure of such high-profile agribusiness MIS, the committee formed the view that a review be undertaken before any decisions about the taxation incentives offered to investors are made. The committee's main findings and recommendations are listed below.

Removing misconception about government endorsement of schemes

It would appear that some product issuers and financial advisers allowed, or even encouraged, investors to assume that an Australian Taxation Office (ATO) product ruling meant that the government was vouching for the commercial viability of the scheme. There was a similar misunderstanding that ASIC was giving its support to the schemes. Thus, growers mistakenly formed the view that the products had ATO and ASIC approval and considered the various schemes safe and suitable for retail investors.

Recommendation 1 **paragraphs 4.49–4.50**

The committee recommends that the ATO undertake a comprehensive review of its product rulings to obtain a better understanding of the reasons some investors assume that an ATO product ruling is an endorsement of the commercial viability of the product. The results of this review would then be used to improve the way in which the ATO informs investors of the status of a product ruling.

The committee recommends that the ATO and ASIC strengthen their efforts to ensure that retail investors are not left with the impression that they sanction schemes, including the use of disclaimers prominently displayed in disclosure documents including PDS.

Future of Financial Advice reforms

The committee recognises that the Future of Financial Advice (FOFA) reforms may well have remedied one of the most pernicious incentives underpinning poor financial advice—commissions. The evidence clearly highlights, however, the importance of ensuring that there are no loop-holes in this legislation that would allow any form of incentive payments to creep back into the financial advice industry.

Recommendation 2 **paragraph 7.51**

The committee recommends that ASIC be vigilant in monitoring the operation of the FOFA legislation and to advise government on potential or actual weaknesses that would allow any form of incentive payments to creep back into the financial advice sector.

Accountants/tax agents providing financial advice

In light of the evidence and the concerns expressed about possible conflicts of interest and blurring of responsibilities in situations where a tax agent provides financial advice, the committee is convinced that this area of financial advice should be reviewed, particularly advice on borrowing. Clearly, there are important lessons to be learnt from the experiences of retail investors who acted on advice from their accountants or tax agent and invested in MIS.

Recommendation 3 **paragraph 7.67**

While noting the 1 July 2016 expiry of the 'accountants' exemption' under Regulation 7.1.29A of the Corporations Regulations 2001, the committee recommends that the Treasury look closely at the obligations on accountants or tax agents providing advice on investment in agribusiness MIS (or similar schemes). The intention would be to identify any gaps in the current regulatory regime (or the need to tighten-up or clarify regulations) to ensure retail investors are covered by the protections that exist under FOFA and that the level of regulatory oversight of tax agents or accountants providing advice on agribusiness MIS (or similar schemes) does not fall short of that applying to licensed financial advisers.

Financial literacy

ASIC provided the committee with examples of its efforts to lift the standard of financial literacy in Australia. The committee has made recommendations that would place obligations on product issuers and research houses to act responsibly in the promotion and marketing of MIS. Much more, however, is required to provide investors with the information needed to protect their own interests. The committee recognises that improved financial literacy will go some way to help consumers make informed decisions.

Recommendation 4 **paragraphs 8.8–8.9**

The committee agrees with the view that financial literacy has 'got to get aggressive' and recommends that the Australian Government explore ways to lift standards. In particular, the government should consider the work of the

Financial Literacy Board in this most important area of financial literacy to ensure it has adequate resources.

Drawing on the lessons to be learnt from the evidence on the need to improve financial literacy in Australia, the committee also recommends that the Australian Government in consultation with the states and territories review school curricula to ensure that courses on financial literacy are considered being made mandatory and designed to enable school leavers to manage their financial affairs wisely. The course content would include, among other things, understanding investment risk; appreciating concepts such as compound interest as friend and foe; having an awareness of what constitutes informed decision-making; being able to identify and resist hard sell techniques; and how to access information for consumers such as that found on ASIC's website. Financial literacy should be a standing item on the Council of Australian Governments' (COAG) agenda.

Culture in the financial services industry

The committee notes that a code of ethics was one of the government's proposed legislative amendments to raise financial advisers' standards. In light of the evidence demonstrating that integrity issues were at the heart of some of the poor financial advice given to MIS investors, the committee highlights the importance of establishing such a code of ethics and suggests that this measure warrants close and determined attention.

Recommendation 5 **paragraph 8.28**

The committee recommends that the government give high priority to developing and implementing a code of ethics to which all financial advice providers must subscribe.

Banned or unscrupulous advisers

In its response to the FSI report, the government indicated its intention to develop legislation allowing ASIC to ban individuals in management roles within financial firms from operating in the industry. The committee welcomes this move but, to underline the importance of removing opportunities for a banned financial adviser to resurface in other roles in the industry, the committee considers that the term 'management' may be too narrow. Thus, in light of the findings of this committee in two previous reports and of the FSI, the committee reinforces two recommendations it made in June 2014.

Recommendation 6 **paragraph 8.45**

The committee recommends that the government consider the banning provisions in the licence regimes with a view to ensuring that a banned person cannot be a director, manager or hold a position of influence in a company providing a financial service or credit business.

Recommendation 7 **paragraph 8.46**

The committee recommends that the government consider legislative amendments that would give ASIC the power to immediately suspend a financial

adviser or planner, subject to the principles of natural justice, where ASIC suspects that the adviser or planner has engaged in egregious misconduct causing widespread harm to clients.

Disclosure documents

The inadequacy and complexity of MIS disclosure documents and accompanying advice has been of long-standing concern. Agribusiness MIS are complex products and difficult to understand. Disclosure documents—prospectuses, PDSs and Statements of Advice (SOAs)—proved inadequate in alerting consumers to the risks of investing in agribusiness MIS. The inadequacies in the disclosure together with poor financial advice and slick promotional strategies created an environment unsuited to informed and considered decision-making.

The evidence underscores, as noted previously, the importance of PDSs doing what they are intended to do—help consumers compare and make informed choices about financial products.

Recommendation 8 **paragraphs 9.77–9.80**

The committee recommends that, based on the agribusiness MIS experience, the Australian Government consult with industry on ways to improve the presentation of a product's risks in its respective PDS. The intention would be to strengthen the requirements governing the contents and presentation of information, particularly on risks associated with the product. This measure should not result in adding to the material in these documents. Indeed, it should work to further streamline the contents but at the same time focus on information that an investor requires to make an informed decision with particular attention given to risk.

With this objective in mind, the committee also recommends that the government consider expanding ASIC's powers to require additional content for PDSs for agribusiness MIS.

The committee recommends further that ASIC carefully examine the risk measures used in Europe and Canada mentioned by the FSI and prepare advice for government on the merits of introducing similar measures in Australia.

In conjunction with the above recommendation, the committee recommends that the government consider the risk measures used in Europe and Canada mentioned by the FSI to determine whether they provide a model that could be used for Australian PDSs.

General advice provided during promotional events

The committee welcomes the government's undertaking to replace the term 'general advice' with a term that clarifies the distinction between product sales and financial advice. It is not convinced, however, that renaming the term, in and of itself, provides adequate consumer protection particularly in circumstances where the product producer uses seminars and dinners to promote the product. The committee heard numerous accounts of growers, who attended seminars or promotional dinners, being encouraged to sign up to invest in agribusiness MIS. It has highlighted the role that

investment seminars had in influencing investors and is particularly concerned about the way in which scheme promoters used high pressure or hard sell techniques during so called public 'information' or 'educational' sessions. This advice would be classified as general advice.

In the highly charged environment around information sessions, there should be clear obligations on the promoters engaging in this type of marketing to ensure that potential investors are made fully aware of the risks carried by the product they are promoting. Investors must have access to full and accurate information about the product and be discouraged from signing up before receiving independent financial advice—that is receiving personal advice with all the attendant regulatory safeguards. Worryingly, however, the committee notes occasions where the financial adviser was very much part of the promotional team.

Recommendation 9 **paragraph 10.21**

The committee recommends that the government consider not only renaming general advice but strengthening the consumer protection safeguards around investment or product sales information presented during promotional events.

Recommendation 10 **paragraph 10.22**

The committee recommends that ASIC strengthen the language used in its regulatory guides dealing with general advice. This would include changing 'should' to 'must' in the following example:

> **You must take reasonable steps to ensure that the client understands that you have not taken into account their objectives, financial situation or needs in giving the general advice.**

Recommendation 11 **paragraph 10.25**

In light of the concerns about the lack of understanding of the role that referral networks had in selling agribusiness MIS without appropriate consumer protections, the committee recommends that the government's consideration of 'general advice' also include the role of referral networks and determine whether stronger regulations in this area are required.

Research houses experts' reports

The committee acknowledges that there are numerous participants who offer products or services within the financial advice value chain that influence, directly or indirectly, consumers' decisions on financial matters. It particularly notes that research houses and subject matter experts produce reports containing important information for financial advisers and investors in agribusiness MIS. Generally, such information is attached to, or included in, disclosure documents including PDSs. Under the user pays model, however, the experts' opinions may be biased by the remuneration offered by the product issuer and the promise of further business. In the committee's view, research houses and experts providing opinions should be held to high standards of honesty and integrity. In this regard, the committee notes the relevant International Organization of Securities Commission's (IOSCO) statement of principles governing

integrity and ethical behaviour and is of the view that they should apply and have force in Australia.

The committee is concerned that the message about compliance and adherence to high ethical standards is not reaching all participants in the industry.

Recommendation 12 **paragraph 10.52**

In respect of research houses and subject matter experts providing information or reports to the market on financial products such as agribusiness MIS, the committee recommends that the government implement measures to ensure that IOSCO's statement of principles governing integrity and ethical behaviour apply and have force. In particular, the committee recommends that the government consider imposing stronger legal obligations on analysts, and/or firms that employ analysts to rate their product, to act honestly and fairly when preparing and issuing reports and applying ratings to a financial product.

Role of the banks

The committee is firmly of the view that the banks that financed investor loans through the financing arm of both Timbercorp and Great Southern cannot outsource their responsibilities for allowing borrowers to enter into unsafe loans. Even though the banks were not directly involved in arranging the loans and can legally distance themselves from the loan arrangements, they absolutely owed a duty of care to borrowers. As such, the committee contends that the banks, or liquidators with the banks' support, should, as a gesture of good-will, extend to those borrowers special consideration in resolving their outstanding debts.

The committee is disappointed that an apparent adversarial mind-set is undermining the work of the independent hardship advocate (IHA), which was appointed by the liquidator of Timbercorp, KordaMentha. Despite this initiative, the Holt Norman Ashman Baker Action Group (HNAB–AG), a collection of investors who received advice from Mr Peter Holt or his associates, continues to raise complaints against the IHA. The engagement of the advocate had the potential to defuse the confrontational and ultimately damaging relationship that had developed between the liquidator and this group of borrowers. The committee takes the view, however, that despite falling far short of HNAB–AG's expectations, the work of the IHA still offers a more productive way to resolve long-standing disputes over unpaid loans.

Recommendation 13 **paragraphs 11.63–11.64**

The committee recommends that KordaMentha continue, through its hardship program, to resolve expeditiously outstanding matters relating to borrowers who are yet to reach agreement on repaying their outstanding loans from Timbercorp Finance.

The committee recommends that spokespeople for HNAB–Action Group consult with KordaMentha and the independent hardship advocate on implementing measures that would help to restore confidence, faith and good-will in the hardship program.

Recommendation 14 **paragraph 11.78**

The committee recommends that Bendigo and Adelaide Bank support the appointment of an independent hardship advocate to assist borrowers resolve their loan matters relating to Great Southern.

Regulation around investment lending

Investment lending has been instrumental in causing significant financial loss to retail investors who borrowed to invest in agribusiness MIS. In the committee's view, the responsible lending obligations imposed on brokers and lenders through the new credit laws should apply equally to the promoters, advisers and lenders involved in providing funds for investment purposes. The committee has no desire to stifle funding for investment, but to put an end to situations where retail investors are unwittingly entering into unsuitable loan arrangements. The committee is particularly concerned about consumers being encouraged to take out 'full recourse' loans, which means that, in the case of default, the lender can target assets not used as loan collateral. Evidence presented to the committee shows that, in many cases, investors did not realise that if their investment failed to generate the anticipated returns or failed completely, they would need to meet repayments from other sources and could be at risk of losing their home.

The committee is also extremely troubled by the numerous accounts of growers signing over a power of attorney to their adviser to arrange and refinance loans. Clearly, there was a serious breakdown in communication with growers unaware not only of the risky investment venture but of the high risk loan agreement they entered.

These glaring gaps identified in the regulatory framework around credit laws mean that retail investors borrowing to invest are not covered by the responsible lending obligations. The committee formed the view that this situation needs to be remedied. The consultation process, which commenced with the release of the National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012, would provide an ideal starting point for reform and should include recourse loans for agribusiness MIS. The committee understands a referral of legislative power from the states and territories would be required.

Recommendation 15 **paragraph 11.92**

The committee recommends that the Australian Government initiate discussions with the states and territories on taking measures that would lead to the introduction of national legislation that would bring credit provided predominantly for investment purposes, including recourse loans for agribusiness MIS, under the current responsible lending obligations. The provisions governing this new legislation would have two primary objectives in respect of retail investors:

- **oblige the credit provider (including finance companies, brokers and credit assistance providers) to exercise care, due diligence and prudence in providing or arranging credit for investment purposes; and**

- **ensure that the investor is fully aware of the loan arrangements and understands the consequences should the investment underperform or fail.**

Recommendation 16 **paragraph 11.93**

The committee recommends that the Australian Government consider ways to ensure that borrowers are aware that they are taking out a recourse loan to finance their agribusiness MIS and also to examine the merits of imposing a maximum loan-to-valuation limit on retail investors borrowing to invest in agribusiness MIS.

Recommendation 17 **paragraph 11.94**

The committee recommends that the Banking Code of Conduct include an undertaking that the banks adhere to responsible lending practices when providing finance to a retail investor to invest. This responsibility would apply when the lender is providing finance either directly or through another entity such as a financing arm of a Responsible Entity.

Legal advice causing harm

Some investors took legal advice to cease repayments on their MIS loans and are now faced with a loan substantially greater than at the time their schemes collapsed. The committee is concerned that vulnerable people who joined class actions expecting, in effect, to have their loans nullified are now in a financial position far worse than when the class actions started.

The committee is firmly of the view that the legal profession has the responsibility to inform itself of the circumstances around the advice provided to retail investors in collapsed agribusiness MIS to cease repayments on their outstanding debts. The profession needs to act to ensure that it maintains high ethical standards and its members adhere to best interest obligations towards their clients.

Recommendation 18 **paragraphs 12.15–12.16**

The committee recommends that the Victorian Legal Services Commissioner and Legal Services Board thoroughly review the conduct of the lawyers who provided advice to retail investors in collapsed agribusiness MIS to cease repayments on outstanding debts and the circumstances around this advice.

The intention would be to determine whether the profession needs to take measures to ensure it maintains high ethical standards and that its members adhere to best interest obligations towards their clients. The investigation would include making recommendations or determinations on:

- **remedies available to investors belonging to the class actions who have suffered considerable financial loss as a result of following advice to cease repayments on their outstanding loans;**
- **whether disciplinary action should be taken against the lawyers who provided the advice to stop repayments;**
- **whether the matter warrants any form of compensation; and**

- **whether the matter should be referred to any appropriate disciplinary body.**

Penalties

There can be no doubt that much stronger measures are needed to protect retail investors from the promotion and marketing of high risk products. A number of inquiries, including the committee's 2014 inquiry into the performance of ASIC and the FSI, have mounted a compelling argument for such action. Agribusiness MIS are a clear example where, based on the evidence before the committee, disclosure was inadequate; information was confusing rather than instructive for retail investors; and oral advice either misinterpreted the disclosure documents, downplayed risks, or selectively presented positive messages. Clearly, improved regulation could have prevented many unwary investors from entering into unsafe financial arrangements.

The committee is of the view that Australia's financial services regulatory regime, with its focus on disclosure, has not served Australian investors well and has not provided a reasonable level of consumer protection. While improved disclosure and education are necessary, they must be accompanied by other measures. Attention must be given to product issuers and their obligation to act in the best interests of investors.

The committee welcomes the government's endorsement of the FSI's recommendation to confer on ASIC a product intervention power. The committee understands that penalties commensurate with the offence are needed to send a strong message to product issuers to act responsibly when marketing products to retail investors. Indeed, in light of the FSI and ASIC's observation regarding the importance of having higher penalties, the committee formed the view that the government should consider increased penalties for serious breaches.

Recommendation 19 **paragraph 14.47**

To augment ASIC's product intervention power, the committee recommends that the government review the penalties for breaches of advisers and Australian Financial Services Licensees' obligations and, under the proposed legislation governing product issuers, ensure that the penalties align with the seriousness of the breach and serve as an effective deterrent.

Liquidation of agribusiness MIS

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 CAMAC to undertake a review of the current statutory framework for all MIS. The subsequent report was comprehensive and produced a range of well-considered and practical proposals for reform under the current legal framework and, in addition, set out an alternative legal framework for the regulation of schemes.

Recommendation 20 **paragraph 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.

Taxation incentives for agribusiness MIS

In 2005, the government undertook a review of the taxation policy of plantation forestry and, in 2008, conducted a review into non forestry MIS.[15] Since then, there have been major developments in this area that have exposed flaws either in taxation policy and/or its implementation. Now, with the benefit of hindsight, the committee is convinced that, based on the MIS collapses, it is time to examine the tax incentives and any unintended consequences that flowed from them. In particular, the review should look at the extent to which the tax concessions created distortions.

In this respect, the committee notes, however, the pleas from some quarters of the industry not to 'throw the baby out with the bathwater'.

Recommendation 21 **paragraph 16.40**

The committee notes that neither the ATO nor Treasury have undertaken a comprehensive review of the tax incentives for MIS and whether they had unintended consequences, such as diverting funds away from more productive enterprises; inflating up front expenses; or encouraging poorly-researched management decisions (planting in unsuitable locations). The committee recommends that Treasury commission a review to better inform the policy around providing tax concessions for agribusiness MIS.

Recommendation 22 **paragraph 16.41**

The committee recommends further that the proposed review consider the approach to the incentives offered to investors in agribusiness ventures by other countries such as the United Kingdom to inform the review's findings and recommendations.

Recommendation 23 **paragraphs 16.42–16.43**

In addition to the above recommendation, the committee recommends that the government request the Productivity Commission to inquire into and report on the use of taxation incentives in agribusiness MIS. As part of its inquiry, the Productivity Commission should identify the unintended adverse consequences, if any, that flowed from allowing tax deductions for agribusiness MIS. For example:

- **the potential for mis-selling financial products on the tax concessions;**

---

15 In the 2005–06 Budget, the government announced that it would conduct a review of the application of taxation law to plantation forestry in the context of the government's broader plantation and natural resource management policies. Treasury, *Review of Taxation Treatment of Plantation Forestry*, 22 June 2005, http://archive.treasury.gov.au/contentitem.asp?ContentID=997&NavID= (accessed 22 September 2015).

- **the incentive for retail investors to borrow, sometimes unwisely, to fund their investment;**
- **whether the taxation concessions:**
    - **became an end in themselves rather than the business model;**
    - **showed up as subsidies to higher cost structures, operations and/or returns to the operators of the schemes; and**
    - **distorted land values and diverted high value farmland into passive monoculture such as Blue Gums.**

The main purpose of the inquiry would be to draw not only on the experiences of the failed MIS but also the successful schemes to determine whether there is merit in reforming the system of tax incentives and, if so, what those reforms should be.

Enforcement

It is important that penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties, or the failure to apply them, undermine the regulator's ability to do its job. Inadequately low penalties or poor enforcement do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. In 2014, the committee considered that a compelling case had been made for the penalties currently available for contraventions of the legislation ASIC administers to be reviewed to ensure they were set at appropriate levels. The committee has reinforced this recommendation. But, ASIC must also ensure that it uses its powers to effect in order to send a potent message to all those in the financial services industry that it is serious about exposing misconduct and bringing the full weight of the law to bear on wrong doers.

Recommendation 24 **paragraph 18.16–18.18**

The committee recommends that ASIC review the complaints made against advisers and accountants, licensed or unlicensed, who engaged in alleged unscrupulous practices when recommending that their clients invest in agribusiness MIS. The review would identify any weaknesses in the current legislation that impeded ASIC from taking effective action against those who engaged in such unsound practices. This review would also examine the adequacy of the penalties available to ASIC to impose on such wrong doers. In particular, ASIC should consider the adequacy of penalties that apply to those who were unlicensed or have since become unlicensed. Banning in such cases is redundant.

The committee also recommends that as part of this review, ASIC consider the practice of advisers using bankruptcy as a means to avoid recompensing clients who have suffered financial loss as a result of their poor financial advice and any possible remedies.

The committee recommends that ASIC provide its findings to the committee.

In this regard, it should be noted that the committee is currently inquiring into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime.

Senator Chris Ketter

Chair