

## Chapter 2

### Land banking schemes—old and new

2.1 Investment in property is a long established and accepted strategy for Australians to build wealth. Land banking is a particular category of property investment, and can take many forms: an individual entrepreneur who purchases a block of land for future sale, a land banking company that buys land and divides it into smaller plots to sell to investors or a company that holds the land or property as a collective investment on behalf of the investors. In this chapter, the committee provides insight into the nature of land banking schemes, particularly the 'innovative' use of options agreements to fund housing developments. It undertakes a detailed analysis of the way land banking schemes are promoted to investors with a particular emphasis on two companies involved in land banking schemes, 21<sup>st</sup> Century Group and Market First. The committee also considers matters dealing with transparency and disclosure in the marketing of these products.

#### **Land banking**

2.2 Land banking is a speculative venture whereby an investor purchases a block of undeveloped or underdeveloped land in the expectation of selling it in the future when its value has increased significantly. Ideally, the investor will wait until market conditions are favourable and then divide the block into smaller sections or into house and land parcels to sell at a profit. While often heralded as a smart way to increase wealth, this type of investment exposes the investor to the risk of losing significant amounts of money. For example, the areas chosen for land banking are often located on the outskirts of cities in the hope that urban development will over time boost the value of the land. Permission, however, may not be granted for the anticipated development and the investor is left with a plot that remains under restrictions and is unlikely to increase in value. There is also potential for the promoters of such schemes to entice investors to sign up to deals without alerting the investor to the inherent risks of land banking in general or their particular land banking scheme.

#### ***Options to purchase***

2.3 In contrast to a number of 'get-rich-quick' schemes which have been promoted (and attracted the attention of regulators) in the past, land banking schemes have been described as a 'get-rich-slow' scheme. This is because of the long time frame between the contract being signed and the payment of the option fee or a deposit for an off-the-plan contract of sale.

2.4 Much of the committee's attention during the inquiry was focused on a land banking scheme that has unique features and is a relatively new type of investment scheme promoted by property spruikers—options to purchase.<sup>1</sup> The use of options

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1 This report uses the term 'property spruikers' generically to refer to unscrupulous operators, marketeers and promoters of property investment schemes.

agreements as an investment strategy is the 'innovation' which distinguishes these land banking schemes from previous property investment schemes. Mr Simon Cohen, Director of Consumer Affairs Victoria, described this type of arrangement as:

...distinct from rent-to-buy or vendor terms contracts in that the contract a buyer enters may only be an option at some future point to purchase a plot of land subject to development approval.<sup>2</sup>

2.5 In other words, 'rather than getting an interest in the property per se, there is an option that may be exercisable at some future point after registration of a concept that is marketed to someone'.<sup>3</sup> With the schemes using options, investors typically enter a contract that provides them with an option, but not an obligation, to purchase a plot of land subject to development approval. They pay a fee for the option at the outset. ASIC provided some general background on land banking schemes before explaining the more recent 'option' model:

Land banking is a real estate investment scheme involving the acquisition of large blocks of land by a promoter or developer of the scheme, often in undeveloped rural areas, who then offer portions of the land to investors.

Land banking companies typically promote the investment with representations of high potential returns if the land is redeveloped, or if plans for rezoning and development are finalised.

Investors either purchase a lot in the land, or acquire an option to purchase a lot of land in an unregistered plan of subdivision. The option agreement is triggered at a time that the necessary development is approved by the local council.<sup>4</sup>

2.6 According to media reports, options were commonly marketed as an affordable way to get a foothold in the property market, with substantial returns on the investment promised once the land was rezoned for residential development and converted into housing estates to meet future housing demand. The attraction for investors was that they would only need to outlay a small sum of money for the option fee and would later benefit from any appreciation in the value of the land once the land was developed.<sup>5</sup>

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2 *Committee Hansard*, 30 September 2015, p. 2. Consumer Affairs Victoria described rent-to-buy schemes as one that targets lower income consumers or prospective buyers who are unable to obtain mainstream finance. It stated 'under a rent-to-buy scheme, the buyer enters into a rental agreement with the vendor where they are charged high rent (well above market rate). At the end of the rental period they may buy the property but ownership of the property does not pass to the buyer until they exercise the "option to Purchase" after the rental period has expired, and buyers have limited legal rights if something goes wrong'. Consumer Affairs Victoria, 'Working with other Australian Consumer Law regulators', and *Year in Review 2014–15*, p. 25.

3 Mr Simon Cohen, Director, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p.4.

4 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', Media release 15-214MR, 7 August 2015.

5 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

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### *Companies involved in recent land banking schemes*

2.7 The two companies involved in promoting the land banking schemes of particular interest to this committee are the 21<sup>st</sup> Century Group, operated by Mr Jamie McIntyre, and Market First, run by Mr Rowan Burn.<sup>6</sup> It should be noted that both companies are being investigated by ASIC for their role in operating and promoting land banking schemes.<sup>7</sup> The committee notes that there may be other companies involved in operating and promoting land banking, including schemes offering options.

2.8 In relation to the 21<sup>st</sup> Century Group and Market First land banking schemes, ASIC estimated that approximately 2,000 investors purchased either options or off-the-plan contracts of sale.<sup>8</sup> Many investors, however, purchased multiple lots so the money invested is likely to be in the high tens of millions, if not more.

#### *The 21<sup>st</sup> Century Group*

2.9 In October 2015, Midland HWY Pty Ltd, the developer of a land banking scheme which was established on 7 September 2011, commenced selling option deeds and off-the-plan land sale contracts for parcels of land lots on the outskirts of Huntley near Bendigo, Victoria. The 21<sup>st</sup> Century Group marketed this development known as Hermitage Bendigo (formerly Acacia Banks) located at Midland Highway, Bagshot, Victoria.<sup>9</sup>

2.10 To protect the interests of investors, ASIC commenced proceedings in the Federal Court of Australia (Victoria) to freeze assets and wind up this development. Based on preliminary investigations, the administrators prepared a supplementary report to creditors, dated 14 October 2015, noting there were many issues concerning the Midland project that required further investigation by a liquidator. The administrators reported that Midland had spent the entire proceeds of the option fees and was without funds to repay the c\$24m Option Fees. It provided the following details:

- Midland received c\$24m from Option Holders and has spent those funds without completing its obligations under the Option Deeds.
- Only c\$1.7m of the c\$24m appears to have been applied specifically for planning permit and development purposes.

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6 Mr Jamie McIntyre refers to his companies as the '21st Century Group'. 21st Century Group Pty Ltd (ACN 108 150 545) is not a defendant to the ASIC's court proceedings against 21<sup>st</sup> Century Group, and ASIC is not aware of any connection between 21st Century Group Pty Ltd and Mr McIntyre's 21<sup>st</sup> Century Group.

7 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 64.

8 ASIC, answer to written question on notice, 30 November 2015, p. 7, <https://www.ppbadvisory.com/uploads/i399-Midland-FAQ.pdf> (accessed 6 January 2016).

9 ASIC, 'ASIC acts against 21<sup>st</sup> Century Group and Jamie McIntyre land banking schemes', 15–214MR, 7 August 2015. Mr McIntyre, *Committee Hansard*, 30 September 2015, p. 23.

- Up to c\$22.3m of payments from Midland's bank accounts have been identified as likely to be voidable transactions or other potential claims which should be investigated by a liquidator:
  - c\$7.6m—in payments unrelated to the development of the land, including \$7.2m to companies associated with Midland's lawyers;
  - c\$2m—paid for which Midland appears not to have received any benefit;
  - c\$11.9m—for potential payments at 'above market rates', including:
    - \$7.3m—commission paid out of Option Holder payment proceeds;
    - \$4.6m—fees paid to Project Management (AUST) Pty Ltd (PMA), whose sole director and shareholder appears to be a Midland shadow director/de facto director; and
    - c\$761k—miscellaneous payments requiring further investigation.<sup>10</sup>

2.11 PPB Advisory partner, Mr Nicholas Martin, advised creditors that:

This is a very unfortunate situation for Midland Hwy investors, as our preliminary investigations have revealed that of the \$24 million invested in the scheme, just \$1.7 million has been spent on the planning and development of the project. While all option fees also appear to have been spent, the majority have not been applied to activities relating to the development of the land.<sup>11</sup>

2.12 The administrators were unsure whether the land owner, Bilkurra Investments Pty Ltd, had sufficient financial resources to complete the land development.<sup>12</sup>

2.13 On 7 December 2015, the Federal Court of Australia made wind-up orders for the company.

2.14 As part of its wider investigation into land banking schemes, ASIC also launched proceedings in the Federal Court of Australia against companies associated with Mr McIntyre and the 21st Century Group in relation to their promotion and sale

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10 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016). The small 'c' in front of \$ indicates 'circa'.

11 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016).

12 PPB Advisory, 'Administrators Recommend Midland Hwy be Placed in Liquidation to Conduct Investigations and Maximise the Prospect of a Return to Investor', <https://www.ppbadvisory.com/news/d/2015-10-19/administrators-recommend-midland-hwy-be-placed-in-liquidation-to-conduct-investigations-and-maximise-the-prospect-of-a-return-to-investors> (accessed 4 January 2016).

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of interests to investors in five land banking schemes. ASIC alleges that the schemes are unregistered managed investment schemes and that the 21st Century Group companies and Mr McIntyre have been unlawfully carrying on an unlicensed financial services business. The five schemes were promoted and advertised as:

- Botanica, located at 805 Archer Rd, Kialla, Victoria (an area of the previously named Moira Park Green City development outside of Shepparton);
- Secret Valley Estate, located at 955 Old Sydney Road, Bylands, Victoria;
- Oak Valley Lakes Estate & Resort, located at 124 Booth Road, Brookhill, Townsville, Queensland;
- Bendigo Vineyard Estate & Resort, located at 51 Andrews Road, Bendigo, Victoria; and
- Melbourne Grove Estate, located at 1491 Dohertys Road, Mount Cottrell, Victoria.<sup>13</sup>

2.15 Over the course of the court proceedings against 21<sup>st</sup> Century Group, ASIC became increasingly concerned about the prospects of 21<sup>st</sup> Century Group's land banking schemes, informing the committee that:

ASIC's view is that it is unlikely that options investors in the 21st Century land banking schemes will be able to see their return on their investment or receive a refund of their option fee given that the developments do not appear to be capable of being completed because:

1. the relevant councils have stated that the underlying land in each development will not be, or is highly unlikely to be, rezoned as residential land for the foreseeable future;
2. the underlying land in each development is either:
  - i not yet owned by the 21st Century Group; and/or
  - ii financed by way of mortgage;
3. at present, there appears to be insufficient funds available to:
  - i complete the developments;
  - ii refund the money paid by investors if the developments cannot be completed; and/or
  - iii pay money, whether in respect of any debt, by way of damages or compensation or otherwise, or to account for financial products or otherwise, to investors.<sup>14</sup>

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13 ASIC, 'ASIC acts against 21st Century Group and Jamie McIntyre land banking schemes', 15-214MR, 7 August 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-214mr-asic-acts-against-21st-century-group-and-jamie-mcintyre-land-banking-schemes/> (accessed 4 January 2016).

14 ASIC, answer to question on notice No. 6, 30 November 2015, p. 4.

2.16 Mr McIntyre, CEO of 21<sup>st</sup> Century Group, described his land banking schemes as a 'new strategy' that his company started selling four or five years ago.<sup>15</sup> It has been reported that a Shepparton property developer, Mr Nejat Mackali, was the original creator of options agreements, which he used as an innovative method of funding the Moira Park Green City development outside of Shepparton, Victoria.<sup>16</sup> Mr Mackali alleges that the 21<sup>st</sup> Century Group, which marketed the Moira Park Green City development, later used his options strategy as the funding model for other land banking schemes.<sup>17</sup> As noted in the previous chapter, Mr McIntyre appeared before committee in public to give evidence relating to his involvement in land banking schemes. While Mr Mackali corresponded with the committee, he declined an invitation to give evidence at a public hearing.

#### *Market First*

2.17 Market First was the promoter of Foscari, located in Truganina, Victoria. Foscari was touted as having its own aura and a unique combination of attractions, 'wonderful in design, inspired by some of the world's most prestigious and luxury resorts'. Said to be located in one of Melbourne's hottest growth corridors, Foscari offered:

...an exclusive collection of individually designed luxury residences brought to you by internationally acclaimed Elevli Plus Peddle Thorp Architects.<sup>18</sup>

2.18 According to Market First's advertisements, the development had approval from the Council and 'millions of dollars of earthworks have already been done in preparation for the construction of the project'. Further:

The Developers are putting heart, soul—and lots of money!—into making this a landmark development. That's why I have no doubt it will win many awards for its ground-breaking design and amenities.

All of which will help to increase the potential returns of those Market First Members who wisely invested.<sup>19</sup>

2.19 On 21 December 2015, the Federal Court made freezing orders against Foscari Holdings with respect to selling, charging, mortgaging or otherwise dealing with or disposing of any property of Foscari Holdings until the hearing and determination of the proceeding or further order of the court. The court also ordered

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15 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 29.

16 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

17 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

18 Foscari Holdings Pty Ltd, Brochure, *Foscari Beautiful Living*, 2013.

19 Market First website, 'Unique opportunities', <http://www.marketfirstgroup.com.au/latest-news-1/foscari-development-council-approved> (accessed 5 January 2016).

that Foscari Holdings be restrained from completing contracts of sale relating to Foscari (unless the prior written consent of ASIC was obtained).<sup>20</sup>

2.20 It should be noted that some investors in Market First's schemes did not invest through options: instead, they invested through a more traditional property investment route, by paying a deposit for an off-the-plan contract of sale. For example, of the 197 Slater and Gordon clients who invested in Market First's schemes, 156 were off-the-plan contracts and the remaining 41 had purchased options.<sup>21</sup>



*Rowan Burn at one of Market First's sites outside of Melbourne, which would apparently be transformed into a luxury housing development*

2.21 There are more protections under state and territory laws around property transactions for off-the-plan contracts of sale, and these investors may stand a better chance of getting their deposit returned as it should have been held in trust. Whether off-the-plan investors will actually receive their deposit back is yet to be seen. Even so, ASIC was concerned that the development company was insolvent and that it was 'just and equitable' that the company be wound up. ASIC's investigations suggested that:

...investors may have invested in the land banking schemes on the basis of misleading representations and that option agreements entered into by

20 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

21 See chapter 4, paragraph 4.18.



investors in Hermitage and Foscari purportedly allow for monies invested in the schemes to be used for any purpose whatsoever, and need not be used to progress the two land banking schemes.<sup>22</sup>

2.22 ASIC was concerned that Foscari was not close to completion and appeared to be incapable of completion due to the financial position of the development company.<sup>23</sup>

2.23 After an initial investigation, sparked by an awareness that one of its lawyers was providing advice on the schemes, Slater and Gordon Lawyers also became concerned about a number of matters related to the Foscari development and another one called Veneziane. Many of these concerns raised questions which remain unanswered, particularly around the opaque ownership of the developments.<sup>24</sup> Ms Sharon Taylor, Slater and Gordon Lawyers, informed the committee that her firm had concerns about a number of misleading presale representations made to investors, including representations made about the price of the investments:

We were particularly concerned about the idea that they were wholesale prices. Our investigations indicated they were not.

...

There was also the idea that people were paying for some sort of exclusive membership to give them the opportunity to look at hand-picked projects, and it appeared only two projects were on offer.<sup>25</sup>

2.24 She added:

Some of the more extravagant lifestyle amenities were thought unlikely to be delivered. The bare registration of the plans of subdivision was considered to be possible, if the projects received Council approval. We were sceptical and put a number of specific questions on this issue to the vendor's solicitors [Evans Ellis Lawyers] in our letter dated 12 December 2013 to which they responded by a letter dated 19 December 2013.<sup>26</sup>

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22 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

23 ASIC, 'ASIC takes action to freeze assets and wind up companies associated with land banking schemes', 15-401MR, 18 December 2015, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-401mr-asic-takes-action-to-freeze-assets-and-wind-up-companies-associated-with-land-banking-schemes/> (accessed 4 January 2016).

24 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 46.

25 Ms Sharon Taylor, General Manager, Professional Standards and Risk, Slater and Gordon, *Committee Hansard*, 30 September 2015, p. 44.

26 Slater and Gordon Lawyers, answers to question on notice No. 7, 2 December 2015, p. 2.



2.25 Mr Rowan Burn, CEO of 21<sup>st</sup> Century, declined the committee's request to appear as a witness to answer questions relating to the operation of these land banking schemes. He informed the committee that he was currently using his time and energy contacting clients 'to ensure they have all the information they need'. According to Mr Burn, his focus was 'on having private discussions with option holders and off the plan buyers', who were also free to contact him 'to discuss their own circumstances as they always have been'. He was of the view that he could not provide 'any meaningful information' that would assist the committee's inquiry.<sup>27</sup>

2.26 The committee takes a very different view. People with inside knowledge of those particular property schemes hold information vital to understanding the ventures and should do their utmost to impart such knowledge, especially where the interests of retail investors may be in jeopardy. Their reluctance to do so merely adds to the uncertainty and doubts around the credibility of the schemes and their promoters.

### **Transparency**

2.27 Concerns about property investment schemes are not new, and there is some evidence that part of the problem associated with such schemes can be attributed to 'rogue traders' often with links to shady operators from the past. A number of people who were involved in property investment scams in the early 2000s (during the last property boom) are also allegedly involved in the schemes promoted by Market First and 21<sup>st</sup> Century Group, including notorious rogue trader Mr Henry Kaye and his sister Ms Julia Feldman.<sup>28</sup> Mr McIntyre denied Mr Kaye had ever worked with 21<sup>st</sup> Century Group, and told the committee that Ms Feldman had not worked for the group for around 18 months.<sup>29</sup> Prior to this time, Ms Feldman worked for 21<sup>st</sup> Century Group as a sales manager and trainer.<sup>30</sup> Ms Feldman reportedly held similar roles in Market First, and is one of many people linked to both Market First and 21<sup>st</sup> Century Group.<sup>31</sup>

2.28 The leadership and ownership structures around the less reputable land banking schemes are often opaque, so it is difficult to determine who is involved (often behind-the-scenes) in the companies that develop or promote the schemes. There are also other parties involved in the operation of the schemes: developers, project managers and land owners. The Midland HWY development provides a recent

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27 Private correspondence, Mr Rowan Burn to the committee.

28 The Federal Court of Australia declared that Mr Kaye was involved in conduct that was misleading and deceptive in September 2004, in regards to claims Mr Kaye had made at property investment courses. Mr Kaye was later given a five year ban from managing corporations in 2010.

29 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, pp. 15-16.

30 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 24.

31 Simon Johanson, Royce Millar and Ben Schneiders, 'Land deal with Kaye link caves in', *Sunday Age*, 19 July 2015, p. 13.

example of this opacity and the murkiness that surrounds the identity of controlling and related entities.

### ***Midland Hwy development—Hermitage Bendigo***

2.29 The difficulty determining the parties involved in operating a land banking scheme can be illustrated through the Hermitage Bendigo land banking scheme.<sup>32</sup> As previously noted, the developer of the project was Midland HWY Pty Ltd (Midland Hwy). The 21<sup>st</sup> Century Group was the principal marketer of Hermitage Bendigo. Mr McIntyre acknowledged that 21<sup>st</sup> Century Group had marketed around \$16 million of the approximately \$25 million invested in the project.<sup>33</sup>

2.30 As noted earlier, Midland Hwy was placed into voluntary administration on 2 July 2015 and, following proceedings in the Federal Court commenced by ASIC, officers from PPB Advisory were appointed administrators.<sup>34</sup> Subsequently, on 7 December 2015, the Federal Court ordered the winding up of Midland Hwy and appointed PPB Advisory as liquidators.<sup>35</sup> The principal reasons for the court's determination were:

- Midland was insolvent—it had little in the way of assets but had substantial liabilities to the retail investors and third parties. Midland was not operating a business and appeared to be a shell.
- Midland had been used for shadowy purposes—substantial transactions and money flows involving Midland ranging from \$22.3 million to \$24 million required full investigation more appropriately carried out by a liquidator rather than by ASIC.
- Bilkurra Investments Pty Ltd, the proponent of the Deed of Company Arrangement (DOCA), was substantially implicated in the transactions that in the court's view required full investigation, as were the persons and entities associated therewith.
- The proposal propounded by Bilkurra to the creditors of Midland was embryonic and Bilkurra's capacity to implement the same was doubtful—indeed, according to the court, Bilkurra's own financial state was 'dubious to say the least'.
- It was doubtful whether the creditors of Midland who were the retail investors and option holders would receive any substantial benefit from the DOCA and, further, misleading representations were made to such creditors prior to their vote on the relevant resolution in order to procure their vote.

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32 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 25.

33 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 24.

34 ASIC, 'ASIC takes action to remove administrators of failed land banking company', Media release 15-203MR, 31 July 2015.

35 ASIC, 'Failed land banking company Midland Hwy to be wound up following ASIC action', Media release 15-369MR, 7 December 2015.

- Generally, it was in the public interest that the administration of Midland come to an end and that Midland be wound up.<sup>36</sup>

2.31 PPB Advisory, as the liquidator, is continuing to investigate the affairs of Midland Hwy and to determine whether any money can be recovered for creditors. However, as noted above, some concerning details have already been uncovered. In a supplementary report to creditors, PPB Advisory reported that \$24 million had been paid in options fees and around \$1.15 million had been paid under off-the-plan land sale contracts (with bank guarantees totalling a further \$433,000 in lieu of payments).<sup>37</sup> PPB Advisory reported that Midland Hwy had spent the \$24 million in option fees without completing its obligations under the option deeds, and only \$1.7 million of the money invested appeared to have been spent for planning permit and development purposes.<sup>38</sup>

2.32 Evans Ellis Lawyers, who are linked with many different land banking schemes operated and promoted by both Market First and 21<sup>st</sup> Century Group, are acting as solicitors for both Midland Hwy and the company which owns the land, Bilkurra Investments Pty Ltd (Bilkurra). Evans Ellis Lawyers has refused to identify the individuals providing instructions to them on Bilkurra's behalf, and PPB Advisory suspects that someone other than the director of Bilkurra is providing instructions.<sup>39</sup>

2.33 It should be noted that on numerous occasions the court referred to shady deals, and also noted the complex web of entities and transactions involving Midland. The court described Midland as a corporation that 'has been used and controlled by shadowy figures and entities'. Mr Michael Grochowski, according to the court, 'appears to have been the de facto or shadow director and the real controller of Midland' and also controlled PMA, which was appointed project manager for Midland in December 2011.<sup>40</sup>

2.34 The committee asked Mr McIntyre about reports that the project manager for Hermitage Bendigo, PMA, received a significant amount of money from the options fees. PMA was appointed as project manager for Midland Hwy in December 2011 and

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36 Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators apptd) (2015) FCA 1360, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2015/2015fca1360> (accessed 4 January 2016).

37 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 11.

38 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 2.

39 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 3.

40 Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators apptd) (2015) FCA 1360, paragraphs 11, 15, 50, 76 and 80.

no other project manager was appointed subsequent to this date.<sup>41</sup> Mr McIntyre informed the committee that he had no knowledge of, or links to, PMA.<sup>42</sup> Instead, Mr McIntyre told the committee 'all we had heard of was Midland and the project manager'.<sup>43</sup> Further, Mr McIntyre distanced himself from the operation of Hermitage Bendigo: '[w]e were the marketer of this project. I know others would like to make allegations that somehow we are the developer, but we are not'.<sup>44</sup> It is unclear how Mr McIntyre knew of a project manager but did not know of PMA itself.

2.35 In addition, media reports linked Mr Henry Kaye to Hermitage Bendigo through the involvement of a number of Mr Kaye's associates.<sup>45</sup> Mr McIntyre maintained that 21<sup>st</sup> Century Group had 'never knowingly marketed his [Mr Kaye's] land projects'.<sup>46</sup> From Mr McIntyre's perspective:

There was speculation made around the Midland project, but we could never verify that. We ceased marketing anyhow, but I can tell you that the board at 21<sup>st</sup> Century would never have approved or signed off on marketing a Henry Kaye project.<sup>47</sup>

2.36 It would seem, based on Mr McIntyre's evidence, that it can be difficult even for the companies who promote and sell the majority of lots in certain land banking scheme to determine who is involved in the operation of land banking schemes. The court concluded:

Midland received \$24 million from retail investors to be used ultimately for the purchase and development of the land. The \$24 million is missing ... Yet Bilkurra has the land, and other entities and individuals have received and had the benefit of most of the \$24 million. Midland now has nothing. The investors have nothing. All of this demands a proper investigation by a liquidator and appropriate recovery proceedings.<sup>48</sup>

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41 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 8.

42 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 24. Following the hearing, PPB Advisory reported that Mr Michael Grochowski, PMA's director, appeared to have acted as a shadow director/de facto director of Midland HWY, authorising payments of around \$24 million from Midland HWY's bank accounts, including around \$22.3 million in potential voidable transactions and other claims: PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed)* CAN 153 096 069, 14 October 2015, p. 3.

43 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 24.

44 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 24.

45 For example, Simon Johanson and Royce Millar, 'McIntyre's collapsed land banking scheme faces liquidation', *the Age*, 19 October 2015, p. 21.

46 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 25.

47 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 25.

48 *Australian Securities and Investments Commission v Midland Hwy Pty Ltd* (administrators apptd) (2015) FCA 1360, [94].

### *Foscari Holdings Pty Ltd*

2.37 As noted earlier, ASIC had concerns about Foscari Holdings Pty Ltd. The administrators, PPB Advisory, also identified a link between the 21<sup>st</sup> Century Group marketed Hermitage Bendigo project and Market First's Foscari project in Truganina, on the outskirts of Melbourne. Midland Hwy paid \$4.768 million to a holding company, Foscari Holdings Pty Ltd (Foscari Holdings).<sup>49</sup> There was no documentation or explanation for the payments.<sup>50</sup> Foscari Holdings appears to be owned by Evans Ellis Lawyers (who are also acting as solicitors for Midland Hwy and Bilkurra) through holding companies, and the identities of the beneficial owners of the holding companies are unclear.<sup>51</sup> As noted in the previous chapter, the committee attempted to contact but received no response from Mr Darren Eliaou, the principal lawyer at Evans Ellis Lawyers, and thus did not have an opportunity to seek further information on this point.

2.38 The approaches taken by 21<sup>st</sup> Century Group and Market First to promoting options as a property investment strategy, and the financial links and business connections between the two organisations raise serious questions about whether the same (unknown) interests are behind most, if not all, of the land banking schemes that are currently raising concerns.

### **Disclosure**

2.39 Options to purchase land are a complex product and potential investors should be properly informed about the proposal being offered to them. Evidence received by the committee, however, demonstrated that many investors were unaware of the risks and disadvantages of investing through option agreements. Instead, some investors thought that they were purchasing an interest in the land itself. The committee received as evidence DVD recordings of sessions from investment seminars where spruikers from both 21<sup>st</sup> Century Group and Market First promoted their respective land banking schemes.<sup>52</sup> It should be noted that ASIC informed the committee that there were no off-the-plan investors in land banking schemes subject to the 21<sup>st</sup> Century proceeding.<sup>53</sup> Neither seminar fully explained the nature of options and the interest that investors who paid the option fee would actually be receiving.

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49 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed) CAN 153 096 069*, 14 October 2015, p. 18.

50 PPB Advisory, *Administrators' supplementary report: Section 429A of the Corporations Act 2001—Midland Hwy Pty Ltd (Administrators Appointed) CAN 153 096 069*, 14 October 2015, p. 18.

51 Royce Millar, Ben Schneiders and Simon Johanson, 'State money in troubled homes plan', *the Age*, 9 January 2015, p. 8.

52 Ms Grazyna Monka, *Submission 148* (21st Century Property Direct, 1 Day Wholesale Land Release DVD: Homestudy); Mr & Mrs Jim and Alison Guy, *Submission 150* (Market First, 'Property Education Pack' DVD series).

53 ASIC, answer to written question on notice No. 7.

2.40 During the course of the inquiry, the committee heard evidence from four investors in land banking projects: Ms Grazyna Monka, who invested through 21<sup>st</sup> Century Group, and Mr Jim Guy, Ms Liesl Baxter and Mr Trevor Haynes, who invested through Market First. Only one of the four investors, Ms Monka, was aware that the investment involved options.<sup>54</sup> The three Market First investors had never heard of options agreements before; it is possible that they all had invested through off-the-plan contracts of sale.<sup>55</sup> Indeed, Mr Guy later provided a submission which indicated he had invested through an off-the-plan contract of sale.<sup>56</sup>

2.41 In his submission, Mr McIntyre provided copies of correspondence allegedly from investors in 21<sup>st</sup> Century Group's projects to ASIC and/or 21<sup>st</sup> Century Group.<sup>57</sup> The investors were supportive of 21<sup>st</sup> Century Group and generally expressed the view that ASIC should discontinue its court proceedings if 21<sup>st</sup> Century Group provides investors with refunds or converts the options agreements into a managed investment scheme. Some investors made the point that they conducted ample due diligence on their options investment. They were under the impression, however, that they were making an investment into real property. For example, one investor contended:

My husband and I purchased an option in December last year in our SMSF after doing complete due diligence, going to the office to discuss the project and visiting the site.

...

If 21<sup>st</sup> Century has done the wrong thing by not 'registering' as an financial investment company (**I thought we were investing in land, not a financial product**) would it be possible for you [ASIC] to point out their mistake and assign them the correct paperwork you require so all the investors involved aren't taken to the wall?<sup>58</sup>

2.42 In contrast to the lack of clarity in the marketing of the schemes, Mr McIntyre outlined for the committee the non-refundable and non-property nature of options, illustrated with an example from his own personal experience:

What is important to note about land banking and options? Option is a fee for service. Once you have bought an option, that is it. You have the right but not the obligation to use the option to acquire land in the future. There is a simple example. On one of my farms, three years ago, I sold an option to a mining company. They paid me \$90,000 for a three-year option. Once the mining companies pay that money it is mine to keep, regardless of whether they choose to exercise their option. They are not obligated to but

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54 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 7.

55 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 35; Ms Liesl Baxter, *Committee Hansard*, 30 September 2015, p. 35; Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

56 Mr & Mrs Jim and Alison Guy, *Submission 150*.

57 Mr Jamie McIntyre, *Submission 146*, pp. 55–75.

58 Mr Jamie McIntyre, *Submission 146*, p. 64. (emphasis added)

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they cannot change their mind and ask for feedback or question where the money is. It is none of their business. They bought a non-refundable product.<sup>59</sup>

2.43 In his submission to the inquiry, Mr McIntyre reiterated the point that once an investor pays for an option they cannot change their mind and get the fee back or even question where the money is as it is 'none of their business'.<sup>60</sup> He did note, however, that 21<sup>st</sup> Century was offering 'a 100% money back option if the project wasn't approved in 20 years' time.<sup>61</sup>

2.44 While Mr McIntyre is adamant that investors cannot change their mind about their investment, or, in his words, 'question where the money is', the fact that investors in these schemes are repeatedly asking those same questions points to a fundamental misunderstanding about the nature of the investment they were making.<sup>62</sup>

2.45 The (potential) benefits of holding an option to purchase land differ significantly from the benefits of purchasing an interest in investment property. If the land received development approval and the option were, in effect, triggered, investors would then have the option to purchase the land or resell the option to another investor. To purchase the land (and a housing package to develop the land into residential housing) would require either a significant amount of money or access to credit. It is unclear how many investors would have been in a position to purchase and develop the land if the option were activated (that is, to take advantage of the benefit the option supposedly gave them). For example, Dr Elizabeth Lanyon from Consumer Affairs Victoria noted that the promoters of land banking schemes often targeted consumers who have limited access to mainstream finance.<sup>63</sup>

2.46 One investor who spoke to the committee was already bankrupt when he purchased the options, and it appears unlikely that investors in such circumstances would have been able to purchase and develop the land if their options were triggered.<sup>64</sup> This is unsurprising given the land banking schemes appear to have been promoted to people who were looking for a more affordable way to purchase property.

2.47 The other approach, to resell the option to another investor, might be possible, assuming the option was actually triggered and the land had some value which would appeal to another purchaser. Prior to the option being triggered at some future point, the option has limited (if any) value as there appears to be no secondary market in

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59 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 13.

60 *Submission 146*, p. 5.

61 *Submission 146*, p. 5.

62 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 13.

63 Dr Elizabeth Lanyon, Director, Regulation and Policy Division, Consumer Affairs Victoria, *Committee Hansard*, 30 September 2015, p. 2.

64 Mr Jim Guy, *Committee Hansard*, 30 September 2015, pp. 36–38.



which to sell the option. ASIC described the option as an illiquid investment as there 'is no market for it'.<sup>65</sup>

2.48 For investors who erroneously thought that they were purchasing an interest in land, the complexities around the use of options were unlikely to have been considered when making decisions about the value and utility of investing in a land banking scheme.

### **Timeframe for development approval and construction**

2.49 There was conflicting evidence before the committee about the likely timeframe for land banking schemes to be rezoned and receive development approval. This timeframe is central to land banking because only when the development approval is received are the options to purchase land triggered; as discussed earlier, options have limited (if any) value before they are activated.

2.50 Mr McIntyre advised the committee that land banking is a '10- or 20-year strategy' and that it would be 'absurd' for people to have made money in two, three or four years' time after purchasing an option.<sup>66</sup> When asked by the committee if 21<sup>st</sup> Century Group informed investors in the Moira Park Green City development, which entered into administration in 2012, that the land was not part of any future development plans, Mr McIntyre stated:

Absolutely. They bought a 10-to-15-year option because they know it could be 10, 15 or 20 years before it is developed.

...

When we acquired it—which was only 2013—we told them that this could be a 10-, 15- or 20-year plan. We do not expect the council to approve it within 10 years, and that is exactly what the council told us. Remember that this is a long-term strategy. They are buying an option; the longer it takes, the better off the option holder is. This is not like buying an option and waiting two or three years—there is no capital growth in that period. It is a 10- or 20-year strategy; that is what land banking is!<sup>67</sup>

2.51 In 2012, with the aim of achieving financial security in her retirement, Ms Monka, when in her early 50s, purchased two options in the Moira Park Green City development through the 21<sup>st</sup> Century Group.<sup>68</sup> As noted above, this development has since fallen into administration.

2.52 Some investors in Market First's land banking schemes, including Foscari, were under a similar misapprehension about the timeframe. A glossy Market First marketing brochure promises:

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65 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 62.

66 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 29.

67 Mr Jamie McIntyre, CEO, 21<sup>st</sup> Century Group, *Committee Hansard*, 30 September 2015, p. 21.

68 Ms Grazyna Monka, *Committee Hansard*, 30 September 2015, p. 9.

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You can delay settle[ment] for up to 3–7 years: This means you can secure your property now, then pay nothing more for up to 3–7 years. So you get any and all of the capital growth over this time, with a relatively small amount of money down.<sup>69</sup>

2.53 Investors told the committee that Market First made representations at investment seminars indicating that the projects would receive development approval and be constructed in the short- to medium-term. For example, Mr Jim Guy told the committee:

We were told that it would be up to three years before the property would be developed and we could rent it out. Also, we were led to believe that there was a 10-year rental guarantee at the end of it. The only mention of an option to me later on was when we paid a deposit on the building of this particular thing, and it was only later, a few weeks ago, that I rang the lawyer who has our money and we found out that it has a six-year term in the contract that we had never even picked up on and no-one advised us of. So it is a six-year plan.<sup>70</sup>

2.54 The circumstances are further complicated by Market First's attempts to convince investors that the land banking schemes they had invested in had received development approval, and additional money was required to proceed towards the construction phase. Mr Guy recounted for the committee how he was approached by Market First to make an additional investment:

Eventually, in 2014, Market First rang me and said that we needed to consider taking an option on the building. The option was not mentioned on the land, but on the building it was. We were to pay \$43,000 for that option. I said that we could not do that because I was a bankrupt at the time.<sup>71</sup>

2.55 Later, Mr Guy contacted Mr Burn to receive an update on the project's development. Mr Guy told the committee that Mr Burn said 'that it was all developing nicely and we would start developing by late last year [2014], but nothing has happened since I went there in February'.<sup>72</sup> In December 2014, Mr Guy received an email from Market First stating that development approval had been received for the Foscari development, on the outskirts of Melbourne, and that construction would commence in mid-2015.<sup>73</sup> In February 2015, Mr Guy visited the site of the Foscari development and discovered it was still farmland.<sup>74</sup> Construction has not yet commenced on this development. Mr Haynes, who also invested in Market First's

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69 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [49].

70 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

71 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 36.

72 Mr Jim Guy, *Committee Hansard*, 30 September 2015, p. 37.

73 Mr & Mrs Jim and Alison Guy, *Submission 150*, p. [5].

74 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

Foscari project, told the committee a similar story about being approached for additional investment money:

I did not put more money in, because much later on, when I thought things were not going very well, I got feverish calls from Market First representative Alex Baker. I had to put in \$40,000 quick smart because the building was ready, the roads had been done in the area and were waiting for drainage and it was not long before the development was to start. I took a step back and thought, 'If he wants my money so badly, there must be a problem, because there's been no hurried rush to date.' So I did not take that option for the \$40,000 deposit.<sup>75</sup>

2.56 One investor, whose name is withheld from publication, provided the committee with correspondence they received from Market First which provides further evidence of Market First's requests for additional investment money. One email (dated 26 May 2014) from Market First informed the investor that builders (Creation Homes) had been appointed to the Foscari project and a house could be built on the lot for \$322,000; a detailed glossy brochure and a rental appraisal were attached to the email.<sup>76</sup> Despite the many promises to different investors that the development was progressing to the construction phase, the Foscari development is still farmland.

## Conclusion

2.57 The problems associated with land banking schemes have become more apparent as investors raise concerns when property development milestones are missed and the land remains undeveloped.<sup>77</sup> Worried investors, who want to discuss their concerns, have reportedly had trouble finding anyone in the companies that promoted and sold the options and off-the-plan developments.

2.58 Investors were promised luxury housing estates with architect designed homes, helipads, walking paths and BBQ areas that were detailed in innovative conceptual drawings and marketing material. However, none of the land banking schemes discussed in this report has been developed into residential housing developments. Many sites are still farmland, while some, such as Market First's Foscari development, have had limited earthmoving work done so that they now have a few mounds of rubble.<sup>78</sup>

2.59 As discussed earlier, there is disagreement between the investors and operators/promoters of these schemes as to the timeline for development. Many investors believe that construction should have already commenced on their development, if not already been completed, and have received regular updates from

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75 Mr Trevor Haynes, *Committee Hansard*, 30 September 2015, p. 39.

76 Name withheld, *Submission 149*, pp. [8, 10].

77 For example, Royce Millar and Ben Schneiders, 'Government wants land money back', the *Age*, 3 September 2015, p. 2.

78 For example, Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

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Market First and 21<sup>st</sup> Century Group promising that rezoning and construction was being progressed. Beyond the lack of physical signs of progress on the sites, many of the land banking schemes, as noted earlier, are now in liquidation or subject to court proceedings. For instance:

- the Moira Park Green City development, marketed by 21<sup>st</sup> Century Group, entered into administration in 2012;<sup>79</sup>
- the Hermitage Bendigo project by Midland Hwy, also marketed by 21<sup>st</sup> Century Group, is currently in administration;<sup>80</sup>
- five projects run by 21<sup>st</sup> Century Group— Botanica, Secret Valley Estate, Oak Valley Lakes Estate & Resort, Bendigo Vineyard Estate & Resort and Melbourne Grove Estate—are currently the subject of court proceedings initiated by ASIC, and provisional liquidators have been appointed;<sup>81</sup> and
- ASIC is currently investigating matters relating to Market First, which has marketed the Foscari and Veneziane projects.<sup>82</sup>

2.60 Land banking is a speculative venture that poses significant risks even for the experienced investor. At first glance, land banking as a strategy to build wealth has appeal. But the marketing of such schemes has the potential to attract promoters prepared to tout the 'apparent advantages' of land banking to unwary retail investors, poorly informed about the risks associated with their investment and unaware of the credentials of those pushing and developing such schemes. In the following chapter, the committee examines the techniques used by promoters to sell land banking schemes.

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79 Royce Millar, Simon Johanson and Ben Schneiders, 'Investors' dreams turn to dust', *Sunday Age*, 8 March 2015, p. 28.

80 ASIC, 'ASIC takes action to remove administrators of failed land banking company', Media release 15-203MR, 31 July 2015.

81 ASIC, 'Jamie McIntyre and 21<sup>st</sup> Century land banking companies agree to the appointment of provisional liquidators and other interim orders', Media release 15-289MR, 7 October 2015.

82 Mr Tim Mullaly, Senior Executive Leader, ASIC, *Committee Hansard*, 30 September 2015, p. 64.

