

Chapter 2

Managed investment schemes

2.1 The passage of the *Managed Investment Act 1998* (MIA) created a framework that allowed for the establishment of an investment structure—a managed investment scheme. This structure replaced the prescribed interest schemes that, up to that time, were widely used as a collective investment mechanism to 'pool' investors' funds.¹

2.2 The primary object of the MIA was to strengthen investor protection in an era of unprecedented growth in collective investment schemes. The deregulation of financial markets in the 1980s saw a proliferation of collective investment vehicles, from the largest commercial property and management trusts to small one-off schemes such as pine forests, ostrich and yabby farms. The government's support for self-funded retirement, following the introduction of compulsory superannuation in 1992, further stimulated growth in this sector during the 1990s. According to a review of the MIA undertaken in 2001:

A key driving principle behind the new framework was the shortcoming evident under the dual trustee/fund manager structure of the former [prescribed investment] regime, where it was difficult to determine who was ultimately responsible for a scheme's operation.²

2.3 Under the MIA, the managed investment sector continued to expand substantially with new companies forming to offer products to the retail market. In particular, agribusiness MIS grew. In this chapter, the committee examines the structure, responsibilities and operation of agribusiness MIS.

Structure

2.4 As a structure, MIS allows for collective investments that enable a large number of investors (either retail or wholesale) to pool funds, or invest in a common enterprise, for large scale projects.³ They have the following features:

- people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent, and whether they are enforceable or not);
- contributions are pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders); and

1 See Alan Cummine, *Submission 146*, p. 7.

2 Commonwealth of Australia, *Review of the Managed Investments Act 1998*, 2001, p. 25.

3 See, for example, Australian Forest Products Association, *Submission 126*, p. 5.

- members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).⁴

2.5 The MIA removed the requirement for an independent trustee. Under this new legislation, a single responsible entity (RE) replaced the dual trustee/fund manager structure of the prescribed interest regime and was directly responsible to scheme members for the scheme's operation. The intention was to avoid the confusion over accountability engendered by the dual trustee/fund manager structure of the previous regime.

Responsible entity

2.6 A registered MIS cannot operate without an RE, which must be a public company that holds an Australian financial services licence (AFSL) authorising it to operate a managed investment scheme.⁵ As noted above, investors do not have day-to-day control of the enterprise, rather the RE carries full responsibility for a scheme and any liability for losses. One of the duties of an RE is to hold scheme property on trust for scheme members.⁶ As the operator of an agribusinesses MIS, the RE agrees to plant, manage and harvest the product with the harvest proceeds net of outstanding costs and fees returned to the investor.⁷ In exercising its powers and carrying out its duties, the RE of a registered scheme must:

- act honestly;
- exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position;
- act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;
- treat the members who hold interests of the same class equally and members who hold interests of different classes fairly;
- not make use of information acquired through being the responsible entity in order to:
 - gain an improper advantage for itself or another person; or
 - cause detriment to the members of the scheme;

4 *Corporations Act 2001*, s 9, Definition of managed investment scheme, <http://www.comlaw.gov.au/Details/C2014C00519/Download> (accessed 15 November 2014).

5 *Corporations Act 2001*, s 601FA.

6 *Corporations Act 2001*, s 601FC(2).

7 Christine Brown, Colm Trusler and Kevin Davis, 'Managed Investment Scheme Regulation: Lessons from the Great Southern Failure', 29 January 2010, p. 3, http://kevindavis.com.au/secondpages/workinprogress/Great_Southern_JASSA-v2-28-1-10-3.pdf (accessed 9 December 2014).

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- ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB (provisions governing contents of the constitution and legal enforceability of the constitution);
 - ensure that the scheme's compliance plan meets the requirements of section 601HA (provisions governing the contents of the compliance plan);
 - comply with the scheme's compliance plan;
 - ensure that scheme property is:
 - clearly identified as scheme property; and
 - held separately from property of the responsible entity and property of any other scheme;
 - ensure that the scheme property is valued at regular intervals appropriate to the nature of the property;
 - ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and the Act;
 - report to ASIC any breach of the Act that:
 - relates to the scheme; and
 - has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
 - carry out or comply with any other duty, not inconsistent with the Corporations Act, that is conferred on the responsible entity by the scheme's constitution.⁸

2.7 It should be noted that these requirements were in force during the period covered by this inquiry.

2.8 An officer of the RE of a registered scheme is under similar statutory obligations to, among other things, act honestly; exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and act in the best interests of the members. If there is a conflict between the members' interests and the interests of the RE, the officer is to give priority to the members' interests. Officers of an RE must not make improper use of their position as officers to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme. In addition, officers must take all steps that a reasonable person would take to ensure that the responsible entity complies with the Corporations Act, any conditions imposed on the responsible entity's Australian financial services licence, the scheme's constitution and compliance plan.⁹

8 *Corporations Act 2001*, s 601FC.

9 *Corporations Act 2001*, s 601FD.

2.9 ASIC informed the committee that, although the legislative framework for MIS has been 'the subject of a number of reviews and a significant amount of work in developing potential refinements', the regime has remained largely unchanged.¹⁰

Agribusiness MIS

2.10 Agribusiness MIS are essentially a means to finance agricultural operations on a large scale. They allow small investors to pool their funds and to invest in a large agricultural operation that can achieve significant scale. This pooling of investment funds is most beneficial in those agricultural industries where scale is necessary to achieve low cost production.¹¹ Individual investors then delegate their allotments to a single manager for the efficient operation of the entire scheme. Investor fees provide the scheme manager with the necessary funds to establish and operate the scheme.¹²

2.11 According to the Australian Forest Products Association, the MIS structure proved effective in 'leveraging private sector investment in plantation development' and became a high profile source of investment in rural industries. It suggested that this success was due to schemes being able to:

- provide investment scale through pooling of investments funds;
- provide economies of scale through year-on-year investment in the resource;
- address information deficiencies and lower transaction costs; and
- improve cash flow to help offset high up-front establishment costs.¹³

2.12 During their early years, agribusiness MIS accounted for around \$300 million per annum of investment in rural industries—mostly in forestry, viticulture/wine, olives and almonds. Although, a minor source of investment overall, agribusiness MIS have been important in the development of some industries—notably blue gum forestry and olives.¹⁴

10 *Submission 34*, paragraph 12.

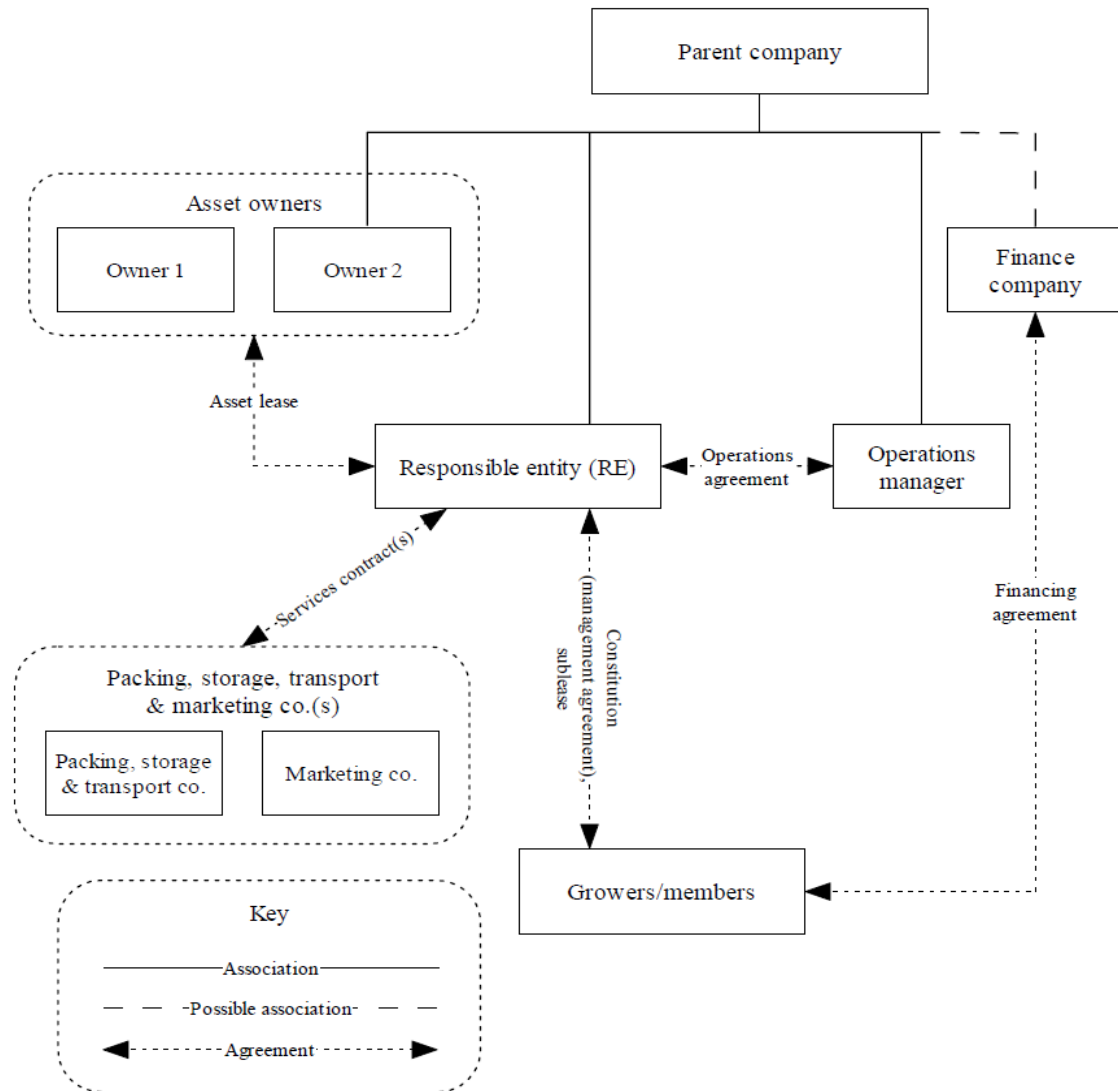
11 Rick Lacey, Alistair Watson and John Crase, *Economic effects of income-tax law on investments in Australian agriculture, with particular reference to new and emerging industries*, Rural Industries Research and Development Corporation (RIRDC), RIRDC Publication No 05/078, RIRDC Project No AWT-1A, January 2006, pp. vii, 33, 37, 38 and 48. <https://rirdc.infoservices.com.au/items/05-078> (accessed 5 December 2014).

12 The Treasury, *Review of Non-Forestry Managed Investment Schemes*, Report, December 2008, paragraphs 10 and 65, http://archive.treasury.gov.au/documents/1549/PDF/Review_of_non_forestry_MIS.pdf (accessed 4 December 2014).

13 Australian Forest Products Association, *Submission 126*, p. 6.

14 Rick Lacey, Alistair Watson and John Crase, *Economic effects of income-tax law on investments in Australian agriculture, with particular reference to new and emerging industries*, Rural Industries Research and Development Corporation (RIRDC), RIRDC Publication No 05/078, RIRDC Project No AWT-1A, January 2006, January 2006, p. vii.

Figure 2.1: A typical MIS structure¹⁵



15 Based on Chart 4: A typical MIS structure, The Treasury, *Review of Non-Forestry Managed Investment Schemes*, Report, December 2008, p. 28, http://archive.treasury.gov.au/documents/1549/PDF/Review_of_non_forestry_MIS.pdf (accessed 4 December 2014).

Growers' rights

2.13 By and large, investors in an agribusiness MIS (known as growers) do not own any physical assets, such as the land or trees. The growers' contributions secure them an interest in the scheme, which, in effect, is a bundle of rights over an area of land or allotment. These rights include 'a right to have particular services carried out in a given area of land (such as the establishment and maintenance of trees for growing a crop), and a limited right to the trees and the crop that is grown'.¹⁶ ASIC explained:

...investors acquire a right to derive profits from agribusiness produce of the agribusiness enterprise (e.g. timber, wine, grapes, olives, and almonds), net of management and lease fees paid to the responsibility entity, and net of rent and other expenses incurred in operating the agribusiness scheme.¹⁷

2.14 Generally, on entering the scheme, investors assign their rights to the crop to the manager in return for a share of the harvest proceeds. Researchers have noted that:

Even though the investor may have 'ownership rights' to the trees or crop on a specific acreage, the MIS agreement provides that the harvest proceeds from the whole scheme are shared pro rata among investors according to their relative investments—thereby diversifying risk.¹⁸

2.15 The Great Southern Plantations 2007 Project was one such scheme. The scheme was registered with ASIC on 8 March 2007, at which time Great Southern Managers Australia Limited (GSMAL) became the RE. Approximately 4,000 growers invested in the scheme which took in 43,989 woodlots of about one third of a hectare each. By May 2009, growers had invested around \$132 million in the scheme. The relationship between GSMAL and the growers was defined by a Product Disclosure Statement (PDS), a scheme constitution, the terms of the sub lease and management agreement whereby each grower engaged GSMAL to prepare, establish, maintain and ultimately harvest the trees.¹⁹ According to the Bendigo and Adelaide Bank:

16 The Treasury, *Review of Non-Forestry Managed Investment Schemes*, Report, December 2008, paragraph 11, http://archive.treasury.gov.au/documents/1549/PDF/Review_of_non_forestry_MIS.pdf (accessed 4 December 2014). See also ASIC, *Submission 34*, paragraphs 39 and 40.

17 ASIC, Regulatory Guide 232, *Agribusiness managed investment schemes: Improving disclosure for retail investors*, January 2012, paragraph RG 232.33, <http://download.asic.gov.au/media/1246956/rg232.pdf> (accessed 9 June 2015).

18 Christine Brown, Colm Trusler and Kevin Davis, 'Managed Investment Scheme Regulation: Lessons from the Great Southern Failure', 29 January 2010, p. 3, http://kevindavis.com.au/secondpages/workinprogress/Great_Southern_JASSA-v2-28-1-10-3.pdf (accessed 9 December 2014).

19 *Primary RE Limited v Great Southern Property Holdings Limited (recs & mgrs apptd) (in liq) [2011] VSC 242* (8 June 2011) [7].

A managed investment scheme was the logical investment vehicle for Great Southern to offer pooled investments in plantation and agricultural projects to investors.²⁰

Tax benefits

2.16 For tax reasons, many agribusiness MIS were structured so that investors were taken to operate their agribusiness investment in their own right. Thus, an agribusiness MIS is a tax effective investment vehicle. With this type of scheme, investors can claim a personal income tax deduction for the cost of investing in timber plantation and agribusiness development activities—for the up-front investment and any annual fees paid to the RE and its related parties.²¹ According to ASIC, agribusiness schemes were designed around this tax benefit, which is 'received at point of initial investment and then subsequent revenue commencing at a variable time later, such as 4–5 years later when the crops reach maturity'.²² Although there have been changes to the tax regimes for forestry and non-forestry MIS, the allowable tax deductions are a common characteristic of the schemes.²³

Financing investment through borrowing

2.17 The provision of finance is a marked feature of agribusiness MIS. While some growers drew on their own funds to finance their investment, many chose to access finance offered through their scheme, which provided finance for growers to make their initial application fee. Repayments were to be made over the life of the loan and fully discharged from the proceeds of the harvest. The scheme allowed an upfront tax deduction of the loan application fee and of interest payments on the loans.

Forestry MIS

2.18 Forestry schemes refer to plantation forestry projects which may be ready to harvest in 8–25 years, necessitating a long period between investment and return.²⁴ The Australian Forest Products Association noted the significant challenges in attracting private investment into plantation forestry created by the large scale

20 Bendigo and Adelaide Bank, response to *Submissions 52 et al*, dated 24 December 2014, p. [3].

21 NewForests, 'Rationalizing Timberland Managed Investment Schemes: The Changing Landscape of Australia's Forestry Investment Sector', pp. 1–2, <http://www.newforests.com.au/wp-content/uploads/2014/09/Rationalizing-the-MIS-20140908.pdf> (accessed 15 November 2014).

22 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 62.

23 ATO, answer to written question on notice, No. 2 taken on 14 October 2015.

24 ASIC *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraphs 59–61.

required to achieve a viable resource, the asset's relative illiquidity, high initial costs and long waiting period for return on these long-term ventures.²⁵

Plantations 2020 Vision

2.19 In the 1990s, Australia faced a growing trade deficit in wood products.²⁶ In 1992, the Commonwealth and state governments endorsed a plantation policy contained in the National Forest Policy Statement (1992). Importantly, one of the policy goals was to increase the total area of forest. In this regard, the governments recognised that the long-term nature of plantation investments, often in excess of twenty years, could cause difficulties attracting investment capital as the policy statement explained:

When capital is committed for such a long time before a return is received, companies, individuals and farmers may be reluctant to invest in plantations.²⁷

2.20 Notably, under this policy, the Commonwealth recognised 'pooled development funds' as a useful mechanism for promoting long-term investments, including plantation development, and announced it would encourage the establishment of such funds. Also, taxation was identified as one of the areas that could help minimise impediments to plantation development and assist governments achieve their plantation objectives.²⁸

2.21 In July 1996, the Ministerial Council on Forestry, Fisheries and Aquaculture endorsed the plantation industry's target of trebling the plantation estate by the year 2020. To achieve this target, the Ministerial Council agreed, in consultation with relevant stakeholders, to develop a realistic and achievable national strategy. Subsequently, in 1997, *Plantation 2020 Vision* was released. This agreement was a three way partnership involving the Australian, state and territory governments and industry.²⁹

2.22 In addition to trebling Australia's plantation estate, one of the strategic goals of the *2020 Vision* was to have a plantation industry with a sound reputation as a credible investment destination and to have 'well-informed investors' willingly

25 *Submission 126*, p. 6.

26 NewForests, 'Rationalizing Timberland Managed Investment Schemes: The Changing Landscape of Australia's Forestry Investment Sector', p. 4, <http://www.newforests.com.au/wp-content/uploads/2014/09/Rationalizing-the-MIS-20140908.pdf> (accessed 15 November 2014).

27 National Forest Policy Statement: A New Focus for Australia's Forests, 2nd edition 1995, pp. 3 and 27, http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/nat_nfps.pdf (accessed 12 January 2015).

28 National Forest Policy Statement: A New Focus for Australia's Forests, 2nd edition 1995, pp. 25 and 27, http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/nat_nfps.pdf (accessed 12 January 2015).

29 Department of Agriculture, *Submission 135*, p. 3.

participate in 'well-run and profitable managed investment plantations projects'.³⁰ The expectation was that private investment would take on a bigger role in helping to boost the national plantation estate.

2.23 Following the release of the *2020 Vision*, Australia's plantation estate increased significantly to around 2 million hectares by 2008.³¹ Mr Alan Cummine, who has extensive experience in the forestry industry, attributed the growth in private plantation after 1997–98 to companies that had been managing 'prospectus-financed' forestry schemes for some years responding positively to the launch of the *2020 Vision*.³²

Structure of forestry MIS

2.24 Although forestry investment schemes take on different forms, their core activities involve establishing, managing, harvesting, processing and supplying timber products from plantation grown on behalf of shareholders, unit holders and scheme members.³³ For example with the Willmott Group:

Each investor leased an area on which trees were to be grown. Generally, each investor made a forestry management agreement with a company in the Willmott group, by which that company agreed to plant, maintain and harvest the trees. Most forestry management agreements provided for the investor to pay the relevant company an initial fee, but for the investor to pay no further sum until the trees were harvested.³⁴

2.25 Each lease was for a term of years and some leases gave the tenant an option for a further term.³⁵ The National Association of Forest Industries noted the special characteristics that distinguish forestry MIS, including the significant proportion of the total costs that are incurred during the plantation establishment phase. In this regard, it noted that growers are required to 'wait a long time before any returns on their investments can be realised'. It stated:

30 *Plantations for Australia: The 2020 Vision*, an industry/government initiative for plantation forestry in Australia, p. 15, http://www.agriculture.gov.au/Style%20Library/Images/DAFF/_data/assets/pdffile/0009/2398185/plantations-australia-2020-vision.pdf (accessed 12 January 2015).

31 Department of Agriculture, *Submission 135*, p. 3.

32 Mr Alan Cummine has experience as a senior policy adviser to, and representative of, the forestry industry, *Submission 146*, p. 11.

33 Willmott Forests Limited, in the matter of Willmott Forests Limited (recs & mgrs apptd) (in liq) [2011] FCA 1517 (29 June 2011) [26]–[27].

34 Willmott Growers Group Inc v Willmott Forests Limited (recs & mgrs apptd) (in liq) [2013] HCA 51 (4 December 2013) [10].

35 The Australian Restructuring Insolvency & Turnaround Association (ARITA) gave the example of Willmott Forests Limited (WFL), which leased to growers portions of land which WFL owned or leased. The leases were made at various times. *Submission 23*, p. 2.

There is no annual source of income and in the most simple forestry investments, the trees are established in the first year of the project and income is received when the trees are harvested a minimum of ten years later.³⁶

2.26 Also, a single forestry scheme could be conducted on multiple plantations, which were distant from each other. Again using Willmott as an example:

The growers' individual woodlots may be adjacent to woodlots in other schemes, and land used in the schemes is intermingled, creating a 'chequerboard' effect.

The lots are divided and allocated to growers at random and land in various schemes is intermingled. This is true of all regions. To access its lot, an individual grower may have to cross other growers' land and to identify a grower's land, GPS is necessary, but not always possible. Surveying would be prohibitively expensive.³⁷

2.27 The Great Southern Plantation 2003 Project was another such scheme. Members of the group (growers) participated in a scheme to grow and harvest timber in forestry plantations. Under the schemes, a grower would acquire an interest in a woodlot where trees would be grown and harvested on the grower's behalf.³⁸ The grower would enter into a land management agreement with GSMAL.

Fee structure

2.28 The fee structures for forestry projects generally require an up-front fee from investors, and deferred rental and management fee out of proceeds of the harvest, which can be many years later. Some forestry MIS, however, may require growers to make annual lease and management payments as well as the up-front fee.³⁹

2.29 ASIC observed that fee structures that rely on up-front payments and payments out of proceeds from harvests have presented issues for the sector. This

36 National Association of Forest Industries, A joint submission from the National Association of Forest Industries and Tree Plantations Australia to the Review of the Taxation of Plantation Forestry, p. 3, http://archive.treasury.gov.au/documents/1000/PDF/051_National_Association_of_Forest_Industries.pdf (accessed 3 January 2016).

37 Willmott Forests Limited, in the matter of Willmott Forests Limited (recs & mgrs apptd) (in liq) [2011] FCA 1517 (29 June 2011), [26]–[27]. Mr Crosbie described this arrangement.

38 Re Great Southern Finance Pty Ltd (in liq) [2013] VSC 351 (15 July 2013).

39 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 74 and Regulatory Guide 232, *Agribusiness managed investment schemes: Improving disclosure for retail investors*, January 2012, paragraph 232.33 and *Submission 34*, paragraph 47 to this current inquiry.

structure requires the RE (or its ultimate parent) to absorb a sustained period of negative cashflows until the project produces enough income to meet its costs.⁴⁰

Horticultural MIS

2.30 Horticultural MIS were also operating before the MIS regime commenced in 1998 but increased significantly after 2004. According to ASIC, the growth was due largely to Timbercorp's expansion into this sector. Non-forestry agribusiness MIS have focused on horticultural crops involving olives (for oil), almonds and wine grapes. Other horticultural crops include; macadamia nuts, citrus fruit, stone fruit, tomatoes, olives, table grapes, mangoes, avocados, truffles and wheat.⁴¹

2.31 The wait for a return on investment in these projects differs between crops but is less than forestry MIS. ASIC explained:

Horticultural schemes (almonds, wine grapes and olives) are marketed in Australia as being fully income producing after 5 years. They then generally [are] expected to have a revenue producing life of up to 22 years.⁴²

2.32 Horticulture projects, however, are labour and capital intensive in comparison to forestry MIS.⁴³

2.33 While each horticultural MIS was structured differently, it is possible to make generalisations on how they operated.⁴⁴ In the main, agreements in an MIS comprised a constitution, a management agreement, a head lease and sublease and a compliance plan.⁴⁵ Normally, the schemes were structured around a contract between the grower and RE.

40 *Submission 34*, paragraph 48 and ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 75.

41 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into aspects of agribusiness managed investment schemes, July 2009, paragraph 61.

42 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into aspects of agribusiness managed investment schemes, July 2009, paragraph 66.

43 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into aspects of agribusiness managed investment schemes, July 2009, paragraph 65.

44 Christine Brown, Colm Trusler and Kevin Davis, 'Managed Investment Scheme Regulation: Lessons from the Great Southern Failure', 29 January 2010, p. 2, http://kevindavis.com.au/secondpages/workinprogress/Great_Southern_JASSA-v2-28-1-10-3.pdf (accessed 9 December 2014).

45 See *Non-forestry Managed Investment Schemes*, Issues Paper, 2008, paragraph 13, http://archive.treasury.gov.au/documents/1401/PDF/Non-Forestry_Managed_Investment_Schemes_Issues_Paper.pdf (accessed 4 December 2014).

- The MIS operator leases land and water rights from land owners which are often associated with the MIS operator. The land owner usually funds all land preparation and infrastructure necessary for the project and acquires all necessary water licences. Most MIS projects are either fully or partially developed by the landowning entity at the time MIS participants are accepted into the project.
- After leasing the land and water rights, the MIS operator then divides these into allotments or plots, which are then subleased to individual MIS participants to conduct agribusinesses.
- The MIS operator then enters into a management agreement to operate and manage the agribusinesses of MIS participants. As a rule, the management agreement will be the same for all the MIS participants—there is a master agreement to which a list of MIS participants is attached.
- MIS participants pay the MIS operator an up-front fee as well as annual rent and management fees in return for managing the MIS project—in other words the growers enter into a contract with the RE to cultivate, maintain and harvest their agribusiness enterprise on their behalf.⁴⁶
- The MIS operator enters into an operations agreement with another entity, the MIS manager, who is usually also associated with the MIS operator. The MIS manager manages day-to-day operations, from preparing land to harvesting. The MIS manager usually conducts these activities through contracting third parties to undertake the work. Generally the contractor makes the major decisions on how the farming activities are conducted with the MIS manager overseeing.
- Once the crop is harvested, the MIS operator contracts one or more companies to pack, store, transport and market the product.⁴⁷

2.34 The MIS operator receives the proceeds from the sale of the harvested product and once received, holds them on trust for the MIS participants. The MIS operator keeps a proportion as a harvesting/marketing fee and distributes the remainder to MIS participants in proportion to the funds contributed and number of interests held. All produce grown on the project is pooled and the amount that a MIS participant receives takes no account of the price received for the variety grown on their individual allotment or of the yield from their allotment.⁴⁸

46 See *Non-forestry Managed Investment Schemes*, Issues Paper, 2008, paragraphs 14–18 and ASIC, Regulatory Guide 232, *Agribusiness managed investment schemes: Improving disclosure for retail investors*, January 2012, paragraph 232.33.

47 See *Non-forestry Managed Investment Schemes*, Issues Paper, 2008, paragraphs 14–22.

48 See *Non-forestry Managed Investment Schemes*, Issues Paper, 2008, paragraphs 14–22.

Fee structure

2.35 Generally horticultural projects require an upfront fee from growers and either:

- on-going annual rental and management fees to the manager to carry on the business as per the prospectus; or
- rental and annual fees paid out of net proceeds from harvests (for typical horticultural MIS, returns are generated after 4–5 years).⁴⁹

2.36 Most commonly the fee structure for agricultural and horticultural public investment ventures was based on leasing an identifiable area of land to an investor. In some prospectuses, ownership of an identifiable area of land was offered to the investor.⁵⁰

Agribusiness MIS collapses

2.37 After the introduction of the MIA, the number of agribusiness MIS grew steadily until the high profile collapses in 2009 and subsequent years. During the lead-up to these failures, there was a notable surge in investment in agribusiness MIS. In the peak year of 2006–07, investors placed over \$1.2 billion in MIS projects.⁵¹ According to figures cited by the National Farmers' Federation, the MIS industry managed to raise \$1.079 billion in the 2007/08 financial year. Non-forestry projects received 35 per cent (\$378 million) of total MIS funds.⁵²

2.38 Statistics indicate that contributions to non-forestry MIS grew rapidly from \$160 million in 2003–04 to \$256 million for 2004–05, \$445 million in 2005–06 and

49 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraphs 65 and 74; Regulatory Guide 232, *Agribusiness managed investment schemes: Improving disclosure for retail investors*, January 2012, paragraph 232.33; and Tracy Bramwell and Peter Chudleigh, *The Impact of Tax Driven Financial Investment on New Industry Development*, RIRDC Publication No 00/14, RIRDC Project No AGT–3A, February 2000, p. 1, <https://rirdc.infoservices.com.au/items/00-014> (accessed 5 December 2014).

50 Tracy Bramwell and Peter Chudleigh, *The Impact of Tax Driven Financial Investment on New Industry Development*, RIRDC Publication No 00/14, RIRDC Project No AGT–3A, February 2000, pp. 9–10, <https://rirdc.infoservices.com.au/items/00-014> (accessed 5 December 2014).

51 NewForests, 'Rationalizing Timberland Managed Investment Schemes: The Changing Landscape of Australia's Forestry Investment Sector', p. 1, <http://www.newforests.com.au/wp-content/uploads/2014/09/Rationalizing-the-MIS-20140908.pdf> (accessed 15 November 2014).

52 Submission to the Review of Non-Forestry Managed Investment Schemes, p. 3, http://archive.treasury.gov.au/documents/1423/PDF/National_Farmers_Federation.PDF (accessed 23 November 2014). The National Farmers' Federation quoted figures from the Australian Agribusiness Group.

\$467 million in 2006–07.⁵³ With regard to forestry MIS, according to NewForests, the MIS sector established almost 1 million hectares (2.5 million acres) of timber plantation in Australia between 1998 and 2008.⁵⁴ Overall, ASIC informed the committee that since the introduction of the MIS regime in 1998 agribusiness schemes had raised approximately \$8 billion.⁵⁵ The following table provides detail on the funds invested in agribusiness and shows the amounts invested during the peak years of 2006–2008 and the sudden decline thereafter.

Table 2.1: Estimates of amounts invested in Agribusiness MIS 2000–2012⁵⁶

Year	Amount invested Agribusiness MIS (\$)	Timber (\$)	Other(\$)	Projects	Participants
2012	40m	40m	0	4	165
2011	51m	48.6m	2.4m	10	491
2010	103m	74m	29m	14	2,474
2009	250m	227m	23m	26	7,560
2008	1.079b	701m	378m	56	24,300
2007	1,139b	672m	467m	67	24,500
2006	1,141b	698m	442m	57	25,800
2005	1,024b	767m	257m	47	~16,200
2004	665m	500m	165m	42	~15,800
2003	345m	247m	98m	45	
2002	300m	189m	111m	68	
2001	~500m				
2000	~800m				

Source—Australian Agribusiness end of year reports for 2000 to 2010 income years, Data for 2011 and 2012 income years estimated from ATO data.

53 *Non-Forestry Managed Investment Schemes*, Issues Paper, 2008, Chart 1: Growth in initial contributions to non-forestry MIS, p. 2.

54 NewForests, 'Rationalizing Timberland Managed Investment Schemes: The Changing Landscape of Australia's Forestry Investment Sector', p. 1, <http://www.newforests.com.au/wp-content/uploads/2014/09/Rationalizing-the-MIS-20140908.pdf> (accessed 15 November 2014).

55 Mr Greg Tanzer, *Proof Committee Hansard*, 14 October 2015, p. 18.

56 ATO, answer to question taken on notice, 14 October 2015.

2.39 In 2008, the industry was highly concentrated with Timbercorp, Great Southern and Gunns the major scheme operators. In the five years leading up to 2009, ASIC estimated that 'approximately \$5 billion had been invested in agribusiness schemes by over 75,000 investors'. Forestry schemes represented approximately \$3.7 billion of the \$5 billion.⁵⁷ ASIC produced the following breakdown of the funds raised by major schemes:

- Timbercorp, around \$1 billion;
- Great Southern, \$1.8 billion;
- FEA Plantations, \$426 million;
- Rewards Projects Limited, \$291 million;
- Willmott Forests, about \$400 million; and
- Gunns Plantations, about \$1.8 billion.⁵⁸

2.40 Timbercorp was the first major agribusiness MIS to fail followed by Great Southern.⁵⁹ Based on ASIC's analysis, the majority of investors in both the Great Southern and Timbercorp schemes were retail investors.⁶⁰ Since then, there have been only a small number of forestry MIS offered to retail investors. In addition, as a result of the winding up and deregistration of a number of these schemes, there has been a reduction in the number of registered schemes.⁶¹

2.41 In this report, the committee refers mainly to four of the main agribusiness MIS—Timbercorp, Great Southern, Willmott Forests and Gunns.

Timbercorp

2.42 Mr Robert Hance and Mr David Muir established the Timbercorp Group in 1992. They incorporated Timbercorp Eucalypts Ltd, an unlisted public company, which became known as Timbercorp Ltd. At the same time, Timbercorp Finance Pty Ltd was incorporated as a subsidiary to provide finance to investor growers. The Timbercorp Group of companies carried on business promoting managed investment

57 Mr Greg Tanzer, *Proof Committee Hansard*, 14 October 2015, p. 18.

58 Mr Greg Tanzer, *Proof Committee Hansard*, 14 October 2015, p. 18.

59 Environinvest Limited, which was the RE of nine MIS in forestry plantation projects and raised approximately \$70 million from 320 investors, failed in 2008 with receivers and managers appointed in September 2008 to the Environinvest Group. See ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into agribusiness managed investment schemes*, July 2009, paragraph 167.

60 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into agribusiness managed investment schemes*, July 2009, paragraph 55. This submission provides more detailed statistics on investors in Great Southern and Timbercorp.

61 Mr Greg Tanzer, *Proof Committee Hansard*, 14 October 2015, p. 18 and also refer to Table 2.1.

schemes. Investors, known as growers, invested and participated in the growing of trees, almonds, olives and other horticultural products.⁶²

2.43 On 4 April 2000, Timbercorp Securities Ltd (TSL) was incorporated and replaced Timbercorp as the operator of the existing schemes and became the RE of each new scheme. TSL held an AFS licence and became the RE for 34 registered forestry and horticultural MIS, including eucalypts, almonds, olives, citrus, avocados, mangoes and grapes. According to ASIC, the majority of TSL's agricultural assets were in forestry plantations in Albany, WA and the Green Triangle region spanning the Victorian and South Australian border. TSL's substantial horticultural operations (mainly almonds and olives) were located across the country.⁶³

Financing arm

2.44 As mentioned above Timbercorp Finance Pty Ltd was a subsidiary of the parent company and provided finance to investor growers.

Liquidation

2.45 On 23 April 2009, TSL, its ASX-listed parent Timbercorp Limited (Timbercorp) and around 40 other associated entities appointed KordaMentha as voluntary administrators.⁶⁴ The creditors resolved to put each one of the group companies into voluntary liquidation. At a meeting on 29 June 2009, the creditors resolved to wind up the companies and the administrators became joint and several liquidators.

2.46 At the time of its collapse and liquidation, there were 33 registered MIS and three unregistered private scheme offers. TSL schemes had approximately 18,400 investors who had invested \$1.095 billion.⁶⁵ As a result of the collapse, the majority of the Timbercorp schemes could not be carried to completion, meaning the investments were of limited or no value. Following the collapse, liquidators also commenced or

62 Woodcroft-Brown v Timbercorp Securities Ltd (in liq), [2011] VCS 427 (1 September 2011) [1].

63 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 172.

64 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 169.

65 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 169. See also Simon A. de Garis, *Rural Managed Investment Schemes in Victoria, Australia: The demise of Timbercorp*, Paper presented at the Pacific Rim Real Estate Society Conference, Wellington, New Zealand, January 2010. Mr de Garis was Senior Lecturer, School of Property Construction and Project Management, RMIT University Melbourne, http://www.pres.net/papers/Degaris_Rural_Managed_Investment_Schemes_Victoria_Australia-Demise_Timbercorp.pdf (accessed 5 December 2014).

threatened recovery actions against investors who had borrowed money from Timbercorp Finance. Timbercorp Finance had outstanding loans to over 14,500 investors, totalling \$477.8 million.⁶⁶

Great Southern

2.47 The Great Southern group of companies grew to become the largest manager of agricultural-based MIS in Australia and the largest owner of land for commercially grown hardwood plantations.⁶⁷ Great Southern Managers Australia Limited (GSMAL) was an Australian Financial Services (AFS) licensee and RE of 43 registered forestry and horticultural MIS and raised around \$2 billion between and 2004 and 2009 from 43,000 investors.⁶⁸ According to ASIC, the majority of GSMAL's agricultural assets were in forestry plantations located in Western Australia and the Green Triangle region. GSMAL also conducted substantial horticultural operations (olives, wine grapes and almonds) which were spread across the country.⁶⁹

Financing arm

2.48 Many investors in Great Southern took advantage of finance offered by Great Southern Finance, which was facilitated through Great Southern's arrangements with Bendigo and Adelaide Bank.⁷⁰ Great Southern Finance Pty Ltd (GSF) was the financing arm of the Great Southern Group.⁷¹

66 Woodcroft-Brown v Timbercorp Securities Ltd (in liq), [2011] VCS 427 (1 September 2011) [2].

67 Bendigo and Adelaide Bank, response to *Submissions 52* et al, dated 24 December 2014, p. [1].

68 Deed of Settlement proposed by Liquidators. ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 173. The number of schemes was recorded as 'approximately 44' in Annexure, Clarke v Great Southern Pty Ltd (recs & mgrs apptd) (in liq) [2014] VSC 334 (25 July 2014) [69] to Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs & mgrs apptd) (in liq), [2014] VSC 516.

69 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraph 177.

70 See Mr Michael Galvin, who was one of a team of lawyers who represented plaintiffs in 16 class actions in the Supreme Court of Victoria arising out of the collapse in 2009 of the Great Southern group, *Proof Committee Hansard*, 6 August 2015, p. 30.

71 Clarke v Great Southern Finance Pty Ltd (recs & mgrs apptd) [2012] VSC 260 (20 June 2012), [3]–[5].

Liquidation

2.49 The Great Southern Group collapsed in May 2009 and joint and several voluntary administrators were appointed.⁷² At that time, the Great Southern Group comprised the parent company, GSL, and 34 subsidiaries.⁷³ On 19 November 2009, creditors resolved to appoint the liquidators as joint and several liquidators of GSMAL. GSMAL and GSF were wholly owned subsidiaries of GSL.⁷⁴

2.50 The Bendigo and Adelaide Bank made it clear that at the time administrators, receivers and liquidators were appointed to the Great Southern group of companies, no administrators were appointed to the Great Southern plantation schemes. It explained:

Following a competitive process largely financed on behalf of investors by Bendigo and Adelaide Bank...Gunns Plantations Ltd was appointed to replace GSMAL as responsible entity for most of the Great Southern plantation schemes in December 2009 and January 2010. Gunns, and other bidders for the role, intended to manage the schemes through to completion on behalf of investors.⁷⁵

2.51 Unfortunately for investors in Great Southern MIS, Gunns also struggled to make the schemes profitable and ultimately administrators were appointed in September 2012. Put simply, the plantation managed investment schemes did not have the resources to manage the plantations to completion.⁷⁶

Willmott Forests Limited (WFL)

2.52 Willmott Forests Limited (WFL), which was the RE for a number of managed investment schemes, collapsed financially in September 2010 and receivers and voluntary administrators were appointed.

2.53 On 26 October 2010, new voluntary administrators were appointed. They determined that WFL was 'insolvent and without funds to meet its debts, comply with its statutory obligations as owner/manager of the plantations and fulfil its obligations to the growers and third parties under the constituent documents'.⁷⁷ Subsequently, in

72 ASIC, *Submission 58* to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into agribusiness managed investment schemes, July 2009, paragraphs 174–176. Also see *Clarke v Great Southern Finance Pty Ltd (recs & mgrs apptd) (in liq)*, [2014] VSC 516, [75].

73 Annexure, *Clarke v Great Southern Pty Ltd (recs & mgrs apptd) (in liq)* [2014] VSC 334 (25 July 2014) [67] to *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs & mgrs apptd) (in liq)*, [2014] VSC 516.

74 See Deed of Settlement proposed by Liquidators, May 2014, p. 4.

75 Bendigo and Adelaide Bank, response to *Submissions 52 et al*, dated 24 December 2014, p. [5].

76 Bendigo and Adelaide Bank, response to *Submissions 52 et al*, dated 24 December 2014, p. [5].

77 Willmott Forests Limited, in the matter of *Willmott Forests Limited (recs & mgrs apptd) (in liq)* [2011] FCA 1517 (29 June 2011) [35].

March 2011, the creditors of WFL resolved that the company be wound up and liquidators appointed. The liquidators found that the Willmott schemes could not continue to operate and that it was 'very unlikely' that 'a party would be willing to take over as RE and manager of the schemes'. They set in train a process to sell the assets.⁷⁸

Gunns

2.54 Gunns Plantations Limited (GPL) was formed in 1999 and, as noted above, also acted as the RE for the Great Southern Pulpwood Forestry Schemes (1998–2006).⁷⁹

2.55 In September 2012, an ANZ-led syndicate of banks that were owed about \$560 million appointed KordaMentha as receivers. They were to carry out a detailed analysis of plantation timber managed-investment schemes run by the company, 'into which thousands of investors had pumped about \$600 million'.⁸⁰ PPB Advisory, specialists in corporate recovery, restructure and insolvency, were appointed as administrators of GPL on 25 September 2012 and liquidators on 5 March 2013.

2.56 Following, the collapse of the Gunns Group, the liquidators sought expressions of interest for a RE, but, according to the court:

With the exception of the 2000 and 2001 schemes, no satisfactory replacement could be found. GPL had no funds. The scheme landowners were in receivership. The receivers had issued notices of default to GPL under Forestry Right Deeds, adding further uncertainty to the growers' position and their ability to recover any value from their investments.⁸¹

2.57 Without a properly funded entity to assume all the responsibilities and obligations of an RE for the schemes, the court was satisfied that 'the only course open to the liquidators was to sell the schemes'.⁸²

Conclusion

2.58 Although the MIA was intended to strengthen investor protection, the collapse of a number of high-profile agribusiness MIS has resulted in substantial financial losses for investors in such schemes. Before looking more closely at the failure and

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

79 Gunns Limited, home page 'Our Business', <http://gunns.com.au/our-business/> (accessed 22 September 2015).

80 ASX, <http://www.delisted.com.au/company/gunns-limited> (accessed 22 September 2015).

81 Re Gunns Plantations Limited (in liq) (recs & mgrs apptd) (No 4) [2014] VSC 369 (11 August 2014) [11].

82 Re Gunns Plantations Limited (in liq) (recs & mgrs apptd) (No 4) [2014] VSC 369 (11 August 2014) [11].

liquidation of agribusiness MIS, the committee seeks to highlight the human dimension of the failure of these schemes and to bring to the fore the lived experiences of the investors.