

Chapter 4

Taxation concessions

I was one of the group of people that believed that if an investment had a PDS then that was a stamp of approval by ASIC. As it had a tax ruling, I believed that was a stamp of approval by the ATO.¹

4.1 Since their beginnings, MIS have attracted taxation benefits. For tax purposes, investors in an agribusiness MIS are recognised as 'carrying on a business' whereby they are able to claim tax deductions for costs associated with the normal operations of their business. Researchers Tracy Bramwell and Peter Chudleigh described tax-driven agricultural and horticultural development schemes as:

...those that rely on raising large amounts of financial resources with significant tax effectiveness from many investors and where these resources are used for development of agricultural/ horticultural enterprises.²

4.2 In this chapter, the committee is not concerned with the merits, or otherwise, of the tax concessions allowed to investors in agribusiness MIS. The committee is primarily interested in how these schemes were promoted as tax effective schemes; the extent to which the tax incentive was an effective and appropriate enticement to invest; and investors understanding of what the tax benefit meant for their investment.

Tax benefits as driver of investment

4.3 Much has been written about the tax incentives offered to investors in agribusiness schemes, including commentary generated during the committee's inquiry into mass marketed tax effective schemes in 2001–2002.

4.4 Unlike previous inquiries, the committee's current inquiry attracted many submissions from investors who explained the role of the tax incentives in their decision to invest. Their evidence shows that the broad assertion about the tax benefits determining the decision to invest was too simplistic. Of the investors who made submissions to the inquiry, many indicated that the tax benefit was only part of their

1 Name withheld, *Submission 151*, p. 5.

2 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. iii, <https://rirdc.infoservices.com.au/items/00-014> (accessed 5 December 2014).

reason for investing in an agribusiness MIS and definitely not the driving force.³ Indeed, some provided information on their annual income, which could only be described as modest.

4.5 Clearly, a number of the investors were not high wealth individuals. For example, one couple noted:

Per our tax returns, we had jointly earned \$82,000 in 2005 and \$95,000 in 2006. Steve's [the adviser] recommendation was that we invest \$126,000 in the 2007 scheme between us, all funded via Great Southern Finance.⁴

4.6 Another stated simply that there was no benefit for her to invest in Timbercorp because she was not in a high tax bracket.⁵ A third example came from a man on \$75,000 a year with immediate plans for his wife to stop working to look after family.⁶

4.7 In general, the growers were not astute investors knowledgeable about minimising their tax. Rather, for many of the investors who wrote to the committee, the assumption that the investment would provide a secure and stable return was paramount.⁷ They wanted to 'find a low-risk way to make long-term investments' that would secure their future.⁸ For example, one grower stated:

At the time in 2008 I was a single mother working over 40 hours a week, studying at night school whilst raising teenage children. I was paying more than required into my mortgage and thought that if I was able to take this money and invest it for long term gain my life would not always be so hard. This was a massive step for me; I am a hard worker and did not have money to spare but was advised by the Financial Advisor this Timbercorp investment in 2008 would be of great benefit for me to become part of the forest industry growth.⁹

3 See Mr Neil White, Melbourne-based financial planner and Chairman of the Agriculture Growers Action Group, informed the committee that 'Despite common public perceptions, members of the group were 'not high-net-worth individuals', *Proof Committee Hansard*, 12 November 2014, p. 32. See also, Mr Michael Galvin, *Proof Committee Hansard*, 6 August 2015, p. 31; name withheld, *Submission 120*, p. [1]; *Confidential Submission 36*; and *Confidential Submission 141*, p. [1].

4 Name withheld, *Submission 56*, p. [2].

5 *Confidential Submission 38*, p. 1.

6 Name withheld, *Submission 153*, pp. 3–4 and, as another example, Mr Tyson O'Shannassy *Submission 158*, p. 4.

7 Name withheld, *Submission 48*, p. 1; *Submission 109*, p. 2; *Submission 120*, p. [1]; name withheld, *Submission 167*, p. [1]; Mr Neil White, *Proof Committee Hansard*, 12 November 2014, p. 32; and *Confidential Submission 140*.

8 *Confidential Submission 154*, p. [1].

9 Name withheld, *Submission 30*, p. 1.

4.8 One couple informed the committee that they were advised that investing in the scheme was 'a good option' for them, as they were 'investing in the agricultural business and it was a long term investment that would provide dividends'.¹⁰ The promise of future returns attracted some parents who hoped to use the income to fund a good education for their young children.¹¹ For example, one such grower stated categorically that his investment was not 'a tax dodge'. He was looking to provide his daughters with a start in life—education, car and marriage.¹²

4.9 Mr Peter Jack informed the committee that his goal was also to use the scheme to provide for his family and was looking to secure a funding source to help meet the cost of educating his four children.¹³ The same motive encouraged yet another couple to invest in MIS. They were led to believe that the project was long term, safe in nature, approved by the ATO, and a great investment for the future. They informed the committee:

Our reasoning for investing in the project was to provide for our young family and have a better financial future.¹⁴

4.10 Another grower explained that, while there were some tax advantages to MIS investing, the reason he invested in Timbercorp was to try to secure a bright future for his family but 'all that is left is dark clouds'.¹⁵ Others envisaged the investment as a long term venture and a means of boosting future superannuation.¹⁶ For example, Ms Barbara Gray stated:

We would not consider ourselves naïve investors however require a good return on any funds invested for not only future retirement but a healthy age related annuity profile when that became available.

Timbercorp, FEA Plantations and two Macquarie Bank managed funds were presumably investigated and then recommended to us as legitimate tax alternatives. And we went ahead with those investments on our Accountants recommendation.¹⁷

4.11 Peter and Elaine Wilson, who planned to be self-funded retirees, rejected the notion put forward by the courts that they only invested as a tax evasion. They informed the committee that they invested to have an income stream in their retirement.¹⁸ Similarly, Mr Brett Lawtie informed the committee that his adviser told

10 Name withheld, *Submission 97*, p. [1].

11 Name withheld, *Submission 120*, p. [1].

12 Mr Ken Grech, *Submission 123*, p. 1.

13 *Submission 25*, p. 1.

14 Name withheld, *Submission 72*, p. 1.

15 Name withheld, *Submission 31*, p. [2].

16 Name withheld, *Submission 42*, p. [4].

17 *Submission 54*, p. [1].

18 *Submission 49*, p. 1.

him that he needed to invest in some agribusiness to aid in retirement planning and signed up for \$35,000 worth of almonds and olives. Mr Lawtie contended that his intention was 'purely for retirement planning NOT tax avoidance'.¹⁹

4.12 Another couple, a bus driver and his wife, a part time retail assistant, were not, according to their own assessment, 'the investing type'. They indicated that they did not need to reduce their tax, and 'certainly did not go into this with the view that this was a tax minimisation scheme'.²⁰ Likewise, another couple told the committee that they invested in Timbercorp after their financial planner explained and recommended not only the tax deductions but also the promise of a 23 year-long income. They explained:

At the time [the Husband] had been retrenched after 14 years and as we were entering our 50s with young children we were encouraged to prepare long term for our golden years. The project was partly financed by us (10% initial deposit) and internally financed by Timbercorp Finance (90% lent).²¹

4.13 Some submitters were also persuaded to invest on the understanding that the schemes would be helping people in rural districts—farmers, farm hands and local tradespeople.²² One such investor stated:

Based on the financial advice and reasons why it would be a good investments in that we were supporting Australian farmers and hence contributing to the Australian economy.²³

4.14 A similar incentive prompted another grower to invest in an agribusiness MIS—not only to accumulate funds for retirement and to generate passive cash flows for future financial security but to help contribute to the growth of rural Australia.²⁴ Mr Peter Crean informed the committee that he was advised to invest in ITC pulpwood and sandalwood projects as he would be turning 65 at the time. He explained that he and his wife:

...felt good about the investment as the return promised to be good and also we were investing in Primary production which we thought was good for Australia.²⁵

19 *Submission 1*, p. 1 (emphasis in original). Mr Lawtie's adviser was Mr David Radovan, formally of Infocus, who was found guilty by ASIC and banned for 5 years. ASIC, 10-217AD 'ASIC bans WA financial adviser', 26 October 2010, <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-217ad-asic-bans-wa-financial-adviser/> (accessed 22 September 2015).

20 Name withheld, *Submission 95*, p. [1].

21 Name withheld, *Submission 102*, p. 1.

22 Name withheld, *Submission 42*, p. [4].

23 Name withheld, *Submission 33*, p. [1].

24 Mr Stefan Kaiser, *Submission 107*, p. 5.

25 *Submission 19*, p. 1.

4.15 Similarly, Mr Trevor Burdon, a grower investor and environmentalist, 'invested to provide the forestry industry with alternative resource to heritage forest stocks in the Snowy Mountains and Tasmania, to promote local industry (especially in Tasmania), and to generate a return to support my independent retirement'.²⁶

Committee view

4.16 Certainly not all growers were simply looking for a way to minimise their tax: their modest incomes confirming that such an intention was not a significant consideration. In many cases, the clear and consistent evidence attests to the fact that the tax aspect was not the primary incentive.

4.17 While the tax advantage may not have been the highest priority for some investors, it was a factor and certainly a major plank in the marketing strategy for these products. But even investors primarily motivated by the tax advantages were entitled to sound advice appropriately tailored to their particular circumstances. For such growers, their claims for tax benefits were generally legal. As the Australian National Audit Office (ANAO) noted in 2004:

Taxpayers have the right to arrange their financial affairs to minimise tax, but it is not acceptable to do so by avoiding the intent of the law or by not following the law itself.²⁷

4.18 As noted earlier, agribusiness MIS usually take some time before they earn any income (5 to 20 years). If the investor receives all the tax deductions up front, any income earned later is taxable. It should also be noted that the ATO may query the tax deductibility of the loan interest if the investor 'appears not to be taking any real "business risk"'.²⁸ There were no suggestions that growers were avoiding their tax obligations but, as noted above, even investors seeking the tax advantage should not have been encouraged to invest in high risk, highly geared products if they were retail investors. They certainly should not have been led to assume that ATO rulings were an endorsement of the scheme.

Significance of ATO rulings

4.19 Australia's self-assessment taxation system relies on taxpayers having a reasonable understanding of taxation law so they are able to fulfil their tax obligations. Thus, an important element of the ATO's administration of the taxation law is the provision of interpretative advice on taxation issues. Under this self-assessment

26 *Submission 187*, paragraph 11.

27 ANAO, Audit Report No.23 2003–04, Performance Audit, *The Australian Taxation Office's Management of Aggressive Tax Planning*, Australian Taxation Office, 2004, paragraph 8, http://www.anao.gov.au/~media/Uploads/Documents/2003%2004_audit_report_23.pdf (accessed 12 January 2014).

28 ASIC, answer to question on notice, No. 3, 2 October 2015.

regime, the Commissioner of Taxation may issue both public and private rulings that are legally binding on the Commissioner.²⁹

4.20 In June 1998, in an attempt to preserve the integrity of the tax system, the ATO introduced product rulings. These rulings allowed promoters of MIS to provide relevant information to the ATO, which could then rule on the deductibility of scheme payments for participants in the scheme. Such rulings gave investors certainty about the deductibility status of their claim but only on condition that the scheme was implemented according to the information on which the ATO ruled.

Early problems around tax rulings

4.21 During the early 2000s, a significant number of investors in agribusiness MIS were caught out by having the ATO deem their tax deduction ineligible. At that time, the ATO announced it would initiate aggressive tax measures, which would include issuing amended assessments to approximately 40,000 taxpayers who had invested in MIS.³⁰ The assessments effectively disallowed some deductions and required investors to repay the deducted amount plus penalties and interest. Because the deductions covered a number of years, some investors faced paying substantial amounts of money.³¹

4.22 In response to the criticism of the ATO's action in requiring investors to repay their deductions and hefty penalties, this committee inquired into the mass marketing of tax effective schemes. In June 2001, the committee tabled an interim report that considered the economic, social and personal effect of the then ATO recovery action on taxpayers involved in these tax effective schemes. At that stage of the inquiry, the committee was primarily concerned with whether the level of the tax burden imposed on scheme participants, caught up in what was held to be tax avoidance arrangements, was justified.³² Notably, the harm caused to investors was not the collapse of the schemes but the improper marketing of schemes that promoted tax benefits and the

29 Inspector-General of Taxation, Appendix 3: *History of Australia's system for public advice on income taxation matters*, a report to the Assistant Treasurer, 7 April 2009, <http://igt.gov.au/publications/reports-of-reviews/administration-of-public-binding-advice/appendix-3-history-of-australias-system-for-public-advice-on-income-taxation-matters/> (accessed 4 January 2016).

30 See, for example, 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*, No 05/078, RIRDC Project No AWT-1A, January 2006, p. 4, <https://rirdc.infoservices.com.au/items/05-078> (accessed 5 December 2014).

31 See, for example, 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*, RIRDC Publication No 05/078, RIRDC Project No AWT-1A, January 2006, pp. 4. <https://rirdc.infoservices.com.au/items/05-078> (accessed 5 December 2014).

32 Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection*, Interim report, June 2001, p. 1.

ATO's decision to deny such claims.³³ Of relevance to this current inquiry, however, is the potential for ATO's rulings to be misrepresented or misused. For example, with regard to an ATO private binding ruling (PBR), the committee observed in 2001 that:

Although only a small number of PBRs were issued, it appears that promoters and designers exploited them to market schemes *en masse*. Common practice included using a PBR to market later versions of a scheme or schemes with comparable features. While promoters misused PBRs in this fashion, it seems that many scheme participants relied upon them as a seal of ATO approval or saw them as representing the ATO line on schemes in general.³⁴

4.23 The committee's finding in 2001 that financial advisers did not appear to have advised their clients fully of the risks involved in investing in these schemes, particularly the risk of the ATO taking a different view of the arrangements is also of relevance to this current inquiry.³⁵

4.24 In its 2001 report, the committee highlighted the problem of investors misconstruing the ATO's rulings on mass marketed tax effective schemes and interpreting them as an endorsement of the product. At that time, ASIC conceded that the schemes were generally sold on their tax advantages and that on occasion, they were mis-sold on those benefits. Clearly, in 2001 there were warning signs about the possible misuse of ATO rulings when it came to promoting and marketing agribusiness MIS.

4.25 Five years on, a study found that the ATO's product rulings system had substantially resolved taxation uncertainty for MIS participants. According to the study, product rulings were in effect a move away from 'pure' self-assessment and a useful development. It warned, however, that, while providing clarity on the eligibility of tax deductions for investors in MIS, the ATO product rulings were not intended to

33 Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection*, Final report, February 2002, pp. 5–7.

34 Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection*, Interim report, June 2001, p. 23. A private ruling is binding advice that sets out how a tax law applies in relation to a specific scheme or circumstance and applies to the individual taxpayer who requested the ruling. In 2001, the committee formed the view that 'the influence on investor perceptions of PBRs used to market schemes needs to be recognised. Insofar as PBRs were used as marketing tools to encourage participants to believe they represented a general ATO position, participants were poorly served by both promoters and advisers, particularly tax practitioners who would have known that this was an improper use of PBRs and that no certainty existed for anyone except the PBR applicant'.

35 Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection*, Final report, February 2002, p. 34.

indicate, and certainly not endorse, the commercial viability of the respective product.³⁶

4.26 In its 2008 submission to the non-forestry MIS review, the National Farmers' Federation (NFF) raised concerns about the potential for the ATO product ruling processes to exert undue influence over investor decisions.³⁷

Warnings—not sanctioning the commercial viability of product

4.27 As explained earlier, the Commissioner of Taxation may issue public rulings that are legally binding on the Commissioner.³⁸ An ATO public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applied, or would apply, 'to entities generally or to a class of entities in relation to a particular scheme or a class of schemes'.³⁹ The ATO may allow an investor to claim the operating expenses of an agribusiness MIS as a tax deduction against the investor's total income, which are allowed through a system of product rulings that describe the specific cost items deemed legitimate deductible expenses. Product rulings are binding public rulings about a product such as an investment arrangement or a tax effective arrangement.

4.28 The committee understands that while a product ruling from the ATO provides entities covered by that ruling with certainty as to the tax consequences of participating in that particular MIS, the product ruling provides no assurance that:

- the scheme is commercially viable;
- the fees, charges and other costs are reasonable or they represent industry norms; or

36 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*, RIRDC Publication No 05/078, RIRDC Project No AWT-1A, January 2006, pp. 10-11 and 48.

37 Submission to the Review of Non-Forestry Managed Investment Schemes, 12 September 2008, p. 4, http://archive.treasury.gov.au/documents/1423/PDF/National_Farmers_Federation.PDF (accessed 23 November 2014).

38 Inspector-General of Taxation, Appendix 3: *History of Australia's system for public advice on income taxation matters*, a report to the Assistant Treasurer, 7 April 2009, <http://igt.gov.au/publications/reports-of-reviews/administration-of-public-binding-advice/appendix-3-history-of-australias-system-for-public-advice-on-income-taxation-matters/> (accessed 4 January 2016).

39 ATO, Product Ruling, PR 2007/71, <http://law.ato.gov.au/atolaw/view.htm?Docid=PRR/PR200771/NAT/ATO/00001> (accessed 15 December 2014). According to the ATO, the investor would be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by the ruling if it turned out that it did not correctly state how the relevant provision applied to the investor.

- the projected returns will be achieved or are reasonably based.⁴⁰

4.29 In its product rulings, the ATO advises potential participating entities to 'form their own view about the commercial and financial viability of the scheme'.⁴¹ It advises further that this assessment should involve considering important issues such as the 'track record' of the management; the level of fees in comparison to similar products; how the product fits an existing portfolio; and whether projected returns are realistic.

4.30 ASIC also drew attention to the fact that the ATO makes 'an express representation in every product ruling it issues that it does not sanction nor guarantee any product as an investment'.⁴²

4.31 While the ATO makes clear in its product rulings that it does not sanction or provide assurances as to the commercial viability of the product subject to the ruling, evidence indicates that some investors missed this message. In this regard, ASIC acknowledged that investors may fail to have regard to warnings issued about these products.⁴³

Product ruling—perceived endorsement

4.32 There can be no question that a number of product producers and financial advisers used the ATO ruling as a marketing ploy that succeeded in convincing some investors that the ATO had in fact 'approved' the scheme. For example, Mr David Cornish, a private consultant who focuses on agricultural investment, informed the committee of his concern that investors did not fully appreciate the standing of product rulings. He also accepted that when issuing a ruling on a scheme, the ATO did not, in any way, make a judgment on the financial viability or reasonableness of that scheme. In his opinion, however, it would seem that the general public derived a level of comfort from an ATO product ruling that a scheme would be viable.⁴⁴

4.33 Mr John Lawrence, an economist, tax accountant and more recently a public policy researcher, similarly noted how people were fundamentally mistaken in

40 ATO, Product Ruling, PR 2007/71, <http://law.ato.gov.au/atolaw/view.htm?Docid=PRR/PR200771/NAT/ATO/00001> (accessed 15 December 2014). See also PR 2004/116.

41 ATO, Product Ruling, PR 2007/71, <http://law.ato.gov.au/atolaw/view.htm?Docid=PRR/PR200771/NAT/ATO/00001> (accessed 15 December 2014).

42 *Submission 34*, paragraph 56.

43 *Submission 34*, paragraph 57.

44 *Submission 60*, Appendix 1, 'MS&A submission on the proposed new taxation arrangements for investments in Forestry Managed Investment Schemes (MIS)', p. 5.

believing that having purchased a scheme with a product ruling they were 'safe'. He explained:

The tax office did nothing to dissuade them from the error of this view. The tax office did nothing—to my knowledge, anyway—about checking whether or not the schemes were run in accordance with the product ruling once they were established.⁴⁵

4.34 Consistent with these observations, many investors who wrote to the committee understood, or were led to understand, that the ATO's ruling provided assurances about the commercial soundness of the scheme. As one investor stated: 'it was implied that due to the tax arrangements associated with the scheme they were government endorsed!'⁴⁶

4.35 The matter-of-fact way investors spoke of their scheme revealed the genuinely held assumption that the government had given its support. For example, one investor contended that surely by 'investing for the future through government endorsed schemes, our retirement would be dependably secure'?⁴⁷ Similarly, another couple who invested as individuals and not through their company noted:

...who in their right mind would think that these companies fully approved by the Australian Government for tax saving investment and properly screened by ratings companies and our accountant would go into liquidation that very year. Not only take the investment and not even bother to plant the so called harvest.⁴⁸

4.36 Likewise, Mr David Lorimer was convinced about the legitimacy and soundness of his investment. His accountant introduced him to the schemes, which were presented 'as long term financially secure investments'. Furthermore, Mr Lorimer was led to suppose that, due to the tax arrangements associated with the schemes, they were government endorsed.⁴⁹ Another investor, Mr Michael McLeod, told the committee:

I was provided with many glossy brochures, and the forecast returns looked healthy plus the scheme was endorsed by the ATO with the tax credits which made my decision to sign up seem like a good idea. I was happy that I was doing something positive with my money and taking charge of my

45 *Proof Committee Hansard*, 5 August 2015, pp. 3 and 4.

46 Mr David Lorimer, *Submission 55*. See also Mr Alexander McShane, *Proof Committee Hansard*, 6 August, 2015, pp. 3–4 and name withheld, *Submission 69*, p. 1.

47 *Confidential Submission 37*, p. 13.

48 Ms Barbara Gray, *Submission 54*, p. [1].

49 *Submission 55*, p. 1. See also *Submissions 57*, p. [1]; *64*, p. [2]; *68*, p. [1]; *70*, p. [1]; *81*, p. [1]; and *87*. Name withheld, *Submission 103*; *Submission 133*, p. 1; and *Confidential Submission 8*, p. [1]; *Confidential Submission 80*, p. 3; *Confidential Submission 92*, p. [2].

future to look after my family so as I didn't have to rely on Government handouts during my retirement years.⁵⁰

4.37 Mr David Huggins, a legal practitioner representing a grower, maintained that the tax arrangement lured people into making 'what was in reality, a highly speculative investment'.⁵¹ Mr Samuel Paton, principal of an agricultural consulting evaluation firm, similarly explained that unfortunately:

...the hapless lay investor who was putty in the hands of the unscrupulous financial planners, receiving 10% commissions from the promoters assumed the ATO Ruling was a 'tick' for scheme viability.⁵²

4.38 Thus, although the tax incentive may not have been the primary objective for some investors, many of them were reassured by the fact that, in their view, the ATO had endorsed the MIS and hence had confidence to invest in the product.⁵³ Investors often drew additional comfort about the security of the schemes from an understanding that ASIC had also approved them.

Registration of MIS and required PDS—perceived endorsement

4.39 ASIC must register an MIS within 14 days of lodgement of the application for registration, unless it appears to ASIC that the application or the proposed scheme is deficient with respect to a number of requirements. These requirements go mainly to governance or administrative matters such as the scheme's constitution and compliance plan having to meet statutory obligations. Some investors formed the view that a scheme's registration meant that ASIC had in some way vetted the scheme and given its backing. They also interpreted the publication of prospectuses and product disclosure statements as an indication that ASIC had vouched for the schemes. But, according to CAMAC:

Whatever view of the law is taken on these matters, ASIC is not required to assess the commercial merits of a scheme.⁵⁴

4.40 Many investors assumed otherwise.

4.41 In 2001, ASIC informed the committee that it had gone to great lengths to explain that it does not approve prospectuses: that it does not register these documents. It explained:

There is an argument that says that the lodging of a prospectus with the regulator seems to create the impression in the minds of some investors that

50 *Submission 87*, p. 1.

51 *Submission 118*, p. 6.

52 *Submission 149*, p. 3.

53 See, for example, name withheld, *Submission 150*, pp. 1–2.

54 Corporations and Markets Advisory Committee, *The establishment and operation of managed investment schemes*, Discussion paper, March 2014, p. 42.

the regulator has had a role to play in somehow giving it a tick or otherwise ...The disclaimer that is put in the prospectus, which at the moment says 'ASIC takes no responsibility for the contents of this prospectus', might in fact in some perverse way create the impression: 'That means they must have looked at it, if they are excluding their liability'...But the whole path down which the law is going is that it is a disclosure based regime and that the investor is supposed to make their own due inquiries, et cetera. It is not a regime that we designed, of course, but it is something that we would implement.⁵⁵

4.42 Recently, ASIC informed the committee that, through media releases, consumer warnings, its consumer website, speeches and media commentary, it regularly and consistently warns consumers that it does not 'approve' investments, including agricultural MIS schemes. For example, currently on its MoneySmart website ASIC has issued the following warning:

Be aware that a licence from ASIC does not mean that ASIC endorses the company, financial product or advice or that you cannot incur a loss from dealing with them. ASIC does not approve business models. ASIC grants a licence if a business shows it can meet basic standards such as training, compliance, insurance and dispute resolution. The business is responsible for maintaining these standards. Checking ASIC's databases should be only one of the many checks you should do before you invest your money.⁵⁶

4.43 Even so, ASIC noted its concern that some retail investors might wrongly conclude from the existence of a PDS or prospectus and the operator holding an AFS licence that the government regulator had undertaken some checking and 'the disclosure was sufficient and the schemes being operated were commercially viable'.⁵⁷

4.44 Despite ASIC's attempts to correct the false impression that a registered MIS has the regulator's imprimatur, some investors remained convinced that ASIC had endorsed their scheme. For example, one grower explained that the 'key selling point' was ASIC and the ATO's approval as a genuine, 'sanctioned' investment.⁵⁸ Another stated that she was one of a group people who believed that if an investment had a PDS then 'that was a stamp of approval by ASIC' as was the tax ruling.⁵⁹ Another

55 Senate Economics References Committee, *Inquiry into mass marketed tax effective schemes and investor protection*, Final Report, February 2002, paragraph 4.33. Also refer to discussion on PDSs and lodgement of notification with ASIC in this current report, paragraph 9.16.

56 ASIC's MoneySmart website at <https://www.moneysmart.gov.au/tools-and-resources/check-asic-lists> and <https://www.moneysmart.gov.au/tools-and-resources/check-asic-lists#prospectus> (accessed 7 October 2015). See also ASIC, answer to written question on notice, No. 1, 2 October 2015.

57 ASIC, answer to question on notice, No. 3, 2 October 2015.

58 Name withheld, *Submission 95*, p. [1].

59 Name withheld, *Submission 151*, p. 5.

investor assumed that the scheme in which he invested was ASIC 'sanctioned'. He observed:

ASIC have been more than useless; they have endorsed corrupt, unethical and unconscionable conduct. Great Southern was a fully endorsed product. Whichever government agency that...endorses financial products on offer in the marketplace did not do their job well enough to identify that Great Southern was essentially a ponzi scheme.⁶⁰

4.45 A couple, who also likened the MIS to ponzi schemes, wondered how the projects ever got ATO approval in the first place.⁶¹ In their view, not even ASIC or the ATO put enough research into these investments before approving them.⁶² One couple indicated simply that they thought they were investing in 'a nice, safe investment, a product that was endorsed and supported by Australian Government legislation, and that nothing could go wrong'.⁶³ As another example, one investor asked:

How is it possible for ASIC and the ATO to assess and give approval for such a financial scheme (were they deceived as well?), only to find that within 18 months it turned out to be [a] Ponzi scheme where hundreds (thousands?) of investors lost hundreds of millions of dollars, some of whom will go bankrupt and for a bank to cash in on this misrepresentation?⁶⁴

4.46 Speaking for his wife, one submitter informed the committee that she had assumed Timbercorp was legitimate—'fully supported and endorsed investments by the government, ATO and ASIC...and therefore relatively safe'. Otherwise, he explained, his wife would never have considered buying into these investments.⁶⁵ He contended that steps should be taken to ensure that a false impression is not created, advocating that greater prominence be given to the fact that ASIC or the ATO take no responsibility for the contents of the PDS and do not endorse or support its content.⁶⁶

60 Name withheld, *Supplementary Submission 52*, p. 2.

61 *Confidential Submission 36*, pp. [1] and [5].

62 *Confidential Submission 36*, p. [5].

63 Name withheld, *Submission 56*, p. [2].

64 Name withheld, *Submission 91*, p. 3.

65 Mr Stefan Kaiser, *Submission 107*, p. 5. See also, *Submission 56*, p. [1]; *Submission 114*, p. 1; and name withheld, *Submission 150*, p. [2].

66 Mr Stefan Kaiser, *Submission 107*, p. 20. Mr Kaiser was supporting a recommendation by Willemsen, R. 2010, Submission to ASIC, 'Consultation Paper 133: Agribusiness Managed Investment Schemes: Improving Disclosure for Retail Investors'.

Committee view

4.47 The concerns raised in 2001 about the possible mis-selling of agribusiness MIS were well founded. In the following years, many growers mistakenly formed the view that the ATO had vouched for the viability of the schemes.

4.48 The ATO's effort to ensure that investors understood that it did not vouch for the commercial viability of agribusiness MIS, was undermined by a totally different perception that took hold in the minds of a number of retail investors. It would appear that some product issuers and financial advisers allowed, or even encouraged, investors to assume that an ATO product ruling meant government endorsement of the commercial viability of the product. A similar misunderstanding gained currency about ASIC giving its support to the schemes. Thus, growers mistakenly assumed that the products had ATO and ASIC approval and hence were deemed to be safe and suitable for retail investors.

Recommendation 1

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

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