

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

**Budget Estimates**

**29 May – 31 May 2012**

**Question: BET 65**

**Topic: Horticultural Operations Limited**

**Hansard Page: Tuesday 29 May 2012, page 94**

**Senator WILLIAMS asked:**

**Senator WILLIAMS:** Have you heard of that company Treetop Apples—HP Mercantile?

**Mr Medcraft:** Yes. It is a bit of a favourite.

**Senator WILLIAMS:** Horticultural Operations Limited took over from HP Mercantile. HOL refers to Horticultural Operations Limited.

**Mr Medcraft:** Yes.

**Senator WILLIAMS:** HOL has failed to provide annual financial statements to investors over the nine years since it took over. Are you aware of that?

**Mr Tanzer:** It is one of a number of schemes in this agribusiness area that have fallen into some difficulty.

**Senator WILLIAMS:** HOL has failed to provide annual financial statements to investors over the nine years since it took over. ASIC has failed to follow up why the statements were never provided. Is that correct?

**Mr Tanzer:** I am happy to take that on notice.

**Senator WILLIAMS:** Please do, and please have a good look at it, because that is another complaint I have.

**Mr Medcraft:** It is actually something we have spent a lot of time on. As you are aware, HP Mercantile were looking to recover monies from investors, and we did intervene, because we had concerns about their methods and also their contractual rights. We have completed our investigation there. What we will do is provide you with more information as to where we see the HP Mercantile situation. In fact, it does really come down, if you want a contractual dispute, between the investors and HP Mercantile. But we will provide that.

**Senator WILLIAMS:** I think it is another case of painful losses for many investors, sadly.

**Mr Medcraft:** It is an issue for them to deal with commercially. HP Mercantile has acquired the rights to the debts. The debts have been validly incurred and validly assigned and it is an issue of the debtors pursuing their rights against other parties.

**Senator WILLIAMS:** That is all very good for the debtors, pursuing the rights of other parties, but when those debtors do not have any money it is pretty hard to pursue. Legal teams do not come for nothing, sadly; they cost quite a bit.

**Mr Medcraft:** Unfortunately that is the situation, as you are probably well aware. We will provide you with some background on that.

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#### **Answer:**

##### **Background**

1. Since 2009 ASIC has received over 100 complaints regarding the debt collection practices of HP Mercantile Pty Ltd (HPM) in relation to loans provided in the 1990s to over 2,000 growers/investors (Growers) in 9 tax-effective agricultural prescribed interest projects (schemes).
2. Each of the schemes had a limited term of between 14 and 17 years and it appears that most of the 9 projects have reached or passed the termination date.
3. The project promoters and managers were Tumut River Orchards Management Ltd and Treetop Projects Ltd (Promoters). Australian Rural Group Ltd was appointed as the trustee and representative (Representative) of each of the schemes.
4. Horticultural Operations Ltd (HOL) was appointed by the Representative as replacement manager in 2001 as a result of the Promoters being placed into administration. A number of Growers are shareholders in HOL. The Representative was placed into liquidation in 2002.
5. HOL did not replace the Representative when it was placed into administration and failed to take steps to wind up the schemes. HOL has stated that it did not want to take steps to wind up the schemes as to do so may have caused the Grower loans to become full recourse.
6. Growers entered into a series of contracts (Project Agreements) to give effect to their interest in the scheme and the majority borrowed monies from the Promoters to purchase their interests. A key provision of most loans is that the loan was provided on a limited recourse basis. Under these loans Growers were required to make certain fixed mandatory repayments over 1 – 3 years, with the balance of the loan to be repaid out of the profits of the scheme, provided that Growers made their 'income' from the scheme 'available' to the Representative.
7. Growers received an up-front tax deduction in relation to their purchase of interests in the schemes however the ATO disallowed a portion of these deductions in 2001 on the basis that the deductions were not available because of the general anti-avoidance provisions of the Income Tax Assessment Act.
8. HPM assert they have been validly assigned the loans. The assignment of the loans has been the subject of numerous Court proceedings. The Courts have found the assignments to be valid despite the claims of Growers.
9. HPM seek repayment of the amounts owing by Growers on the basis that the Growers are in breach of the conditions of the loans as income from the schemes has not been made available to the Representative pursuant to the Project Agreements.

##### **Horticultural Operations Limited**

10. The Project Agreements require the Representative to prepare and have audited the financial reports for each of the schemes as well as keep accounting records. Given the Representative is in liquidation and HOL has not undertaken to prepare accounts in lieu of the Representative, no-one has ensured they have been prepared and provided to investors. As a result no scheme financial reports have been lodged with ASIC since the involvement of HOL. HOL claim the schemes have no assets and have not earned any distributable income since their appointment.

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11. ASIC wrote to HOL in 2010 and 2011 concerning the preparation and lodgement of outstanding financial reports for the schemes. ASIC also served notices on HOL in 2011 for documents under our statutory powers to establish whether the preparation of financial reports would be possible. It appears from the material provided in response to these notices that HOL did not have accounting records that would enable financial reports to be prepared for the schemes.
12. We do not have detailed information relating to the asset position of HOL, the Representative and/or their directors; however we understand at the time we obtained information from HOL that it had no assets and would not have been required to hold any insurance policies as manager of the schemes.
13. ASIC took the view that there was limited regulatory benefit for the Growers in pursuing HOL for the preparation and lodgement of the accounts for the schemes in circumstances where it was unlikely that sufficient information was available to produce financial reports and/or HOL did not have adequate resources to prepare financial reports.
14. ASIC did consider whether action should be taken against the directors of HOL in respect of the failure to prepare financial reports for the schemes, however again it was decided that to do so would not obtain any regulatory benefit for the Growers or the broader community.

#### **ASIC Actions**

15. ASIC has conducted a detailed analysis of the issues raised with it by the Growers.
16. ASIC has engaged with HPM who agreed to amend its collection practices to take into consideration concerns raised by ASIC. These concerns included:
  - a. clarifying statements about the scope of court decisions in correspondence with Growers;
  - b. increasing the time period for Growers to respond to letters of demand; and
  - c. clarifying that Growers do not have to provide the first payment of any proposed repayment arrangements prior to HPM agreeing to the proposed repayment arrangement.
17. ASIC has met with key Grower representatives to discuss our position and responded to complaints that ASIC has determined to take no further action in respect of the issues they have raised.
18. ASIC obtained court orders for HOL to lodge its 2007 financial reports. HOL failed to lodge these financial reports. As a result of failing to lodge its financial reports ASIC deregistered HOL in February 2012.