Chapter 5

Role and impact of insolvency practitioners

5.1 Having considered the farm debt mediation process in the previous chapter, this chapter will examine the role and impact of insolvency practitioners (including liquidators, administrators and receivers) in the primary production sector.

Role of receivers

5.2 A receivership is an administrative procedure by which a person, who must be a registered liquidator, is appointed to administer assets on behalf of a secured creditor. The secured creditor (e.g. a bank) appoints the receiver.[1] The duty of the receiver is to manage and realise the secured asset for the purpose of discharging the debt.[2]

5.3 In a primary production context, for example, a bank would appoint a receiver to administer the assets of a farmer. The receiver has a duty to the bank, as outlined by Mr Stewart McCallum, a partner with the restructuring and insolvency firm Ferrier Hodgson:

> When we're appointed as receiver by the banks, our obligation is to collect and realise the assets that the bank holds as security. In other words, our role is serving the banks to maximise the sale value of the assets that they have as security. In the context of receiverships, it's obviously important that we continue to work cooperatively with the borrower where we can because, to put it colloquially, that provides the path of least resistance. That's the best way to go about it. But our duty is to the bank.[3]

5.4 Legal Aid Queensland observed that after a bank appoints receivers it is no longer legally involved in the sale process and is exempt and removed from any claims or actions by the farmer against the receivers. As such, there is no obligation on the bank to ensure that the receiver acts to obtain the best market price for the assets.[4] A receiver however has a statutory obligation under section 420A of the *Corporations Act 2001* to undertake reasonable care to sell charged assets that have a

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1 Australian Restructuring Insolvency and Turnaround Association, *Submission 4*, Appendix 4, p. 24.

2 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Legal Aid Queensland, answers to questions on notice, 2 August 2017 (received 28 August 2017), p. 5.

3 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 7.

4 Legal Aid Queensland, *Submission 6*, p. 9.

market value for 'not less than market value'.[5] The application of section 420A is considered in further detail below.

5.5 Insolvency practitioners can also work for banks in non-enforcement matters, for example as investigative accountants. Mr Will Colwell, a partner with Ferrier Hodgson explained:

> In any sector, not just the rural sector, the bank will send us in, saying, 'This person is in emerging financial distress.' So we might be engaged to see if they can be structured and their business turned around to profitability…[6]

5.6 Although receivers are recovering funds on behalf of banks, their fees are added to the debt of the farmer. Mr McCallum from Ferrier Hodgson summarised the typical situation:

> Receivers are personally liable for all of the expenses that we incur in the receivership, but we have a right to claim those costs out of the assets that we realise, so our costs effectively come out of the value of the asset we realise.[7]

5.7 The fees charged by receivers will be discussed in more detail later in this chapter.

5.8 The committee heard evidence that receivers, who are in fact appointed as an agent of the borrower, have minimal obligations to farmers:

> **Senator BROCKMAN**: Your legal obligation is to the bank. That is very clear… What are your obligations to the owner of the property beyond achieving market value for sale of assets [under section 420A of the *Corporations Act 2001*]?
>
> **Mr McCallum**: In high-level terms, not a lot. By that I mean our primary obligation is to the bank… As an agent of the borrower – and agency is a difficult concept – we've got obligations to act in their best interests. We've got the Corporations Act duties of good faith – they're the duties we've got to the borrower.[8]

5.9 The Australian Restructuring Insolvency and Turnaround Association (ARITA) provided the committee with further information around the agency dynamics in a receivership:

> Agency in a receivership is very complicated. While a receiver is appointed by the Bank and acts for the benefit of the Bank, they are generally the

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5 *Corporations Act 2001*, paragraph 420A(1)(a).

6 Mr Will Colwell, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 7.

7 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 10.

8 Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 10.

> agent of the borrower as stipulated in the security documentation, however, they do not work for the borrower. Such an agency, often referred to by the courts as a 'special' or 'limited' agency, protects the receiver from personal liability for breaches of a company contract.[9]

5.10 The committee is concerned that these complicated dynamics lead to an inherent conflict of interest for the receiver. This matter will be discussed later in this chapter.

Rates of receivership in the primary production sector

5.11 Banks informed the committee that they viewed receiverships as a 'last resort', and generally spent a significant amount of time working with farmers to find other options before commencing any foreclosure action. For example, ANZ stated:

> It should be recognised that by the time ANZ takes action under its security documents, the customer has always exhausted all other possibilities to meet their commitments to the bank and other creditors. We estimate that in the past the time between ANZ first issuing a breach or default notice and ANZ taking action under its security documents is on average a period of over 2.5 years for agribusiness customers.[10]

5.12 Similarly, Westpac informed the committee:

> It is Westpac's preference to work with customers to restore their financial position and resolve defaults without relying on legal rights in loan contracts. After all, our original credit assessment is based on the customer's ability to service the loan ('the first way out') not the enforcement of security ('the second way out').[11]

5.13 Rural Bank advised that foreclosure was a last resort, only entered into once all other avenues to remedy defaults had been explored and exhausted.[12] Rabobank also expressed a similar sentiment.[13]

5.14 A number of banks also noted that they only appointed receivers in a small number of cases. For example, NAB stated they have 'avoided receivership for all but 1.51 per cent of [their] agribusiness workout [financially distressed] customers in the last twelve months, representing 0.0136 per cent of [their] overall agribusiness book.'[14]

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9 Australian Restructuring Insolvency and Turnaround Association, answers to questions on notice, 23 October 2017 (received 3 November 2017).

10 ANZ, *Submission 8*, p. 10.

11 Westpac, *Submission 13*, p. 6.

12 Rural Bank, *Submission 14*, p. 3.

13 Rabobank, *Submission 5*, p. 8.

14 NAB, *Submission 10*, p. 3.

5.15 ANZ also provided information to the committee on this matter:

> In the 18 months from 1 October 2015 to 31 March 2017, ANZ has appointed an insolvency practitioner in relation to an agribusiness customer on six occasions. In each of these cases, the decision was made at the request of the customer who, after receiving their own independent legal advice, believe that this action was in their best interests.[15]

5.16 The Commonwealth Bank of Australia informed the committee that in 2016 it instigated enforcement action in relation to six farming businesses, and that in those cases they had worked with the customers to explore alternative solutions for an average of 44 months.[16]

5.17 Westpac advised that out of the over 30 600 agribusiness customers on its books, it had only appointed receivers and mangers to 15 customers over the last two years.[17]

5.18 Insolvency firm KordaMentha informed the committee that according to its estimates based upon its market knowledge and bank submissions, receiverships in 2017 will impact on less than 0.05 per cent of Australian farm businesses.[18]

Impact of receivers on primary producers

5.19 Throughout the inquiry the committee received evidence from primary producers and other stakeholders outlining instances of unreasonable or inappropriate behaviour on the part of insolvency practitioners.

5.20 The committee heard allegations relating to:

- fire sales of assets where assets were sold for significantly under their market value;
- poor farm management (including animal welfare issues);
- receiver costs which appeared unwarranted or inconceivably high; and
- possible unlawful behaviour.

5.21 Examples of some of these allegations are set out below.[19]

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15 ANZ, *Submission 8*, p. 2.

16 Commonwealth Bank of Australia, *Submission 11*, p. 2.

17 Westpac, *Submission 13*, p. 2.

18 KordaMentha, *Senate Committee: Lending to primary production customers*, pp. 2–3 (tabled 17 November 2017).

19 The committee also received a number of confidential submissions that outlined such allegations.

Fire sale of assets

5.22 The committee heard of several instances where farms and related assets were sold by receivers for significantly under their market value.

5.23 For example, the committee was informed of a case of a cattle property in Queensland that was valued in 2009 at $3.3 million bare (i.e. no stock on it). In 2012 the receivers for the property valued it at $1.6 million bare, but ultimately sold it for $800 000 with 800 head of cattle given in. Given that 800 head of cattle would be valued at approximately $400 000, the property itself was sold for only $400 000.[20]

5.24 The committee heard of another case where a Queensland property was valued at $1.3 million and sold by the bank 20 months later for $590 000.[21]

5.25 Yet another striking example was provided by Mr Harold Cronin, a primary producer in Western Australia, who submitted:

> The NAB and their appointed receiver manager, Ferrier Hodgson, took nearly three years to dispose of the Cronin's farms. The price they eventually received for the farms was a little over half of their sworn valuation. Other farms were sold in the district for 'market price' during the time the Cronin properties were for sale. There has been no explanation as to why the Cronin's farms sold for half their sworn value.[22]

5.26 Mr Bob Yabsley stated that his property in Queensland was valued at $27.2 million, but sold by the bank many years later for $12 million.[23]

5.27 The committee was also told of another case where receivers sold more than $1.2 million of farm machinery in good condition for $550 000.[24]

5.28 The committee was also informed of the following situation by Mr Michael and Mrs Cherie Doyle, primary producers in Western Australia:

> **Mrs Doyle:** Then they [receivers] decided they were going to sell the town property. We felt that the real estate agent was trying to undersell it. We know that he actually was underselling it. It ended up being put to tender. We had buyers out there for it. He would ring them up and we were trying to sell it for $10 million or $12 million, and he was saying, 'Oh, no; you can get about $3.2 million.'

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20 Senator John Williams, Committee Deputy Chair, *Proof Committee Hansard*, 17 November 2017, p. 4.

21 Mr Lindsay Dingle, private capacity, *Committee Hansard*, 2 August 2017, pp. 37–38.

22 Mr Harold Cronin, *Submission 50*, p. 2.

23 Mr Bob Yabsley, private capacity, *Committee Hansard*, 2 August 2017, p. 79. Note: the receivers provided a response to this claim. See response to submission 58 from PPB Advisory.

24 *Confidential Submission 65*, p. 4.

> **Senator MOORE:** This is the one that was seven point something [million dollars] at one stage—is that right?
>
> **Mrs Doyle:** This is the one where they valued it, yes.
>
> **Senator MOORE:** At $3.2 million.
>
> **Mr Doyle:** They originally valued it at about $6.7 million, I believe. Then they revalued it at $4.96 million. And this is the one for which the real estate agent, who was dodgy—I went to Perth and spoke to these people and one guy in particular, of four, was very keen; I'd given him a whole background on the area, the property and what it could achieve. He had looked at all the data I'd given him, and he was sold. He said, 'Mate, we can definitely do a deal; I've got people who will buy this tomorrow.' And I said, 'Look, it's worth $12 million, but we need to sell it, so if you give us $10½ million we can do a deal,' and he said, 'No problem.' He said that at 10½ he'd just need to go down and have a look and let the agent know. He went down there and the agent told the guy, 'Hey, mate: don't even worry about 10; I reckon I'll get this for you for 3.2, no worries.' And the guy said, 'Thanks very much for your time; see you later.' And then it was, 'Oh, I've got other properties; do you want to look at other properties—much better-value properties—elsewhere?' So, the guy went back to Perth, wrote the information down, let me know what had happened and said, 'Not interested'—like there's something dodgy going on down there.[25]

Poor farm management

5.29 The committee heard allegations of poor farm management by receivers, including animal welfare issues and land neglect resulting in out of control weeds and lost crop.[26]

5.30 For example, Mr Charlie Wallace alleged that receivers incorrectly sent stud bulls and cattle to the abattoirs.[27] He also alleged that the receivers neglected livestock on his property in Queensland, causing adult cattle and calves to perish:

> **Mr Wallace:** …We managed our properties spick and span. It was 100 per cent. We did not run them down. When the receivers came, the first letter they wrote said that everything was run down. That is a load of crap. It runs down after they take possession. That is when everything falls down, because they do nothing. Cattle perished on Newburgh. The big mob perished at Newburgh. They were too lazy to go and start pumps. I have photographic evidence.
>
> **Senator WILLIAMS:** Are you saying they literally died of thirst?

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25 Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7–8.

26 The committee also received a number of confidential submissions that outlined such allegations.

27 Mr Charlie Wallace, *Submission 80*, p. 4.

> **Mr Wallace:** Yes. There was no water in the troughs.
>
> **Senator WILLIAMS:** What?
>
> **Mr Wallace:** When potential buyers of Newburgh did an inspection, they rang me and said that they were horrified. They said: 'Lee, there are cattle dead around the troughs. There was no water.'
>
> **Senator WILLIAMS:** That is disgraceful.[28]

5.31 Mr Bob Yabsley stated that receivers failed to undertake weed management or flood protection measures, resulting in the significant devaluing of the property.[29]

5.32 Mr Harold Cronin alleged that receivers on his properties in Western Australia did not undertake essential maintenance, that fixed assets such as pumps and piping disappeared, that houses were neglected and weed growth across all properties was left unchecked.[30]

5.33 Mr Thomas Fox of Western Australia submitted that receivers had failed to understand the perishable nature of his crop, which had detrimental impacts on the amount and quality of crop exported, and the price able to be obtained for it.[31]

5.34 The Doyle family alleged that the receivers managing their dairy farm in Western Australia made mistakes with the timing of feeding and animal husbandry tasks, which led to decreased production.[32]

5.35 Mr Doyle stated:

> But they [receivers] took it [the dairy] and then, fairly quickly after the receivers took control, they wouldn't buy feed, and when they did it was late. The cows started dying….The milk production went shocking.[33]

5.36 Mrs Doyle also stated:

> Basically the business went backwards through the receivers. They had a lot of juniors working there. They didn't really know about dairy farming at all. They did get a bit of advice from the vets. They didn't heed any of the advice.[34]

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28 Mr Charlie Wallace, private capacity, *Proof Committee Hansard*, 11 September 2017, p. 13. See also Mr Charlie Wallace, *Submission 80*, pp. 8, 13.

29 Mr Bob Yabsley, *Submission 58*, pp. 5–6. Note: the receivers refuted these allegations. See response to submission 58 from PPB Advisory.

30 Mr Harold Cronin, *Submission 50*, p. 2.

31 Mr Thomas Fox, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 44.

32 Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7, 15.

33 Mr Michael Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, p. 6.

34 Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, p. 6.

High receiver costs

5.37 The committee was informed of instances where the receiver costs appeared unwarranted or inconceivably high. The committee was informed that the hourly rates for a partner in receivership firm are typically in the order of $650, plus GST.[35] Due to this very high hourly rate, if receivers do not sell the secured property in a reasonable period of time, the amount added to the farmer' debt can increase very dramatically.

5.38 For example, a primary producer in Western Australia advised the committee that he was charged $650 000 in receiver fees over a 9 month period. The receiver in question refuted this figure and provided information demonstrating the fee was $249 000 (including GST and disbursements). The receiver also noted that this receivership involved extenuating circumstances, including security threats against receivers that required additional expenditure to be mitigated.[36]

5.39 Mr Harold Cronin alleged that his receivers charged approximately $700 000 over three years. He provided the committee with an example of what he considered unreasonable fees charged by his receivers:

> ...we had no money, nothing, because all the finances were cut off. When we had to pay an account, a phone bill or something like that, we had to get their permission to write the cheque out so that they could pay it – but they charged us $40 for every cheque. Whether it was only a $20 cheque or a $50 cheque, they charged us $40 on every cheque.[37]

5.40 Mr Andrew McLaughlin detailed one particular case he had come across with unreasonably high receiver fees:

> In one particular case in 11 months the receiver was appointed and in a lot of cases the farmers have asked the receiver whether they could remain there as caretakers – make sure the weeds are under control, do whatever, and present the property as best they can to maximise the return. And what's happened? They don't let you near the farm. They can charge you with trespassing, which has happened. And their receiver's costs within 11 months are $1.2 million.[38]

5.41 The committee heard from Dr Graham Jacobs, a former MLA for the region of Eyre in Western Australia. He outlined a situation which involved exorbitant receiver fees that he had come across during his time as an elected representative:

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35 Mr Matthew Caddy, Partner, McGrathNicol, *Proof Committee Hansard*, 20 October 2017, p. 14.

36 See exchange between Senator Peter Georgiou and Mr Mark Mentha, Partner, KordaMentha, *Proof Committee Hansard*, 17 November 2017, p. 14. See also KordaMentha, answers to questions on notice, 17 November 2017 (received 27 November 2017).

37 Mr Harold Cronin, *Submission 50*, p. 2l; see also Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 45.

38 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 5.

> I sat with a farmer east of Ravensthorpe as he told me this at his kitchen table. The receiver's fees were charged against the remaining farm asset and reduced all remaining equity. The costs could be exorbitant. In one case, when they appointed the receiver they took over the spraying program to knock down weeds. This was ordered by the receiver. That cost $350,000. An earlier program, which could have been done by the farmer, would have cost $100,000. The ongoing management fees by the bank receivers and the lawyers can be up to $50,000 a month.[39]

5.42 On the broader issue of high receiver fees, Dr Jacobs also commented:

> ...my contention is that following the receiver's fees and legal costs – which are exorbitant and, tragically, whittle away the remaining equity that the farmer has – the major insolvency firms and law firms preferred by the banks have cost structures and charge-out rates that are largely geared towards big corporate groups. These are not relevant to small businesses and smaller farms. One could suggest that, by the time the receivership machinery is put in motion, the remaining equity is known and the process works backwards in determining fees. I am not a conspiracy theorist, but, if an asset is valued at $3 million and the debts are $2 million, there is a $1 million equity left in the business, and I contend that often that equity is eroded until there's nothing left determining the equity and working backwards.[40]

Possible unlawful behaviour

5.43 The committee also heard allegations of possible unlawful actions by receivers. For example the committee was told that receivers for a property in Queensland had illegally removed National Livestock Identification System (NLIS) tags from cattle:

> **Mr Jensen:** They're not supposed to remove a beast off a property without a bloody NLIS tag in its ear…
>
> **Senator WILLIAMS:** Why was the receiver changing the NLIS tags?
>
> **Mr Jensen:** Don't ask me.
>
> **Senator WILLIAMS:** If they have the ownership of the farm as they should have been—the breeder of them, in the ear, at marking time—they should stay with that beast until slaughter time. What is the motive for the receivers to change the original NLIS tag?
>
> **Mr Jensen:** I have absolutely no idea.
>
> **Senator WILLIAMS:** There must be some reason or they wouldn't do it.
>
> **Mr Jensen:** Yes, there must be. It's illegal to do it. They must have had some reason to do it.

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39 Dr Graham Jacobs, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 56.

40 Dr Graham Jacobs, private capacity, *Proof Committee Hansard*, 19 July 2017, p. 56.

Senator WILLIAMS: And you are sure that is happening in this area.

Mr Jensen: That happened out there.

Senator WILLIAMS: When you say 'out there', please clarify 'out there'.

Mr Jensen: Out at Richmond saleyards…[41]

Broader impact

5.44 Primary producers expressed significant distress and frustration that the receiverships of their properties and assets were not undertaken in what they deemed a comprehensive or respectful way. Individuals indicated they felt ignored, deliberately uninformed, and excluded by receivers and the instructing bank.[42]

5.45 Legal Aid Queensland outlined a general picture of how such feelings of exclusion arise:

> It is not uncommon for the receiver to have minimal contact with the farmer after serving them with compliance documents etc. Often there is little information sought from the farmer regarding the operation of the farm which might be useful in a practical sense regarding the operation of the business. Often receivers will reinsure the property, change locks, appoint managers and security over the property, engage contract musters and farmers and other 'experts' to advise them in the conduct of the business. All of these activities are expensive and added to the debt of the farmer.[43]

5.46 Legal Aid Queensland emphasised that many such issues could be avoided by civil contact between the farmer and receiver. It was noted that if receivers and farmers choose to work cooperatively it could avoid significant costs for the farmer (who is still responsible to the bank for all receiver's costs incurred), but that such an outcome requires the trust and goodwill of both parties.[44]

5.47 Mr Denis McMahon, a senior lawyer with Legal Aid Queensland informed the committee that in some circumstances he has seen, receivers and farmers have been able to communicate well and work together. However, he also noted that such a

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41 Mr Andrew Jensen, private capacity, *Committee Hansard*, 13 July 2017, pp. 45–46.

42 See for example Mr Michael and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017; Mr Charlie Wallace, private capacity, *Proof Committee Hansard*, 11 September 2017; Mr Bob Yabsley, *Submission 58*; Mr Harold Cronin, private capacity, *Proof Committee Hansard*, 19 July 2017; Mr Thomas Fox, private capacity, *Proof Committee Hansard*, 19 July 2017. The committee also received a number of confidential submissions that outlined such allegations.

43 Legal Aid Queensland, *Submission 6*, p. 9.

44 Legal Aid Queensland, *Submission 6*, p. 9.

positive outcome depended heavily on the level of conflict between the parties and the attitudes of the receivers.[45] He detailed one particular negative incident as follows:

> I've had a matter where the clients weren't aware that the receivers were going to be appointed. They arrived home to find the receivers there, and they were locked out of their home and were asked to leave the property. The locks were changed and the gates altered et cetera. We had to make submissions just for them to get their household goods and clothing and the like out of the property. In that particular instance, the property had been in the process of being developed as an irrigation property. There were certain licences that had to be obtained. Certain licences were in the process of being obtained.
>
> The clients instructed that the receivers didn't communicate with them about any of those processes. They [the receivers] made inquiries to the various departments and took the view that the work was done illegally, which wasn't the case at the time; there had just been a recent change of legislation. Some of the infrastructure that had been developed and created was bulldozed and the property wasn't able to be sold in the way that promoted the potential of the property as an irrigation property. That was, probably, the most stark matter I'd had. There seemed to have been quite a deal of mistrust and failure to communicate between the party, the bank and the receivers.[46]

5.48 In summary, evidence received by the committee indicates that for primary producers, foreclosure action and being put into receivership are particularly stressful and emotional experiences. Several receivers the committee heard from confirmed this assessment. For example Mr Justin Walsh, a partner at Ernst & Young, observed:

> For those who own a business, a receivership is a tremendously emotional and life-changing event. This is the case for all businesses, but obviously especially in agriculture.[47]

5.49 Similarly, Mr John Winter, chief executive officer of ARITA commented:

> As you well know, we deal with humans at their lowest ebb, and that is the greatest challenge in this profession [insolvency practitioners]. People are staring down terrible personal and financial loss, and we have to come along at the most tragic of points.[48]

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45 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Queensland Legal Aid, *Committee Hansard*, 2 August 2017, p. 18.

46 Mr Denis McMahon, Senior Lawyer, Farm and Rural Legal Service, Queensland Legal Aid, *Committee Hansard*, 2 August 2017, p. 17.

47 Mr Justin Walsh, Partner, Ernst & Young, *Proof Committee Hansard*, 20 October 2017, p. 57.

48 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 40. See also Mr Stephen Longley, Partner and Head of Restructuring, PPB Advisory, *Proof Committee Hansard*, 20 October 2017, p. 23; Mr Stewart McCallum, Partner, Ferrier Hodgson, *Proof Committee Hansard*, 20 October 2017, p. 1.

5.50 Mr Andrew McLaughlin, a senior consultant mediator, emphasised the detrimental impact that poor receiver behaviour can have not only on farmers, but on their broader communities:

> There is depression and peer pressure, pressure that you're going to get back from your creditors, because these are people you have dealt with in your community and your family before you that have provided you with the seed or the fertiliser or the fuel, and even in tough times they still supplied you, they gave you time to pay, perhaps 12 months. They knew that eventually your family would pay. What happens when the receiver sells all the assets? There's nothing left. What happens then? You have a divided community.[49]

5.51 Several banks also acknowledged the stressful nature of foreclosure action on farmers and their families.[50]

Committee view

5.52 The committee is aware that many of the allegations made about the conduct of receivers are contested or have been refuted. Nevertheless, without wishing to adjudicate or comment on individual disputes, the general picture observed by the committee indicates that there is a significant problem with the way in which some insolvency practitioners interact with primary producers, and the attitude and methods with which they carry out their duties.

5.53 Additionally, the committee is concerned that the farmers directly affected by the conduct of receivers, and who suffer the financial and emotional consequences of receiver behaviour, are generally excluded from the entire process.

5.54 The committee also holds significant concerns about the potential for conflicts of interest between receivers and banks inherent in the structure of the receiver industry. As former chair, former senator Malcolm Roberts observed to receivers during a public hearing:

> You're [the receiver] working for the bank. Your future engagements will come from that bank, so you must do a good job for them, and all the costs will be paid for by the farmer. Then, in addition, the bank contract terms are really detailed and comprehensive and the farmer is in a position where, with the power of finance and the power of the courts, there is such an imbalance of power, and you're working under the shadow of that imbalance.[51]

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49 Mr Andrew McLaughlin, private capacity, *Committee Hansard*, 11 August 2017, p. 4.

50 For example: NAB, *Submission 10*, p. 6; ANZ, *Submission 6*; Mr Peter Knoblanche, Chief Executive Officer, Rabobank, *Committee Hansard*, 11 August 2017, p. 43.

51 Former senator Malcolm Roberts, Proof *Committee Hansard*, 20 October 2017, p. 11.

5.55 The committee observed and is concerned by an apparent inability on the part of ARITA to consider the possibility that some insolvency practitioners may act inappropriately or unreasonably while carrying out their duties in primary production receiverships. When queried by the committee on the issues with receivers that had come to light during the inquiry, ARITA representatives were all too willing to underscore that some farmers may lodge 'unnecessary and inappropriate complaints on many occasions' due to the fact that receiverships were stressful experiences that led to people being 'at their lowest ebb'.[52] However, ARITA was seemingly unable to seriously countenance the possibility that individuals in their industry had behaved improperly and that at times the complaints from farmers were indeed warranted.

5.56 Additionally, several insolvency firms that appeared before the committee exhibited similar attitudes. The committee was not impressed by the indifference on display by certain receivers during hearings, and the vague, elusive answers given in response to committee questioning. For example, the responses given by representatives of KordaMentha at the hearing and subsequently to questions on notice, demonstrated a unwillingness to provide clear and direct responses to the committee's questions.[53]

5.57 The committee finds such attitudes to be alarming. In the committee's opinion, this lack of self-awareness as an industry, obfuscation of responsibility, and dismissive approach to complaints about inappropriate receiver conduct are not acceptable. The committee strongly rejects ARITA's inference that in difficult or challenging receiverships the fault more often than not lies with the behaviour of farmer, with no connection to the behaviour of the receiver.

5.58 The committee was also highly concerned by the behaviour of a Grant Thornton representative and his legal counsel. When the committee sought further information from Mr Stephen Dixon of Grant Thornton on his activities as trustee for the bankrupt estate of primary producer Mr Lindsay Dingle, Mr Andrew Behman of CLH Lawyers, legal counsel for Mr Dixon, stated on more than one occasion that the cost of his and Mr Dixon's appearance at a public hearing would be charged to the bankrupt estate. As Mr Behman wrote in an email to the committee, for Mr Dixon to appear would 'unduly deplete the assets of the Bankrupt Estate'.[54]

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52 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 43.

53 Mr Mark Mentha, Partner, KordaMentha, *Proof Committee Hansard*, 17 November 2017, pp. 11–12, 14; KordaMentha, answers to questions on notice, 17 November 2017 (received 27 November 2017), pp. 5–7.

54 See written questions from Senator John Williams in: Mr Stephen Dixon, Partner, Grant Thornton, answers to questions on notice, 21 November 2017 (received 27 November 2017); and exchange between Senator John Williams and Mr Andrew Behman, Associate, CLH Lawyers, *Proof Committee Hansard*, 17 November 2017, p. 2.

5.59 This threat caused great distress to Mr Dingle and his family, and the committee remains deeply unimpressed by this needlessly provocative behaviour, which it believes was designed to dissuade the committee from calling the witness and also intimidate Mr Dingle.

5.60 The committee notes that when ARITA was informed of the situation, Chief Executive Officer Mr John Winter stated that ARITA, along with ASIC, would 'have a problem with that'.[55] On this matter, the committee thanks ARITA for promptly commencing a review of the situation.

5.61 In response to questioning at the 17 November public hearing in Canberra, Mr Behman advised the committee that his travel from Sydney and accommodation costs would be paid for by his client (Grant Thornton). Mr Behman advised that it was only the 'cost of preparation in preparing for the appearance' that would be billed to the bankrupt estate of Mr Dingle.[56] The committee was not reassured by this admission, but rather found it astounding that the intention to charge the bankrupt estate, albeit for fewer costs, was again repeated.

5.62 After further written questions on notice from the committee, Mr Dixon subsequently confirmed in writing that the bankrupt estate would not be billed for 'any costs associated with either Mr Behman or me providing evidence to the committee'.[57]

5.63 Although the committee acknowledges evidence from banks and insolvency practitioners noting that the number of agribusiness customers placed into receivership is low as a percentage of their respective overall loan books, or receivership engagements, this does not discount or minimise the distress and frustrations of primary producers who have been placed into receivership and do experience poor receiver behaviour. Even if agribusiness receiverships only comprise a very small proportion of files for a bank or a receiver, for those farmers experiencing that receivership, it is 100 per cent of their lives.

5.64 As such, the committee urges insolvency practitioners to act with transparency, accountability and empathy when discharging their duties. The committee agrees with the observation expressed by Mr Justin Walsh from Ernst & Young:

> These people [farmers facing foreclosure] have not committed a crime. They have not murdered someone. They've just run out of money. Going

55 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 20 October 2017, p. 41.

56 Exchange between Senator John Williams and Mr Andrew Behman, Associate, CLH Lawyers, *Proof Committee Hansard*, 17 November 2017, p. 2.

57 Mr Stephen Dixon, Partner, Grant Thornton, answers to questions on notice, 21 November 2017 (received 27 November 2017).

> into receivership is not a punishment. It's just something that is a sad part of life.[58]

5.65 The committee supports recommendations that seek to bridge the divide between farmer and receiver, in order to make sure farmers who experience foreclosure action are as informed as possible in such situations. The committee is of the opinion that this will assist in easing the frustrations felt by farmers during receivership situations. By requiring greater transparency and communication on the part of receivers, the committee hopes that this will inform and empower the farmers throughout these difficult situations. More openness and transparency will also mitigate the impacts of the apparent conflict of interest inherent in the role of receivers.

Recommendation 15

5.66 The committee recommends that:

- **the government introduce higher standards of accountability and transparency for insolvency practitioners regarding the costs they incur while conducting receiverships;**
- **insolvency practitioners be required to disclose their estimate of costs of the receivership prior to being engaged;**
- **insolvency practitioners be required to account for all incurred fees and outlays and report these to both the lender and the borrower; and**
- **insolvency practitioners be required to provide monthly reports to the lender and the borrower on their farming management and fees incurred (including future plans).**

5.67 The committee agrees with Dr Graham Jacobs' observation that the major insolvency firms preferred by the banks have cost structures and fees geared towards big corporate groups, rather than family farms and small businesses.

5.68 The committee is of the opinion that receivers appointed to family farms cause unnecessary harm and lead to detrimental outcomes, both in regard to farm management (e.g. neglected animals and land), and the farmer's ultimate financial position.

5.69 As Deputy Chair Senator Williams observed:

> I am of the opinion that receivers shouldn't go into family farms. I've got no problem with receivers going into corporate farms – like when McGrathNicol went in to Cubbie Station – because in a corporate farm the management is retained. But if you go into a family farm and the farmer is kicked off – and probably generations of knowledge of how to look after

58 Mr Justin Walsh, Partner, Ernst & Young, *Proof Committee Hansard*, 20 October 2017, p. 66.

> the animals et cetera is gone – if often turns to tears as far as managing the property goes.[59]

Recommendation 16

5.70 The committee recommends in the strongest possible terms that the Australian Bankers' Association revise the Code of Banking Practice to stipulate that if an amicable agreement between bank and farmer cannot be reached through farm debt mediation and the bank needs to sell the family farm, then:

- **receivers not be appointed; and**
- **instead the family (if willing) is to remain managing the property and be paid a wage to maintain it until it is sold.**

5.71 However, in extenuating circumstances the banks can use their legal rights to enforce vacant possession of the land for sale.

5.72 The committee is aware that primary production and farm management is a specialist field. The committee became increasingly concerned during the inquiry by evidence indicating that some insolvency practitioners involved in agribusiness receiverships did not possess adequate experience, nor seek to utilise the skills and knowledge of the relevant farmer where possible.[60]

5.73 The committee was informed by the Australian Securities and Investments Commission (ASIC) that receivers do have an element of discretion as to how to care for assets, which may be problematic if the receiver does not have the appropriate primary production expertise and experience:

> Receivers do have to take basic steps to care for an asset, but they've got a fair degree of latitude in how they do that, and it's probably fair to say that they may not always have the expertise in relation to that. Think about it: they to tend to be receivers for a very wide range of industries.[61]

5.74 In response to observations that some receivers treated livestock they were meant to be managing appallingly, Mr Warren Day, Senior Executive Leader of Assessment and Intelligence for ASIC commented that receivers may have different attitudes to farmers to what constitutes caring for an asset:

> Picking up on the point you were referring to, Senator Williams, you're right: there is no obligation on a receiver to keep the cattle to a certain standard. Similarly, if there's a crop out in the paddock and it's ready to be brought in, on one view there's no real requirement for the receiver to bring

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59 Senator John Williams, *Proof Committee Hansard*, 17 November 2017, p. 3. See also Senator John Williams , *Committee Hansard*, 13 July 2017, p. 42.

60 See for example comments from Mr Michael Doyle and Mrs Cherie Doyle, private capacity, *Proof Committee Hansard*, 14 September 2017, pp. 7, 15.

61 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 9.

> that crop in. They can just let it rot in the paddock if they need to, because, again, as we know, they've got to spend money to bring that in and they may decide that they're not, as they might see it, going to throw good money after bad. But then, again, the farmer would say, 'Well, if you do that and then you sell it, you're going to make a profit, which'll help offset some of the problem.'[62]

5.75 In order to avoid detrimental impacts in terms of land management and animal welfare, as well as the reduction in the value of foreclosed assets, the committee believes it is imperative that all stakeholders involved in agribusiness receiverships are equipped with the relevant experience and knowledge.

Recommendation 17

5.76 The committee recommends that the Australian Restructuring Insolvency and Turnaround Association ensure receivers appointed to agribusiness cases must be appropriately qualified in agribusiness and have a strong background and demonstrated experience in rural management.

Valuations

5.77 Numerous witnesses raised concerns about the cost, use and availability of valuations in the course of this inquiry.

5.78 Valuations of primary production properties are guided by factors such as historical sales data, current market conditions, the carrying capacity of the property, soil types and water infrastructure. However, ultimately valuations are subjective opinions.[63]

5.79 Legal Aid Queensland identified that the issue of valuations ordered by receivers (and by extension, the subsequent sale price of properties based on those valuations) caused significant distress to farmers:

> The receivers will engage their own valuers and are not obliged to provide copies of these valuations to the farmer during the period of insolvency even though the farmer will ultimately bear the costs of obtaining the valuation. It is understood that these valuations would be prepared on the basis of an early sale and not taking into account the period of time which would normally be required for a property to be on the market to sell. It is not uncommon for larger western [Queensland] properties to have an average marketing period of 12 months or more, but a sale by receivers usually occurs after about a six week marketing campaign. Farmers are not made aware of discussions between the bank, receiver and valuers during

62 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 9.

63 Legal Aid Queensland, *Submission 6*, p. 8.

> these periods. They do not receive copies of valuations obtained for sale purposes, yet the outcome affects them directly as they are the ones responsible for any shortfall.[64]

5.80 This sentiment was echoed by individual primary producers who expressed frustration and anger that they were not provided with access to valuations that they would ultimately pay for.[65]

5.81 The Financial Ombudsman Service (FOS) referred to its experience in investigating lending disputes and noted that in its opinion, fewer disputes would arise if valuations were provided to borrowers at the earliest opportunity in the lending process. The FOS submission stated:

> Our dispute experience indicates that, where borrowers do not receive valuations of their property in issues arise in relation to the provision of the loan, they end up feeling as if they are/were unable to make an informed decision in respect of their loan application.[66]

5.82 The ASBFEO's submission recognised that the valuation of primary producing small business assets is localised and industry specific. It also raised the point that there is a lack of understanding on the part of some small business owners about the temporary nature of a valuation. International Valuation Standards state that valuations are only valid for three months.[67]

5.83 In its inquiry into small business loans report, the ASBFEO also made recommendations relating to valuations for small businesses. These included:

- All banks must provide borrowers with a choice of valuer, a full copy of the instructions given to the valuer, and a full copy of the valuation report. [68]

5.84 The committee notes that at least one major financial institution, the ANZ, already provides customers with a copy of a valuation and instructions relating to that valuation where the customer pays for the report.[69] However, the ANZ appears to be in the significant minority in this regard.

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64 Legal Aid Queensland, *Submission 6*, p. 9.

65 See for example Mr Harold Cronin, *Submission 50*, p. 1l; Mrs Debbie Viney, private capacity, *Committee Hansard*, 13 July 2017, p. 50.

66 Financial Ombudsman Service, *Submission 9*, p. 7.

67 Australian Small Business and Family Enterprise Ombudsman, *Submission 17*, pp. 2, 42.

68 Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans*, p. 7.

69 ANZ, *Submission 8*, p. 2.

Committee view

5.85 The committee is of the strong opinion that copies of bank or receiver-ordered valuations should be provided to farmers, given that it is the farmers who pay for the documents. The committee considers that this would ease the feelings of exclusion felt by farmers during their receiverships.

5.86 Given the specialised nature of primary production, the committee also considers it imperative that valuers valuing agribusinesses have the appropriate qualifications and experience to be able to competently carry out their duties.

Recommendation 18

5.87 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association implement policies to ensure that copies of bank or receiver-ordered valuations are provided promptly to farmers.

Recommendation 19

5.88 The committee recommends that the Australian Bankers' Association and the Australian Restructuring Insolvency and Turnaround Association ensure that banks and insolvency practitioners must only engage independent valuers to value agribusinesses with appropriate qualifications and demonstrated expertise and experience in the field.

Achieving market value for forced sales

5.89 As noted above, the committee repeatedly heard evidence that properties under receivership were often subject to an assets fire sale. This is despite statutory requirements under the *Corporations Act 2001* (Corporations Act) for receivers to achieve market value of the assets they are appointed to. Section 420A of Corporations Act states:

> **Controller's duty of care in exercising power of sale**
>
> (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:
>
> a. if, when it is sold, it has a market value – not less than that market value; or
>
> b. otherwise – the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.[70]

5.90 Mr Warren Day, Senior Executive Leader of Assessment and Intelligence for ASIC set out the basis for section 420A:

70 *Corporations Act 2001*, Section 420A.

> The rationale behind the 420A is that, if you go through that process, you give everyone, wide and large, an opportunity to participate – that is, all buyers in the market are put on notice if they're interested in that property and then what that property achieves is what the value is.[71]

5.91 Similarly, a passage in the legal textbook *Corporations Legislation 2017* notes the following in regard to establishing a breach of section 420A:

> It is important to note the s420A is primarily focused on the process undertaken by the receiver to sell the property. Judicial consideration of the section has generally focused on whether the receiver was properly informed (i.e. did the receiver obtain independent advice regarding the proposed sale, and if so, did the receiver follow that advice), as well as steps taken to market the property.[72]

5.92 As set out earlier in this chapter, the committee received evidence that indicated that some properties were sold by receivers for significantly under the market value. In the committee's mind, this demonstrates that section 420A is not operating as intended and its application needs to be reviewed.

5.93 The committee was advised by ASIC that there are examples in state legislation (for example in Queensland) that may have a tighter regime than section 420A of the Corporations Act.[73]

5.94 Under section 85 of the *Property Law Act 1974* (Qld), the mortgagee's duty 'to take reasonable care to ensure that the property is sold at market value' also applies to a receiver acting under a power delegated to the receiver by a mortgagee. The relevant section reads:

> **Duty of mortgagee or receiver as to sale price**
>
> (1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument or mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.

5.95 According to a 2009 article published by Cooper Grace Ward Lawyers, extending the mortgagee's duty to 'take reasonable care to ensure that the property is sold at market value' to the attorney of the mortgagor and to the receiver exercising power of sale represented a significant change to the previous requirements:

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71 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

72 Professor Robert Baxt and Mr Edmund Finnane, *Corporations Legislation 2017*, Thomson Reuters, Sydney, 2017, p. 536.

73 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

> This is significant where the mortgagor is not a company as previously a receiver would not ordinarily have been caught by section 85 PLA [Property Law Act] or subject to any similar duty under the *Corporations Act 2001*. The duty of care under section 420A of the *Corporations Act 2001* only applies to a controller in relation to property of a company.[74]

5.96 Section 85 of the *Property Law Act 1974* (Qld) also sets out a number of prerequisites for the sale, which are designed to ensure that maximum value and at least market value is obtained:

> (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse –
>
> (a) adequately advertise the sale; and
>
> (b) obtain reliable evidence of the property's value; and
>
> (c) maintain the property, including by undertaking any reasonable repairs; and
>
> (d) sell the property by auction, unless it is appropriate to sell it in another way; and
>
> (e) do anything else prescribed under a regulation.

5.97 The Cooper Grace Ward Lawyers article also stated:

> The onus will be on the mortgagee or receiver to establish 'reasonable excuse' if they fail to comply with any requirement listed in section 85(1A)… Complying with the duty under section 85(1) by taking reasonable care to ensure that the property is sold at the market value may not provide a defence if the obligations under section 85(1A) are not satisfied.[75]

5.98 McGrathNicol informed the committee that with respect to the provisions in section 85 of the *Property Law Act 1974* (Qld), comparable legislative requirements apply to the sale of real property in other state jurisdictions.[76]

5.99 McGrathNicol also noted that the term 'market value' is not defined in either the Corporations Act or the *Property Law Act 1974* (Qld).[77]

5.100 KordaMentha advised the committee that the 'market value' of farming property is subject to many factors:

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74 Cooper Grace Ward Lawyers, '*Further perils for mortgagees exercising power of sale in Queensland*', 28 July 2009, www.cgw.com.au/publication/further-perils-for-mortgagees-exercising-power-of-sale-in-queensland/ (accessed 23 November 2017).

75 Cooper Grace Ward Lawyers, '*Further perils for mortgagees exercising power of sale in Queensland*', 28 July 2009.

76 McGrathNicol, answers to questions on notice, 20 October 2017 (received 13 November 2017).

77 McGrathNicol, answers to questions on notice, 20 October 2017 (received 13 November 2017).

> Farm property values are impacted by international commodity prices, exchange rate, financial markets, oil prices, interest rates, competition for alternative land uses, labour costs and many other factors. The costs of holding a farm property are significant and there is no guarantee that property prices will improve. In fact, farm property prices can move in unexpected directions. Recent experience in Queensland shows that grazing property prices rose significantly during the Millennium Drought…but actually fell when the drought broke in 2010. Clearly it is not just drought and flooding rains that impact on farm property prices. Faced with significant holdings costs and volatile property markets the best, and often only, available strategy will be to realise the property in a timely and efficient manner.[78]

5.101 KordaMentha also emphasised that farm property prices can be volatile and that historic valuations are 'unreliable indicators' of current market value:

> In addition, a valuation is only an opinion as to value and valuers do not guarantee that the value they place on farming property will be achieved. This means that the true test of market value is the value a willing buyer is prepared to pay for the property after appropriate marketing.[79]

5.102 The committee received evidence indicating that receiver-initiated sales often result in lower prices being achieved compared to normal sales for similar properties. As Legal Aid Queensland observed:

> Buyers are aware that the property is being sold on a forced sale basis. News that a farm is under the control of receivers travels very quickly around rural communities.[80]

5.103 Legal Aid Queensland also noted that in depressed markets, an increase in forced sale numbers appears to exacerbate the 'downward spiral' in prices, affecting land values within a region which can then impact on the entire farming community.[81]

5.104 The Corrigin and Lake Grace Zone of the Western Australian Farmers Federation echoed this point:

> The Select Committee on Lending needs to be aware that a forced sale of land at a heavily discounted price can adversely affect the value of other farms in the area and set off a chain reaction that would put other farmers in the area below the banks acceptable equity level in their farming

78 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 3 (tabled 17 November 2017).

79 KordaMentha, *Senate Committee: Lending to primary production customers*, p. 3 (tabled 17 November 2017).

80 Legal Aid Queensland, *Submission 6*, p. 10.

81 Legal Aid Queensland, *Submission 6*, p. 10.

businesses. This could cause foreclosure on other farmers and nobody gains from this.[82]

Committee view

5.105 As mentioned earlier in this chapter, the committee heard accounts from farmers of situations where receivers had sold assets for significantly under their market value.

5.106 The committee acknowledges the evidence from receivers indicating that valuations have limitations in regard to predicting sale prices, and that markets can prove volatile.

5.107 The committee also understands that it is possible that receiver-initiated sales result in lower prices compared to a normal sale for similar properties. However, the committee believes that it is unethical for receivers to sell properties in receivership at well below the market value, which seems to have been the case in several examples before the committee.

5.108 The committee is greatly concerned by the accounts of assets being sold for less than market value. The committee is concerned that section 420A of the Corporations Act is ineffective and not achieving its intended purpose. Although acknowledging that it is the market that ultimately determines what price an asset sells for, the committee considers that more effective safeguards must be implemented to ensure that maximum sale prices are being achieved by banks and receivers when selling assets.

Recommendation 20

5.109 The committee recommends that the Australian Bankers' Association revise its Code of Banking Practice and the Australian Restructuring Insolvency and Turnaround Association revise its Code of Professional Practice to stipulate that every effort be made by banks and receivers (in circumstances where they are appointed) to achieve the maximum sale price of an asset.

5.110 In this regard the committee supports the mechanisms set out in section 85 of the *Property Law Act 1974* (Qld), which are designed to ensure that maximum value is obtained.

5.111 Given that ASIC observed that the current legal view is that no private right of action flows on from when there is a breach of section 420A,[83] the committee considers it necessary that such a right be established in order to allow individuals an opportunity for recourse if required.

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82 Corrigin and Lake Grace Zone of Western Australian Farmers Federation, *Submission 22*, p. 3.

83 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 14 September 2017, p. 2.

Recommendation 21

5.112 The committee recommends that the government establish a private right of action for breaches of section 420A of the *Corporations Act 2001*.